Case No. 1402660/2019
1400338/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr I Tapping	AND	Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT ON 4 to 7, 11 to 15, 18 to 22 and 15 to 27 October 2021

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: **Mr I Tapping (in person)**
For the Respondent: **Mrs S Hornblower (counsel)**

RESERVED JUDGMENT

1. **The Respondent contravened section 39(2)(d) of the Equality Act 2010 and the Claimant succeeded in the following claims to the following extents:**
    a. **that the Respondent had failed to make reasonable adjustments, between mid October 2017 and the end of January 2018;**
    b. **in his claim of discrimination arising from disability, in relation to the e-mail sent on 16 March 2018;**
    c. **in his claim of harassment related to disability, on 14 September 2018;**
    d. **in his claim of direct age discrimination, on 18 September 2018;**
    e. **in his claims of victimisation, on 14 September 2018.**
2. **The claim of constructive unfair dismissal was dismissed upon its withdrawal by the Claimant.**
3. **The claims of detriment for making protected disclosures were not well founded and they are dismissed.**
4. **The claims of direct disability discrimination and harassment related to age are dismissed.**

REASONS

1. In this case the Claimant, Mr Tapping, claimed that he had been constructively unfairly dismissed and/or automatically unfairly dismissed and/or subjected to a detriment for making protected disclosures. He also claimed that he had been discriminated against on the grounds of disability and age.

Background

2. On 23 April 2019, the Claimant notified ACAS about the dispute and the certificate was issued on 22 May 2019. The Claimant presented his first claim for age and disability discrimination and detriment for making protected disclosures on 17 June 2019. The Claimant presented his second claim on 16 January 2020 in which he claimed he had been constructively unfairly dismissed and made further allegations of discrimination and detriment.

3. The claim was subject to many case management hearings in order to identify the issues and ensure that it was ready for a final hearing. At a case management preliminary hearing on 27 September 2021, it was confirmed that the core bundle was agreed. The Claimant had also provided confirmation from his GP that he was sufficiently fit to attend and participate in the hearing.

4. The parties consented to the claim being heard by a Judge sitting alone. Written confirmation was received from the Claimant and the Respondent on 27 September 2021.

The issues

5. The final list of issues was agreed at a Telephone Case Management Hearing on 23 March 2021 and were confirmed as correct in the subsequent case management hearings.

6. At the start of the final hearing the issues were discussed. The Respondent referred to correspondence from the Claimant indicating that he was withdrawing the claim of constructive unfair dismissal. The Claimant confirmed that Employment Judge Midgley had suggested that he did not need to arrive at the quantum of his claims by more than one route and suggested that the claims could be reduced. The Claimant said that he understood that the burden of proof was on him, it was difficult to provide proof of the breach of contract and that he did not consider he was in an

adequate position to do so. He considered that there was only a nuance of difference between the constructive dismissal claim and his other claims and was conscious that care needed to be taken with the Tribunal time. I queried with the Claimant as to whether he was sure that he wanted to take such a step. The Respondent confirmed that there would not be a costs application if the claim was withdrawn. The Claimant said he had balanced it and would rather preserve court time and had decided not to pursue the constructive dismissal claim and did not think much could be gained by pursuing it. The Claimant withdrew the claim of constructive dismissal, and it was dismissed. I observed that quantum might be affected, although losses would flow from any detriment.

7. On 5 October 2021, the Claimant, by e-mail, sought to retract the withdrawal. When the hearing was resumed it was explained that by withdrawing the unfair dismissal claim the Claimant would not be able to claim a basic award, however compensation for the detriment and discrimination claims would be based on losses flowing from any proven allegations. It was explained to the Claimant that under rule 51, the Tribunal had no power to set aside a withdrawal so as to re-activate the claim (Khan v Heywood and Middleton Primary Care Trust [2007] ICR 24. This was not a case where the decision had been taken in the heat of the moment and it had been reasoned by the Claimant when he explained why he was withdrawing it. Further the withdrawal was not immediately accepted, and the Claimant was asked whether he was sure before he reconfirmed his decision. The Claimant confirmed that he did not want to try and set aside his withdrawal.

8. Before starting the timetabled reading of documents, the Claimant said that his supplemental bundle of 979 pages was provided to fill gaps if documents were missing and it did not need to be read. I was invited to read a short extract from it. The Claimant, when giving evidence on the first day, was asked why he had not said something in his witness statement, and he said that it was explained in his supplemental bundle. The Claimant was asked how the supplemental bundle should be treated and whether he was relying on the contents as part of his witness statement. The Claimant, after the lunch adjournment, confirmed that he was not seeking to rely on it as part of his witness statement. It was also explained to the parties that the questions asked and the answers given should be concise and that when the Claimant was answering questions he should listen carefully and answer the question asked.

9. When giving evidence the Claimant suggested that he made a further protected disclosure on 2 November 2017. He accepted that he had not raised it as a protected disclosure at the earlier case management hearings. The Respondent made the point that this had been suggested in the context of the first questions of cross-examination and if any amendment was

allowed it would seek an adjournment. The Claimant explained that it was the origin, and he did not need it to be a protected disclosure and would rely on it as part of the background evidence. The Claimant said he was not seeking to amend the claim or add it to the list of issues. No application to amend was made.

10. During the course of his evidence the Claimant said that he no longer relied on protected disclosures 1, 4 and 7 and they were no longer pursued. He also said that allegation 36.5.9 was not a detriment and that allegation 38.1.5 was not related to his disability and they were not pursued. The Claimant also withdrew allegation 40.1.3 on the basis that he did not consider it less favourable treatment. During cross examination, the Claimant also said that he did not consider allegation 43.2.6 to 43.2.10 were acts of victimisation in relation to his grievances and were not because of a protected act. They were part of his former constructive dismissal claim and he withdrew the allegations. The Claimant also considered whether he was relying on the provision, criterion or practice ("PCP) at 44.1.3 of the list of issues and confirmed that he was not alleging that there was a policy or general practice that persons whose grievances are rejected are returned to the same department under the same management and withdrew the alleged PCP at the start of closing submissions.

11. The Respondent accepted, for the purposes of this case, that the Claimant's alleged disclosure to the MOD police would have been a disclosure to the Claimant's employer.

12. The Claimant, in his written closing submission referred to issues with the bundle, disclosure, itext software and the involvement of Mr Maton. He was reminded that evidence had not been heard on those matters and they did not form part of the list of issues, and it was reiterated that submissions were not the time for new evidence to be called.

The evidence

13. I heard from the Claimant and Mr O'Mara on his behalf. For the Respondent I heard from the following witnesses: Mr Harrison, Mr Bailey, Mr Bollen, Gp Cpt Clouth, Mr Cairns, Mr Boyall, Mr Gallagher, AVM Moore (rtd), Mr Sixsmith, Mrs Singleton and Mr Moakes.

14. I was provided with a main bundle of 3762 pages . Any reference, starting with 'p', in square brackets, in these reasons, is a reference to a page in the bundle. I was also provided with a supplementary bundle by the Claimant of 979 pages and any reference starting with 's' in square brackets is a reference to that bundle.

15. There was a degree of conflict on the evidence.

16. When giving his evidence the Claimant tended to provide a lengthy explanation and appeared to digress from what was being asked. He also had a similar tendency when asking questions, this meant that it was not always easy to follow what he was saying. When Mr Bailey gave his evidence he also had a tendency to give lengthy answers. He often would move beyond the question being asked and tended to seek to tie his answers to the events on 14 September 2018.

The facts

17. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

18. On 17 August 2009, the Claimant commenced his employment with the Respondent as project manager on a resource managed basis. He was not assigned to post, but was assigned to Abbey Wood.

The Claimant's disability

19. At all times material to the claim, the Claimant was disabled by reason of fibromyalgia and Respondent accepted that it had knowledge of the same at those times. The Claimant was diagnosed with Fibromyalgia in May 2017.

20. I accepted the Claimant's description that Fibromyalgia was an invisible disability. It is a condition which is subject to flare ups. If the Claimant was in a flare he could look pained, tired and exhausted. A flare would make him prone to other illnesses. Long periods of sitting would cause muscle atrophy and pain and he would need to move every 20 minutes, or he would go into spasm. He also suffered from silent migraine, which he described as not having a headache, but it was like 'brain fog' and he found it difficult to think and he would need to shut his eyes for 20 to 40 minutes to remove the visual load. If he got ill he needed thorough rest. It was made worse by physical and mental stress and when experiencing a flare, he needed a reduced workload and to avoid travelling long distances. His condition could cause extreme tiredness.

Policies, Procedures, Codes and teams

21. The Civil Service Code under the standards of behaviour and integrity said that an employee must not, "*misuse your official position, for example by using information acquired in the course of your official duties to further your private interests or those of others*", and must not, "*accept gits or hospitality or receive other benefits from anyone which might reasonably be seen to*

compromise your personal judgement or integrity." Civil Servants are required to report concerns they have that the code is being breached/not complied with.

22. The Respondent had a "Whistleblowing and Raising a Concern" policy. The policy related to when an MOD worker believed that there had been wrongdoing or malpractice, including a potential danger to people and things which went against the core values of the Civil Service Code. The policy said that if there was a concern about a breach of the code, a matter of public interest, criminal activity or fraud the person should contact the Confidential Hotline. The procedure was not to be used for raising concerns of a personal nature. If an employee was victimised for making a protected disclosure, the MOD would take appropriate action in line with the disciplinary policy. In the advice section, if a whistleblower thought that they had been subjected to a detriment, they were told that they should familiarise themselves with the Grievance Policy and the Bullying and Harassment Policy and contact the DBS enquiry centre. I accepted the Respondent's evidence that the appropriate policies for dealing with allegations of detriment, were the grievance and/or bullying and harassment polices, and detriment was not covered by the whistleblowing policy. The purpose of the whistleblowing policy was to investigate the concern of alleged wrongdoing, whether contrary to the Civil Service Code, a crime or fraud.

23. The Confidential Hotline was headed by Mr Moakes. It was and is independent of the management functions of the MOD. It acted independently to ensure that whistleblowing concerns, including criminal and ethical concerns, were responded to independently and after assessment were referred to the relevant responder. The Confidential Hotline did not investigate the matter, but referred it to the most appropriate department to investigate and provide a response. It was then the responder's responsibility to take forward the investigation. The team received about 3,000 calls per annum, of which about 600 fell within the whistleblowing policy. The responder did not investigate any allegations of detriment for having blown the whistle.

24. The Bullying and Harassment Complaints Procedures (JSP 763) said at paragraph 1.14, "*It is a fundamental responsibility of the Command/Line Management chain to protect personnel from victimisation. Appropriate administrative disciplinary/misconduct action will be taken against personnel who victimise, retaliate against or interfere with a Complainant, Respondent or witness before, during or following an investigation regardless of its outcome*." Under the policy, complainants were encouraged to first seek informal resolution. A formal complaint could be made at any time and informal resolution was not a pre-requisite. Before making a formal complaint the worker was encouraged to consult Defence

Business Services ("DBS"), civilian HR, for advice. Paragraph 4.6 of the policy [p3046] said that a formal complaint must be submitted to the deciding officer ("DO"). In the case of civilian staff, this was usually to their senior line manager. The deciding officer should generally be two pay grades/ranks above the respondent to the complaint. If the senior line manager is the respondent, it should not be submitted to them, and advice should be sought from DBS. The timeline for resolution of complaints for military personnel is 24 weeks from the date the Commanding Officer receives the complaint. The policy did not provide a timeline for civilian personnel, but said time started running from the date the CO or DO received the complaint and I concluded that the intention was to try and resolve the complaint within the same timescale.

25. Under the policy, there was an initial enquiry by the deciding officer into the complaint. Once it was evident that an investigation was required, the DO arranged for the appointment of a suitable person to conduct an investigation, known as a Harassment Investigation Officer ("HIO"). The HIO must be outside the immediate Command/Line Management chain of the complainant and respondent. Under paragraph 6.5, the DO must take account of the views of the complainant and respondent when appointing an HIO. If party objects to an HIO the DO must reconsider and either appoint a new HIO or explain why they are unable to appoint a different one. If the Complainant continues to object to the choice of the HIO, the DO must remind a civilian of their right to appeal if they are dissatisfied with the investigation. This process related to the appointment of an HIO.

26. Once the HIO was appointed they conducted an investigation [p3056-3057]. The complainant was interviewed first. Thereafter the respondents and any witnesses were interviewed. The HIO could reinterview anyone if they needed to clarify or check confusing or conflicting accounts. After an interview the HIO made a written record and invited the interviewee to check and sign it as accurate. The investigation was one of evidence gathering and was to be concluded impartially and thoroughly. The Final Investigation Report should not reach conclusions or make recommendations, but could highlight discrepancies or inconsistencies in the evidence and indicate that which corroborated or contradicted a party's account. After considering the Final Report, the DO decided how to deal with case and what action should be taken. The DO would not normally re-interview a party before making a decision.

27. When reaching a decision, the DO had to decide, on the basis of considering the evidence in the Final Report, whether on the balance of probabilities all or some of the incidents were likely to have occurred. The DO had to decide whether there was sufficient or insufficient evidence to substantiate the allegations and whether they amounted to bullying or harassment.

28. When the DO informed the complainant of the decision they must be notified of their right to appeal. For civilian personal this was normally within 10 working days of receiving the decision [p3061].

29. Under the grievance procedure [p3218-3237] a formal grievance must be raised with a decision manager, who would normally be the line manager of the person complained about. If the complaint related to the line manager the grievance should be sent to their line manager or next most senior manager or advice sought from DBS.

30. A bullying and harassment complaint is a more detailed and lengthy process than the grievance procedure and involves investigation by an HIO.

31. Within DBS was Employee Services. Employee Services provided services such as counselling, wellbeing and mediation. It also provided advice to employees regarding MOD policies and procedures. The advice given was only procedural and was not about contents of a grievance and did not make any assessment of the same. For a civilian employee to raise a grievance, it needed to be raised with a deciding officer. When a query had been answered it would be closed on the internal system. I accepted Mrs Singleton's evidence that the MOD does not provide its employees with legal advice. Members of trade unions can access advice from their unions, otherwise employees had to find an external source of advice.

32. Also within DBS was HR Casework Services, which provided HR advice to line managers.

How contractual payments are triggered in contracts with the MOD

33. Before a contractor was put on a contract, the project section checked the technical side to ensure that the client was getting what it needed, the commercial team ensured that it was within the constraints of the contract and the finance team made sure it was affordable and value for money. After the review, all three teams signed the commitment case. How payments to contractors were triggered depended on the type of contract. Milestones were a recognised point at which a payment might occur. A 'deliverable' was an itemised list under a milestone setting out what the contractor would achieve. A 'recuring output' was something which occurred as routine within the contract, for example weekly or monthly reporting. Both recurring outputs and milestones could be a trigger for a payment within a contract.

The events involving the Claimant

34. At the end of 2016, the Claimant joined the Imagery and Geospatial Systems Team ("IMAGE") in a project management role on the Aerospace Information Capability (AIC) project. The project involved the interaction of military aircraft, on take off and landing, with civilian aircraft and other fixed or moveable objects. The Air Information Documents Unit was part of the RAF and was self contained. The project involved modernising the department and changing the business process and merging it with another department. From September 2016, the Claimant's line manager was Matthew Harrison, team Leader of the Integrated User Services Team. The project was run by Gp Cpt Clouth, to whom Mr Harrison reported. When the Claimant started work on the team, he informed Mr Harrison of medical conditions he had. This did not include fibromyalgia as it had not been diagnosed at that stage.

35. PSIT (Picasso Systems Integration Team) was a consortium of contractors who could bring in others as experts to help on projects, so that the MOD did not have to get involved with many little contracts PSIT2 worked on the P-AIC project and other projects. The Lead contractor was CGI and below them were other subcontractors.

36. The Claimant's sole role was as project manager on the AIC project. He was required to develop project artefacts (e.g. systems requirements documents, risk registers and stakeholder analysis) and support the project from the assessment phase to business case approval and to a competitive tendering process for the solution. Part of the Claimant's role was to confirm that work had been completed satisfactorily by PSIT/CGI. The Claimant did not have a 'Financial Delegation' and was therefore not authorised to authorise a payment or decline to pay it, but he could reject an unproven invoice. Mr Harrison held the Financial Delegation and was responsible for payment and non-payment. Mr Harrison, as the Claimant's line manager had the prerogative to overrule or change agreements made by the Claimant and could authorise payment for an invoice that the Claimant thought should be rejected. There were, however, checks and balances with the finance and commercial teams.

37. In early 2017, due to a problem with a sub-contractor, the Claimant undertook work, of his own volition, which should have been completed by the contractor. This meant that the Claimant was working many extended hours. I accepted that the Claimant had a tendency to research into matters outside of his remit and provide reports or solutions in relation to them and that this took his time away from that which he was meant to be doing. I accepted that the Claimant had gone beyond his remit before his transfer to the IMAGE team when he was working on project Thundercloud.

38. By the summer of 2017, the P-AIC project had reached the stage where it needed to go before the Defence Investment Approvals Board. The IMAGE

team was seeking funding to put PSIT on a contract to deliver an assessment phase so that the project could obtain approval for a competition to be run. In early summer 2017 the Claimant was involved in agreeing a Statement of Requirements ("SoR") for the P-AIC project.

39. By an e-mail dated 22 June 2017, the Claimant raised concerns about his workload with Mr Harrison. Mr Harrison responded by saying that he understood the predicament and suggested that the Claimant built leave into the next 9 weeks. Mr Harrison was concerned about the length of the hours the Claimant was working and ensured that he took leave during the summer.

40. In July 2017, Mr Boyall, Deputy Head in the Project Delivery Function e-mailed the Claimant, in his capacity as counter-signing officer ("CSO), about annual performance objectives. The CSO is one grade senior to a line manager and the purpose of the role was to ensure that the employee and line manager were participating in performance management in an appropriate way. The CSO also signed off the employees Performance Appraisal Report and ensured it was done fairly. If there was a dispute as to an appraisal box marking they would arbitrate. The CSO was also available to discuss career progression. Mr Boyall was in a different division to the Claimant and had no sight of his work. The Claimant replied to Mr Boyall on 26 July 2017 and said he was working as a quarter resource and his work had just multiplied, but he was just about stable again. Mr Boyall e-mailed Mr Harrison and asked if the Claimant was OK. On 31 July 2017, Mr Harrison replied that the Claimant had been busy, and he had been working with him to try and reduce his flexi hours and take some leave, which he had now done.

41. By the time the Claimant went on leave in the summer of 2017, he had agreed an SoR for the P-AIC project with Mick Brockley and had given it to the project leader in PSIT2, Andy North. The statement consisted of a draft business architecture and gave a rough idea of how they wanted the ultimate reorganisation to look. The Claimant described this as moving from 'what is it' to 'what it is'. The Claimant sought an agile delivery so that decisions were taken quickly and meetings would not end until they were made. There were no milestones included. The client department had wanted the project completed in 3 months which the Claimant had attempted to provide for in the SoR.

42. Whilst the Claimant was on holiday, Mr Harrison was involved in arranging the contract with PSIT2 and he spoke to the Claimant by telephone on at least one occasion. He considered the Claimant's SoR was woolly and not well defined. The Claimant had used the word 'agile' on many occasions but had not clearly explained how the suggested framework would achieve the outcomes. Mr Harrison considered that the SoR did not give them what

was needed to get the project to the next stage and, as it stood, it was not deliverable. When giving his evidence and when cross-examining, the Claimant gave convoluted explanations or build ups to questions which were difficult to follow, as they involved apparent digressions. I accepted that Mr Harrison genuinely considered that the SoR was woolly and that it was not clearly defined.

43. Mr Harrison did not think that the project could be delivered in the timescale of 3 months or on the basis of an agile delivery, he therefore changed the timescale and reverted to a conventional process. At this time, the IMAGE team had limited capacity and skills to adopt an agile form of working and was not fully equipped to apply the methodology to the Project. Mr Harrison, using his previous experience of similar projects with the contractor, agreed deliverables with PSIT. Mr Harrison included milestones, which were a mixture of deliverables, such as architecture documents, and recurring outputs including weekly or monthly reporting. It was agreed that rather than quarterly payments, the milestones would be paid on a monthly basis. Mr O'Mara gave evidence that Mr Harrison was entitled to agree such matters. The Claimant accepted that if Mr Harrison decided what he had agreed was unrealistic that it was within Mr Harrison's remit to make changes. I accepted that it was within Mr Harrison's remit to make such changes and he considered that they were necessary.

44. The contract was signed on 28 August 2017 and the Claimant returned from holiday the following day. On his return from holiday, Mr Harrison did not tell the Claimant that he had changed the SoR or the method of delivery.

45. The Claimant clarified, in his evidence, that although it appeared that his case was that the contract with PSIT2 had been changed, that was not what he was saying and that his complaint was that it did not reflect the SoR he had agreed.

46. Shortly after returning from leave the Claimant gave a presentation at the P-AIC project kick-off meeting, however he had not read the contractual documentation or the revised SoR. The Claimant's evidence was that he described a method, which was clearly agile, but that Mr Harrison did not interject and say that the method and date had changed. Mr Harrison's evidence was that the Claimant's presentation was a mess, and it was difficult to untangle what the Claimant was saying and how it would be delivered and therefore he did not interject. I preferred Mr Harrison's evidence on the nature of the presentation, and I accepted that it was difficult to follow. I did not accept the Claimant's evidence that at the meeting CGI only said 'what Ian said' as part of their presentation.

Initial requests for adjustments by the Claimant

47. In autumn 2017 the Claimant started suffering a flare from Fibromyalgia, which lasted until about March 2018.

48. On about 2 October 2017, the Claimant had a discussion with Mr Harrison. The Claimant's evidence was that he informed Mr Harrison that he had fibromyalgia, explained the condition and said he was becoming ill and needed to manage his workload. The Claimant was seeking an adjustment of his workload by reducing it to that of a normal person. Mr Harrison accepted that there might have been a meeting, but did not accept that the Claimant had referred to any adjustments by reference to a disability. On 10 April 2018, the Claimant sent an e-mail to Performance and Recognition within DBS and gave details of a conversation in October 2017 [p202]. The Claimant's version of events was more probable. He had been experiencing a flare of fibromyalgia, had been diagnosed in May 2017 and was concerned about his workload. I accepted that he had referred to fibromyalgia, explained the condition and said he was becoming ill and needed to reduce his workload.

49. The Claimant gave evidence that he had a discussion with Mr Harrison in November 2017 about fibromyalgia and needing adjustments. Mr Harrison denied such a conversation. The Claimant's e-mail, dated 10 April 2018, did not suggest that he had a discussion in November about disability related adjustments. The Claimant's evidence was that his subsequent e-mails on 7 December 2017 were part of an ongoing discussion. It was more likely that the Claimant referred to his workload being too high in November 2017, but that he did not refer to fibromyalgia, having previously referred to it in October.

<u>What the Claimant was doing in relation to the P-AIC contract</u>

50. In September and October 2017, the Claimant considered that CGI was not providing, or proving, work had been done in accordance with the contract and the SoR for the P-AIC project. He rejected an invoice and sent e-mails saying that he did not consider there had been compliance. On about 30 October 2017, Mr O'Mara, IntSys Commercial Officer, told the Claimant that Mr Harrison had made changes before the contract had been signed. The Claimant was of the view that the work was not being completed in accordance with the SoR, that it had not started for 10 weeks and therefore payments had not been triggered. Mr Harrison was of the view that work had been done and a stage payment should be made. The Claimant accepted in evidence that it was Mr Harrison's prerogative to conclude this.

51. The Claimant gave evidence that he had three conversations about the P-AIC contract with Mr Cairns, Assistant Head of Commercial for Defence Digital. The first was in October 2017 when he had said that the PSIT 2 contract had been changed and that the contractor was not complying. The

Claimant's evidence was that this was not a protected disclosure. Mr Cairns' evidence was that they had two conversations in late 2017/early 2018. I preferred the Claimant's evidence that he had three conversations.

52. On 2 November 2017, the Claimant e-mailed Chris Hares, copying in Mr Harrison and Mr O'Mara. He referred to changes in the PSIT2 contract and with what he had agreed with Mr North. He also referred to the PSIT team ignoring the MOD position despite 12 expressions of discontent in as many weeks. He had believed that quarterly payments would be made but it had been changed to monthly payments. He also referred to Mr Carpenter quoting the letter of the contract and said, "According to their monthly report they are assessing themselves as on-target but they do not go so far as to say meeting my SoR." He had found the monthly report unacceptable and rejected it. He said, "I am legally unable to make any payments against a contract that does not meet the intention as formally expressed on behalf of MoD in the SoR." He concluded by saying , "My position will just be that I have no basis on which to authorise any payment. I have offered to help unwind the position but I cannot do anything that it did not contract for."

53. On 3 November 2017, Mr Harrison sent an email to Gp Cpt Clouth saying that the Claimant was becoming increasingly difficult to manage and that the email of 2 November 2017 was one of many examples of contentious and inflammatory often incorrect e-mails where the Claimant was making it difficult to progress the assessment phase and manage the relationship.

54. There was a fundamental disagreement between the Claimant and Mr Harrison, at the relevant time and during the final hearing, as to whether the milestones were being met. Mr Harrison believed that PSIT was performing. The Claimant considered that despite a start date of 4 September 2017 work really started in December 2017 when a project team had been built. A later audit had not identified any red flags and there was no evidence that the work was not being done. Mr Harrison's evidence was that the Claimant vehemently disagreed with the way in which the milestones had been created and it was a common theme throughout his time on the contract. This was supported by what the Claimant said in his e-mail dated 2 November 2017. Mr Harrison's evidence, which I accepted, was that the work was being done in accordance with the revised SoR. The Claimant also considered that CGI should have provided a narrative of what had been done before sending an invoice. I accepted Gp Cpt Clouth's evidence that he had not seen an issue where due process had not been followed and that there was a continuous conversation with PSIT in which the evidence of work was captured. I also accepted Mr Harrison's evidence that if the milestone work had been produced there was not a requirement for there to be a narrative expressing the same.

55. The P-AIC project was challenging because it involved flight safety and it left the concept phase without the concept being clear. The project involved an element of business change, which was not unusual, but there was a challenging group of stakeholders involved. I accepted Gp Cpt Clouth's evidence that there was debate and friction around the Claimant's perspective of what was required and the appetite of the stakeholders to be as radical. The Claimant had strong views on this, but the perspectives of others led to friction. There were many issues with the concept and it was stressful for all the participants. Gp Cpt Clouth accepted that the Claimant was fulfilling his duty as a project manager by expressing concern, and he considered that Mr Harrison was trying to keep an oversight and ensure that the friction did not negatively impact the project.

56. The relationship between the Claimant and PSIT became difficult. Several meetings took place to try and resolve the problems. On 9 November 2017, Mr Harrison agreed to devise some new milestones, which were agreed with the PSIT on 17 November 2017. The Claimant thought that what had been agreed was too soft. Following this a contractual amendment was made. The Claimant accepted in evidence that it was a pragmatic solution. During this time the PSIT2 project manager was reallocated to another project. I rejected the Claimant's evidence that the manager was dismissed for being 'useless' and accepted Mr Harrison's evidence that it was due to relationship difficulties with the Claimant and that it was an attempt by PSIT2 to build a better relationship.

57. Part of the P-AIC project involved an Architectural Design Review ("ADR"), which had been scheduled for mid February 2018. At about the end of November 2017, the Claimant agreed with the PSIT project leader that it was impossible to complete by 14 February 2018 and the time would be extended to April. On 4 December 2017, Mr Harrison had a discussion with the Claimant about whether the target date was achievable. The Claimant's evidence was that he was told that the original target date would be maintained, which he interpreted as that the project would fail if the work was not completed by then. The Claimant considered that he was being asked to complete 6 months work in half the time and that the workload in the period dictated was increased. Mr Harrison's evidence was that they would have had a discussion as to whether the target was achievable and he wanted to push the team to try and achieve it, his later oral evidence suggested that this was after the receipt of the Claimant's e-mails dated 7 December 2017. Mr Harrison said it was recognised that the ADR would not happen in February, so it was moved to April 2018. Mr Harrison's evidence was more consistent with him telling the Claimant that the ADR date would be maintained. It was more likely that, on 4 December 2017, the Claimant was told that the 14 February 2018 date would be maintained, and the date

was not changed until after Mr Harrison received the Claimant's e-mails dated 7 December 2017.

58. On 5 and 6 December 2017, the Claimant was absent from work, which was recorded as a self certificate for "coughs, colds, flu, asthma".

59. On 7 December 2017, the Claimant e-mailed Mr Harrison at 0706 [p3511] and said "*I am able to work today but weakened by many weeks of illness so I am working from home today. My latest problems was just a cold but while recovering from the last episode it left me incapacitated*." He said that he hoped he could have a chat about his workload becoming unmanageable. Mr Harrison responded by saying he was available the next week and they could discuss his tasking and how they could prioritise it against the PSIT schedule. At 1206 the Claimant sent Mr Harrison a second e-mail attaching a workload analysis [p3512-3518]. In the e-mail he said, "… I want to see this project succeed but as it stands at the moment my overload is going to hit the critical path. … I must gain help or transfer most of my workload to others." He suggested that there were an additional 29 hours of work per week required as a result and an additional person, working a full time equivalent of 60%, was required. Mr Harrison interpreted the analysis as a request for an additional resource (person) to be provided to the Claimant. The analysis did not refer to reasonable adjustments or any disability.

60. Mr Harrison forwarded the e-mail to Gp Cpt Clouth and asked to speak about it and said, "*there seems to be some logic to what he is saying, however what I find somewhat ironic is that for someone who is overworked he seems to find time for such a detailed analysis of the problem…*"

61. I accepted that at about this time the Claimant was doing the work of about 1 ½ people and he was asking for the workload to be reduced. It was more likely that the date for the ADR was not moved until the end of January/early February 2018 when it became apparent that CGI would not be able to deliver the project without an add on and after the Claimant spoke to Mr Boyall on 18 January 2018. I also accepted that Mr Harrison asked PSIT to undertake some of the project legwork at about the same time the ADR date was moved.

62. On about 10 December 2017, the Claimant spoke to Mr Cairns for a second time. The Claimant's evidence was he said, that after sending the e-mail on 2 November 2017, he was refusing to be instructed to commit a criminal offence and that he was being asked to enter a receipt for work saying it had been satisfactorily completed, when it had not been done, so that Mr Harrison could authorise payment. Mr Cairns' witness statement referred to

two conversations which had the same content, including that Mr Harrison had been taken to a roof top restaurant. The meal in the roof top restaurant did not occur until February 2018 and accordingly I was not satisfied that Mr Cairns could accurately remember what had been said in December 2017. I accepted the Claimant's oral evidence as to what he said.

63. The Claimant said that he believed that what he said tended to show that there had been a criminal offence, because he was being asked to say work had been completed when it had not. His unchallenged evidence was that it was a criminal offence to cause a loss to the Treasury, by causing it to pay funds which were not due. He also said civil servants were under an obligation not to cause a loss to the Treasury, which was well known, and he was being asked to breach that obligation and commit an offence. His evidence was that he believed it to be in the public interest because it involved public funds and that they were supposed to act in the interests of the nation to preserve best value for money and prevent wasteful losses.

64. By end of December 2017 the Claimant believed that issues with irregular payments on the P-AIC project had been resolved. In January 2018 CGI chased payment on an invoice that the Claimant had receipted in December 2018. On 29 January 2018, CGI chased 3 AIC invoices to be receipted, the Claimant responded by saying that he thought he had authorised the payments.

65. On 16 January 2018, a further amendment to the P-AIC milestones was agreed.

66. On 18 January 2018 the Claimant met Mr Boyall. The Claimant's evidence was that he explained that the workload was excessive and that he was ill and was asking for the workload to be reduced to a normal level. Mr Boyall could not remember what was discussed, but accepted that it was clear from the e-mail traffic that the Claimant was concerned about his workload and it was plausible they discussed it. Mr Boyall did not recollect a request to make reasonable adjustments or a link to a health condition. I accepted Mr Boyall's evidence that if the Claimant had linked workload with health issues it would have rung alarm bells for him and he would have immediately e-mailed Mr Harrison and 'given him a rocket'. The Claimant also said that as a consequence Mr Boyall had e-mailed Mr Harrison and Mr Harrison had responded by saying that he was working with the Claimant. I rejected this evidence, the only e-mail I was referred to was in July 2017 and it was more probable that the Claimant had misremembered when this e-mail was sent. It was most likely that the Claimant had complained about his workload to Mr Boyall.

67. At the end of January 2018, it became clear that CGI would not be able to deliver the project without allocating additional resources to it. Within the

original PSIT proposal there was an option, as an add on to the contract, to call on work up to £150,000 for additional effort as needed. PSIT had previously proposed a solution, costed at £600,000, which Mr Harrison had told them was unaffordable.

68. At a meeting on 5 February 2018, at Mr Harrison's desk, there was an attempt to find out the value of the add on. The figure had been talked up from £150,000 to £250,000.

69. On 6 February 2018, at a public meeting which involved CGI, discussion turned to the 'add on' for the PAIC contract. Mr Harrison said, what are we talking here, £600,000. The Claimant agreed, when giving evidence, that this sounded more like a challenge than an offer. Mr Harrison said that he was meeting the contractor the following day.

70. On 7 February 2018, Mr Harrison went to London for a day long meeting with CGI, at which Gp Cpt Clouth was also in attendance. The add on figure was not agreed at the meeting, although it was subsequently agreed at £150,000 on a different day. The meeting was held at CGI's offices. There was a staff restaurant on the top floor of the offices. After the morning meeting, Mr Harrison and Gp Cpt Clouth and 4 others had lunch in the restaurant, at which Mr Harrison had a glass of wine. Further work issues were discussed during lunch, before returning to the offices for further meetings.

71. After the meetings Mr Harrison went back to his hotel and then met a friend, unrelated to CGI, for dinner. After dinner he returned to his hotel. On 8 February 2018, Mr Harrison travelled by tube from Edgware Road to Northwood and attended a meeting.

72. The Claimant alleged that on 8 February 2018, Mr Harrison attended work appeared the worse for wear and boasted to Mr Thorne that he had got drunk at lunchtime and then gone on to a Peruvian restaurant with a friend and got so bladdered he was amazed he had got the last train home. Mr Harrison produced receipts showing that he stayed in London on the night of 7 February and receipts showing him making purchases in London at 0845 the following day. He also provided a receipt for the share of his dinner on 7 February 2018. I was satisfied that Mr Harrison did not attend the office on 8 February. The Claimant was correct that Mr Harrison went to a Peruvian restaurant, and it was likely that at some point he mentioned he had been. I was not satisfied that Mr Harrison had said he had got drunk at lunchtime or that he said he was surprised he made it home due to amount he had been drinking.

73. On about 12 February 2018, the Claimant spoke to Mr Cairns at an impromptu meeting, at which neither party took notes. The Claimant's

evidence was that he had said that Mr Harrison had made a commitment for a large sum of money, by blurting a figure out in a meeting and had given a verbal commitment to the contractor and the commitment had bankrupted the project. Mr Harrison had then said that he was meeting the contractor the following day. He said he told Mr Cairns, that on 8 February 2018, that Mr Harrison came into the office looking the worse for wear and boasted that he 'got so bladdered he was surprised he made it home'. He had also said that how wonderful the event was and that the wine never stopped flowing and had referred to the roof top restaurant and a subsequent dinner. In his witness statement, Mr Cairns recalled that the Claimant had said that Mr Harrison had been taken to a roof top restaurant in London for dinner and given alcohol by a contractor.

74. The Claimant accepted in evidence that 'lavish entertainment did not feature in the civil service code, but explained that it was acceptable to accept a working lunch if carrying on working, but otherwise you would have to break and go to the canteen. An acceptable lunch would not include going to a restaurant, having multiple courses or having alcohol. It must not look like a gift or bribe and never associated with contract formation as per the civil service code. The Claimant referred to 'lavish entertainment in many of the e-mails which followed.

75. It was most likely that the Claimant told Mr Cairns that Mr Harrison had blurted out the figure of £600,000 at the meeting on 6 February, giving a verbal commitment to the contractor, and then said he was having a meeting with CGI the following day. It was also likely that the Claimant informed Mr Cairns that Mr Harrison had received lunch at a roof top restaurant, and he had used his term 'lavish entertainment'. The Claimant also referred to Mr Harrison going on to dinner and had drunk large quantities of alcohol. I accepted the Claimant's evidence that he told Mr Cairns that you cannot accept lavish entertainment when negotiating a contract.

76. In terms of his belief in the public interest, the Claimant relied upon the same matters as per his earlier alleged disclosure. He also considered that the events gave rise to his suspicion of a corrupt relationship between Mr Harrison and CGI on the basis that Mr Harrison was prepared to take lavish entertainment, negotiated an uplift and had set up the contract change in his absence

77. At the end of the meeting, Mr Cairns told the Claimant that he would need to submit his concerns in writing so that he could take them further and asked whether the Claimant would be prepared to whistleblow.

78. On 12 February 2018, the Claimant e-mailed Mr Harrison [p26], after receiving an amended SoR, and referred to shock about hearing discussions regarding contract pricing. He said that he was not a party to the negotiation. Mr Harrison responded by saying PSIT already knew the cost of the option and, their initial assessment against the original option was in excess of £600,000 which he had informed them was unaffordable and was no longer an issue. The Claimant was told that what he was needed to do was to "agree with the customer community that the scope in the SoR was correct with user community, and if so for PSIT to cost it [p25]. The Claimant responded by say that he first heard of the £600,000 figure the CIWG. He also said that he had no part in placing the original contract which just ignored his SoR and wasted resources. He said it felt unsafe and that he would feel in jeopardy if directed to authorise anything that vague. Mr Harrison responded that, he needed the Claimant to do the work requested and ended with "Please just get on and do this. I do not need your further comment on the original PSIT AIC task thank you!" I accepted Mr Harrison's evidence that whenever there were issues with the project, the Claimant referred back to the original SoR and his disagreement with the changes to it and the scope of the contract.

79. On 7 March 2018, Charlie Oliver (PSIT) e-mailed the Claimant about having provided deliverables and requested comments by 19 March 2018 [p35] in relation to invoices sent in February 2018 [p46]. The Claimant's response was that the schedule for payments was agreed in his absence and not what he would have accepted, he did not agree that meetings and progress reports were deliverables and therefore there was nothing to bill against and said what he considered was necessary [p34].

80. Mr Harrison then e-mailed the Claimant and said, "this is not how it works." He said that the list of deliverables had been modified to reflect the changed position and weekly and monthly reports were part of the milestones [p32-33].

81. At a meeting on 8 March 2018, Mr Oliver told the Claimant that CGI were speaking to lawyers about the non-payment of the invoices. The following day, the Claimant sent Mr Oliver a proposed agreement [p3740]. Mr Oliver responded by saying that the payment timescales had been exceeded and requested payment of 2 invoices immediately [p3742]. Further correspondence took place about the provision of deliverables and Mr Oliver wanted to know whether payment would be denied so that he could inform Mr Carpenter. As consequence of these e-mails, Mr Harrison concluded that the relationship between the Claimant and PSIT had broken

down and that they were not going to agree a sensible way ahead. I accepted the evidence of the Respondent's witnesses that the clients and stakeholders had become very frustrated with the Claimant.

82. On 11 March 2018, Mr Harrison e-mailed Gp Cpt Clouth and Mr Bloomfield. He said that the project was at severe risk of failure mainly due to the Claimant's working practices and relationships with the AIC community and a formal letter of complaint was expected. It was suggested that the Claimant's relationship with PSIT was broken, that he was refusing to pay several invoices and was saying that he had never agreed to the original proposal. There were also concerns raised by IMAGE commercial. Mr Harrison could not see the point of going down the restoring efficiency route and said the Claimant worked hard but did not have the skills to manage a project of that complexity and it was likely he would go off sick.

83. Gp Cpt Clouth responded [p50-51], noting that the Claimant was intelligent and capable but that he did not deal well with complexity, ambiguity and uncertainty and he tended towards being a perfectionist rather than pragmatic. He considered that the Claimant was a bad fit for the AIC project. It was noted that the Claimant had been working long hours and was becoming very stressed. He was concerned about the viability of the project and suggested that the Claimant was removed and was used in the forthcoming IntSys transformation.

84. I accepted Gp Cpt Clouth's evidence that he had spoken to PSIT2 and other stakeholders in the project and that there had been too much friction and the relationships were being damaged. Gp Cpt Clouth considered that the biggest issue was running the risk of losing the support of the stakeholders and that the Claimant had upset many of them. CGI had also been voicing concerns to him. He considered that there had been a mismatch for the Claimant's skills, and trust and confidence had been impacted. I also accepted Gp Cpt Clouth's evidence that he had no knowledge that the Claimant had raised any concerns about Mr Harrison's commercial practices.

85. Gp Cpt Clouth spoke to Mr Bloomfield and was informed that there was an expectation that there would be substantive role in the IntSys transformation, and the Claimant would be involved in scoping and defining it.

86. On 12 March 2018, the Claimant e-mailed Mr Harrison reporting that there was good news on the project and it looked like it would be a success. The same day Mr Oliver, of PSIT, asked Mr Harrison for a meeting and said that

the Claimant did not agree with the current PSIT contract and had flatly refused to abide by the terms and conditions, and that PSIT had delivered and invoiced as agreed. He referred to the Claimant's behaviour being unreasonable and that the invoices for January and February were overdue and the Claimant was refusing to honour his commitments [p58A].

87. On 14 March 2018, Mr Harrison, Mr Bloomfield, Gp Cpt Clouth and Mr Bollen had a meeting, at which it was agreed to transfer the Claimant as per Gp Cpt Clouth's proposal. Mr Harrison followed this with an e-mail, suggesting that the Claimant was transferred to support the IntSys evolution process and he would remain his line manager for the short term, but that Mr Bollen would be task manager. Mr Bollen replied by saying he was "not massively keen on taking on task management duties" for the Claimant given his capacity and limited involvement thus far with the transformation. The Claimant suggested that this showed that Mr Bollen was refused to be part of a collaboration and I rejected that suggestion. Mr Bollen became the Claimant's task manager after the Claimant moved roles. I accepted Mr Bollen's evidence that as a civil servant it was normal for project managers to be transferred between postings and that the determining factors were business need and the project manager's skill set.

88. On 15 March 2018, the Claimant met Gp Cpt Clouth in the canteen. The Claimant was thanked for his hard work, and it was explained that there was concern about the Claimant's well being and that other parties had been upset. It was explained that the Claimant would be moved to the transformation role, for which he would be better suited. The Claimant agreed to the move. Following the meeting Gp Cpt Clouth sent an e-mail, into which the Claimant was copied, confirming the Claimant's move.

89. On 16 March 2018, the Claimant attended work and read Gp Cpt Clouth's e-mail. He collapsed and was unconscious for a time, the recollection of which is still particularly distressing for him.

90. At a similar time to when the Claimant was reading the e-mail from Gp Cpt Clouth, Mr Harrison sent an e-mail, without copying in the Claimant, to a large number of people involved in the PSIT project. In the e-mail he said, "*In consultation with Intelligence Systems senior management, I have taken the decision to remove Ian Tapping from the PICASSO ASG AIC Assessment Phase Project Role; the decision has not been taken lightly and is not a reflection on Ian's performance; but we have become increasingly concerned for Ian's well-being and the impact managing the AIC Assessment phase is having on him; we have agreed that now was the*

time to take positive action in Ian's best interest." It was said he would move temporarily to support IntSys evolution activities.

91. Mr Harrison's evidence was that he considered an explanation focusing on the Claimant's wellbeing was more appropriate than publicising the principal reason for the move, namely the concerns about his management of the project and the deteriorating relationships within it. In oral evidence Mr Harrison accepted that the e-mail was clumsy, but that he thought it was unfair to expose the stakeholder concerns. Mr Harrison considered that the Claimant was working long hours and was concerned that they could be having a detrimental effect on him. The Respondent asserted it was a kinder way of explaining the move, rather than saying that the Claimant had fallen out with other parties in the project.

92. The Claimant did not know that the e-mail had been sent, until about September 2018 when he saw it at the bottom of on an e-mail from Mr Blockley. The Claimant took issue with the e-mail because it was not the true reason why he was leaving the project. The Claimant considered that it related to his disability because he had asked for reasonable adjustments and he was still having flares associated with fibromyalgia and was frail and prone to collapse. The Claimant considered that his disability was being used to misrepresent the position.

93. On 15 March 2018, the Claimant was transferred to support the IntSys Evolution programme. The Claimant asserted that after the move, Mr Bollen told him that the Transformation role did not exist and that later it was not official. Mr Bollen gave evidence, which I accepted, that the role existed. There was a requirement to produce a campaign plan and the plan was to launch the IntSys Transformation, and that there was a business need to develop the plan and for someone to lead it. A report was required by the end of April 2018 and a lot of activity was required to prepare it. I did not accept that Mr Bollen told the Claimant that the role did not exist, however he later said that the department did not have approved funding. I also accepted Mr Bailey's evidence that he was able to use the project managers assigned to his portfolio of projects as he saw best and the rigid link between individuals and posts had long since been removed. I accepted Mr Bailey's evidence that there was not a formal process for such moves, and it would be done by way of discussion with the individual and the task managers There was a need for research work to be carried for the early stages of the transformation project and I accepted that the Claimant was allocated to that role and that it was important work.

94. On 19 March 2018, the Claimant spoke to Mr Lansbury via the Confidential Hotline. He told Mr Lansbury that there had been a contract change whilst

he was on holiday and had not been told about it. Further that the contractor was underperforming, Mr Harrison appeared to act as their advocate and was not challenging underperformance. Mr Harrison was forcing him to say work had been done when it had not. He also said that Mr Harrison had accepted lavish entertainment. Mr Lansbury asked him if he thought anything was criminal and he said that it was, because he had strong suspicions about the pattern of behaviour. The pattern had been attempting to amplify the contract and then ignore underperformance at the cost of the Treasury, which was considered a crime. The Claimant considered that the legal obligation was that they were supposed to act in the interests of the nation and preserve best value for money and prevent wasteful losses.

95. On 23 March 2018, the Claimant sent an e-mail and attachment to the Confidential Hotline, in which the Claimant said the following things. Mr Harrison seemed unduly close to the contractor and had objected to the commercial manager attending his weekly meetings. The SoR for the project had been changed whilst he was on holiday. Mr Harrison had negotiated a large uplift to the project in an open forum publicly suggested a figure of £600,000, following which the contractor was asked to leave the room and come back with a figure. On 7 February 2018, Mr Harrison attended an invitation from CGI for a sales promotion disguised as a seminar and it was expected to involve lavish entertainment. It was a lunch in one of the best restaurant's in EC3. The following day Mr Harrison boasted he had really fallen off the wagon and then had gone on to meet a friend at a restaurant and got blasted. He had met Mr Carpenter, senior director of PSIT2, at the event and breached the commercial firewall. He referred to commercial policy and that contracts had to be 'deliverables based' and that what had been agreed went against that. He also said that Mr Harrison had instructed that a payment should be made following a report, when in the Claimant's mind that it was a pre-payment and could not possibly have met the Treasury rules. Invoices had to be loaded onto CO&F quickly and paid or rejected within 10 days or by term of contract or they were deemed payable which he suspected was illegal. He said had no evidence of corruption, but Mr Harrison's behaviours inferred it. In relation to his belief in the public interest and why the information tended to show that that there had been a breach of a legal obligation or a criminal offence the Claimant relied on the same matters as per his earlier alleged disclosures.

96. On 26 March 2018 Mr Bailey started in his role as Head of Intelligence Systems (IntSys) and the Claimant gave him a warm welcome. The Claimant had previously worked with Mr Bailey from July 2009 to June 2015, when Mr Bailey was his CSO. Both men had a good working

relationship and respected each other. In 2013 or 2014 the Claimant had raised medical issues with Mr Bailey and some adjustments to his role were agreed on an informal basis. Mr Bailey had spoken to Gp Cpt Clouth who had briefed him that in conjunction with Mr Bloomfield he had removed the Claimant from the AIC project due to his interaction with stakeholders and that that a complaint was about to be made about the Claimant's behaviour and inability to mange the project. Gp Cpt Clouth also told Mr Bailey it had been thought best to move him to an area more attuned to his skills and that he was concerned about the Claimant's health and referred to his collapse. Mr Bailey was not told about the concerns the Claimant had raised about the PSIT contract. Mr Bailey was keen for the Claimant to work on the transformation work in IntSys, which consisted of a piece of research work. Mr Bailey was appreciative of the work and ultimately used it in his evidence pack for his vision for the transformation.

97. On 29 March 2018, the Claimant sent an e-mail to the confidential hotline, with two attachments [p106-114], in which he complained about being removed from his role on 15 March 2018 and that Gp Cpt Clouth had said that it had been decided due to his health issues that he should move off the project and to find something more suitable for his skills. He said he had told that he had manged to upset just about everyone. He doubted that he was being moved because of his health. He also referred to the P-AIC being under resourced, and he had explained his health situation to Mr Harrison in October 2017. In late November and December, he had spoken to Mr Harrison about his workload, and he predicted it would overflow by 50% a day by Christmas. The Claimant also sent a further e-mail with an attachment of events before and after his removal from the P-AIC project.

98. On 29 March 2018, Ms Cheek of Fraud Defence, e-mailed Mr Lansbury and said that the Confidential Hotline could not take forward concerns of whistleblowers about their personal treatment and that concerns of a personal nature did not fall within the scope of the policy. She said that concerns of harassment, bullying and discrimination would not normally fall within the policy, and they would be dealt with via a line manager following appropriate policies such as the grievance and bullying and harassment polices. She confirmed that the concerns regarding contract management would be confirmed for consideration of investigation.

99. On 4 April 2018, Mr Lansbury e-mailed the Claimant and informed him that the Confidential Hotline would not be able to take forward his complaints regarding his personal treatment and that concerns of a personal nature were not within the scope of the whistleblowing policy unless they had wider public ramifications. The Claimant was told that they should be dealt with via a line manager and following the grievance and bullying and harassment policies [p127]. On 10 April 2018 the Claimant replied and said he

understood that they could not handle the allegations of bullying and it had been included as contextual information only.

100. On 16 April 2018, Ms Cheek, after reviewing the documents, informed Mr Lansbury, that after receiving the Claimant's consent for him to be identified to the appropriate body, the matter could be passed to the MOD Police ("MDP") for their assessment. On 18 April 2018, Mr Lansbury informed the Claimant by letter that his concerns were being passed to the appropriate area for investigation. The Claimant would receive updates, but the final outcome would not be shared with him unless there had been a policy or control improvement as a result. On 19 April 2018, Mr Lansbury CH referred the concerns to the MPD.

The meeting on 19 April 2018

101. The Claimant was concerned whether the transformation manager role properly existed and sent an e-mail to Mr Bailey raising the issue and said if it did legitimately exist he would be delighted to perform it. On 19 April 2018 the Claimant had a meeting with Mr Bailey at which no notes were taken by either party. Shortly before the meeting, Ms Dawson, IntSys Business Support Team (People Lead), approached the Claimant and told him that there had been a mistake. Mr Bailey arrived, and she left.

102. In the list of issues, the Claimant alleged that Mr Bailey had effectively told him that he wanted him out of the unit and used words to the effect that the Claimant was over the hill. The Claimant's witness statement said that the meeting was abrupt. In oral evidence the Claimant said that the tenor of the meeting was 'go away' and it was suggested he look for a job in BATCIS. The Claimant accepted in cross-examination that the words 'go away' were not used. He said HR had looked into a role in BATCIS and it had come to nothing. The Claimant's oral evidence was that Mr Bailey started a theme that he was slowing down and not quick on the uptake and then used an expression about rusting out, however he did not put these allegations to Mr Bailey in cross-examination and they were not referred to in his witness statement. The Claimant did not consider what occurred was linked to his disability.

103. I did not accept that the Claimant was aware that the enquiry with BATCIS had come to nothing. Mr Bollen told the Claimant that the enquiry had not borne fruit on 3 May 2018 and the assertion was also contradicted by the Claimant's e-mail dated 24 April 2018.

104. Mr Bailey's witness statement suggested that it was the Claimant who had raised a possible move to BATCIS, however he accepted in oral

evidence that Ms Dawson might have mentioned it to him. I accepted that Mr Bailey was aware that the Claimant had been making enquiries with BATCIS. Mr Bailey, in his witness statement, denied saying anything on the lines that the Claimant was over the hill. He also said that they discussed whether the Claimant needed any adjustments, but had been told that they were not needed. Mr Bailey's oral evidence was that he told Mr Tapping that the Transformation role was temporary and that he wanted the Claimant to do it. He had encouraged the Claimant to look for other roles, inside and outside of the division, due to the temporary nature of the transformation role, and denied instructing the Claimant to look for a role in BATCIS. I accepted Mr Bailey's evidence that he had later used the Claimant's research work as part of his evidence pack and that he wanted the Claimant to be involved in the implementation of it, if it got that far. He could not remember whether he had referred to rust out and burn out during the meeting. However, he considered that the Claimant's concern that he was only undertaking the research project might have left him feeling under tasked.

105. On 25 April 2018, the Claimant e-mailed various people in IntSys saying he was temporarily assigned to aid Mr Bailey with the IntSys Transformation planning and possibly with implementation and sought their views of various aspects of the process [p168]. The Claimant also sent an e-mail to Mr Bailey on 24 April 2018 and made no reference to being told to leave the team. The e-mails sent after the meeting, tended to support Mr Bailey's version of events and I preferred Mr Bailey's evidence in relation to what occurred on 19 April 2018. Mr Bailey did not suggest that the Claimant was over the hill. He had made clear that the transformation role was temporary and encouraged the Claimant to look for other roles inside and outside the division to ensure his career progression. Mr Bailey did not tell the Claimant explicitly or by implication that he wanted him out of his unit. The Claimant was not told to look for a role in BATCIS. I did not accept that reference to rust out was made during the meeting.

106. Following the meeting, Mr Bailey e-mailed the Claimant [p165] and said, "We spoke about your length of service in PDG1/IntSys, and there was consensus that a change of location and challenge was probably good for you, particularly if it involved heading into a much larger programme. As always, your health is of primary concern; I recognise that this includes "rust-out" as well as "burn out"." The Claimant interpreted the term of rust out as defunct or beyond useful life and he found it offensive, and he raised this in his e-mail dated 24 April 2018 [p164]. Mr Bailey's evidence was that the term 'rust out' was a well known management expression when an employee no longer finds the work interesting or challenging leaving them

disinterested, lacking in motivation and ultimately disengaged. Mr Sixsmith, HR, said in his witness statement he first became aware of the term in the course of the Tribunal proceedings. The Claimant was unaware of term. There were documents in the bundle, including NHS documents, that supported that it was a management expression, however I did not accept it was well known. I accepted that Mr Bailey did not intend the term to be offensive. The Claimant found it offensive and considered that it was a reference to being decrepit, defunct or beyond useful life.

107. On 24 April 2018, the Claimant e-mailed Mr Lansbury raising concern that his role did not exist. Mr Lansbury responded by saying, matters concerning how the Claimant had been treated should be dealt with under the Grievance and Bullying and Harassment polices.

108. On 24 April 2018, the Claimant e-mailed Mr Bailey and said, "knowing you so well, I cannot believe you meant to offend me but the expressions "rust out" as well as "burn out" concern me. The first reads as an age/disability euphemism and the second is an indication of failure – when I am being told I am being moved out of concern for my health. That couples in my mind with your suggestion that I should leave IntSys and I have to ask – have I done something wrong." The Claimant's evidence was that he considered the remarks to be ageist and he was seeking an apology.

<u>First alleged grievance</u>

109. On 10 April 2018, the Claimant e-mailed the Performance & Recognition team within DBS [p202]. He set out the background in terms of that the statement or requirements had been changed and he had been removed from his role. He was concerned that his performance had not been reviewed. He asked whether he needed to make a complaint. He said he had told Mr Harrison in October 2017 that he had a pacemaker and fibromyalgia and that he was seeking relief from an extreme workload. He had been told that his health would come first, but no attempt was made to reduce his workload. He also said he had warned Mr Harrison that he would have a 50% overflow rate after Christmas and nothing was done about it.

110. The enquiry was referred to Mr Sixsmith, Employee and Wellbeing Consultant in Employee services ("ES"). I accepted Mr Sixsmith's evidence that his team did not deal with complaints, and it only provided procedural advice and wellbeing and counselling services. I accepted that Mr Sixsmith's role was to advise on policy and process. Mr Sixsmith, who had been on holiday, responded to the Claimant's enquiry on 2 May 2018 by e-mail [p203] and attached guidance about the grievance policy and bullying and harassment and invited the Claimant to contact him.

111. On 3 May 2018, the Claimant provided a brief history by e-mail and said he wanted to take the softest approach. The Claimant said he would call the following day, but he did not.

112. On 14 May 2018, Mr Sixsmith, not having heard from the Claimant, asked him whether he was content for the call to be marked resolved. The Claimant was told that he could approach his line manager with the aim of informally resolving the situation. On 15 May 2018, the Claimant e-mailed Mr Sixsmith and said it was difficult to discuss matters in an open office. He also raised a query as to what 'informal' meant and said that he wanted a record kept. He said that the atmosphere had become corrosive and that the 1* had made an ageist remark in an e-mail and referred to 'rusting out'.

113. On 15 May 2018, Mr Sixsmith had a conversation with the Claimant and discussed the issues raised in the e-mails and the approaches the Claimant could follow. It appeared a formal complaint was more appropriate because the Claimant wanted it to be documented and possible misconduct action taken. Mr Sixsmith then sent the Claimant a link to the procedure. He also sent an e-mail saying that the query had been resolved and asked for feedback [p210]. I accepted that because Mr Sixsmith had dealt with the procedural query, he considered that the matter had been resolved and marked it accordingly. A face to face meeting did not occur because ES's policy was that it was a telephone service only. The Claimant's evidence was that he had asked Mr Sixsmith what he should do if the deciding officer would be Mr Bailey, however Mr Sixsmith did not recall it. Mr Sixsmith's evidence, which I accepted, was that in such circumstances his advice would be for the Claimant to go up the chain of command again and if that person was getting quite senior he could move sideways to a different department.

114. On 18 May 2018, the Claimant e-mailed Mr Sixsmith attaching what he considered to be a draft grievance, whilst he was waiting for a deciding officer to be appointed. The attachment [p181-192] said that it was a summary of their conversation and agreement. He set out the basis of his allegations, including that he had been denied reasonable adjustments and ageist comments had been made. He referred to bullying and the removal of his role and the e-mail sent by Mr Harrison.

115. It appeared to Mr Sixsmith, that the Claimant had misunderstood the purpose of his advice and that the extent of his remit, namely, to provide policy and process advice but not an assessment of a complaint. Mr Sixsmith did not accept he had agreed with the Claimant as to the process which should be used or any other matters suggested. Mr Sixsmith thought it was important to convey that he was unable to be named as supporting a complaint, because an outcome could only be determined after a formal investigation. On 24 May 2018, Mr Sixsmith e-mailed the Claimant and said

that he needed to submit his complaint to the appropriate deciding officer as per JSP 763. He also said that he was unable to provide his consent for the agreement sought and suggested it was reworded. He further said that the Employee Services team were available to support individuals with the appropriate policy and process, but were not able to agree or tell individuals what to do.

116. I accepted that under the bullying and harassment and grievance policies that the complaint must be submitted to a deciding officer and that Mr Sixsmith was not such a person. Mr Sixsmith thought that the Claimant would go on and appoint a deciding officer. He therefore marked the query as resolved and it automatically closed. Mr Sixsmith's evidence, which I accepted, was that the Claimant having said he had raised ethical concerns had no influence in his decision making process. He was an adviser of process and did not think that a grievance had been submitted to him and he thought he had been clear it needed to be submitted to the appropriate person. As far as he was concerned he had resolved the Claimant's process and the Claimant had not raised a grievance in accordance with the policy.

117. On 16 July 2018, the Claimant e-mailed DBS and said it had been many weeks since he sought a face to face meeting with an HR professional to discuss his grievance. He said the original event was 4 months old and there had been no real progress. The e-mail was treated as a complaint and forwarded to Ms Singleton, Lead of the Employee Services Team, her role included policy and process advice and employee wellbeing.

118. Ms Singleton investigated what happened. She considered that the Claimant had not raised a grievance in line with the policy and did not consider that the Claimant's e-mail dated 16 July 2018 was an appeal against a grievance outcome. She concluded that the complaint was unfounded. In her letter of response dated 23 July 2018. She confirmed that they did not offer a face to face service and she could see that the Claimant had been advised to submit his complaint to the appropriate deciding officer.

119. The Claimant responded by saying he had been referred to JSP 763 several times, but it did not address the problem he was facing. He did not think that his need was likely to be satisfied by a brief conversation with the first person to answer the telephone [p469A].

120. On 26 July 2018, Ms Singleton asked Mr Bottle, who was on her team and had experience with bullying and harassment, to contact the Claimant. Mr Bottle spoke to the Claimant and explained the process. The e-mail following the conversation confirmed that the Claimant thought that the information provided him with a way forward [p484C]. The Claimant acknowledged, in his feedback, that he had subtly misunderstood the process which was why he thought that his initial complaint was mishandled

[p484B]. Mr Bottle informed Mrs Singleton that the Claimant was clear about his options and was going to submit two grievances and informed her that she could close the complaint. I accepted that the complaint referred to the Claimant's e-mail dated 16 July 2018.

Change of role for the Claimant

121. In June 2018, Richard Stewart, Deputy Head of Intelligence Exploitation and Dissemination ("IXD") asked Mr Bailey if the Claimant could be released from IntSys to work on the SkySiren project in his department. The Claimant had undertaken the first task on the IntSys transformation and Mr Bailey was working out what the next phase should be and was content that the Claimant working on SkySiren was a good use of his resource and the Claimant started working on the project.

Further events

122. On 4 July 2018 the Claimant met DC Quaite of the MDP and discussed his commercial concerns. DC Quaite told the Claimant that he should not refer to the matters being investigated by him in the internal investigation.

123. Between 4 July and 17 October 2018, the Claimant, over 5 iterations, prepared a witness statement for DC Quaite. The Claimant had not produced the statement in the form required by the police and was asked to produce different versions removing repetition and references to the bullying and harassment allegations as they did not form part of the police investigation. The final statement was produced on 17 October 2018 [p1157-1173]. The Claimant set out an account of events repeating what he had said before, including changes to the SoR, he had been instructed to make payments, when it was a legal duty to refuse to make payments for work that was not complete and the incidents on 6 and 7 February 2018. On page 11 of the statement a section started about emerging themes and included: (1) perverting the contract to favour the contractor and a potential future supplier (the contractors parent company). He referred to changes to the contract and he believed that they were deliberate and agreed between Mr Harrison and Mr Carpenter to the MOD's disadvantage; (2) Mr Harrison was biased in favour of the CGI/PSIT2 contractor and resisted complaints. (5) there was suspected collusion with Mr Harrison having routine offsite private meetings with Mr Carpenter. (7) Mr Harrison had received lavish entertainment and MR Carpenter attended breaching the firewall and he had negotiated a contract extension whilst in a drunken state. The Claimant said he relied on the same matters, as with his earlier alleged protected disclosures, as to his belief in the public interest and what he said tended to show.

124. On 17 August 2018, the Claimant e-mailed Mr Harrison. He said that they had not communicated since April and, "*I have been advised by HR that I should pursue formal grievance against you as my line manager for failing to assess reasonable adaptations for my disabilities*." He suggested informal action with a written record and that he needed to be assessed by Occupational Health. He said if Mr Harrison was content he would write fully to set out the situation and provide evidence.

125. Mr Harrison forwarded the e-mail to Mr Bailey and said he was about to depart on a week's leave and intended to do nothing with "*this ridiculous e-mail*" until he returned. Mr Baileys' evidence was that he thought it was discourteous for the Claimant to send the e-mail just before Mr Harrison went on leave.

126. On 5 September 2018, the Claimant e-mailed Mr Lansbury and said that he had learnt by rumour that his temporary role was to be changed again and he linked it to his grievance sent to Mr Harrison.

127. On 5 and 6 September 2018, the Claimant and Mr Harrison corresponded about an offer by Mr Harrison to meet on 10 September 2018 to discuss his grievance. Mr Harrison said he hoped to have an informal chat before they got to the stage of writing formal letters to each other. The Claimant said he wanted a record created.

128. On 10 September 2019 the Claimant was told that his role with SkySiren was ending when he was asked to resign by Richard Hughes [p689]. I accepted Mr Bailey's evidence that the first he knew of the Claimant's removal from the role was on 14 September 2018 when he had a meeting with him. The Claimant cross-examined Mr Bailey on the basis that his removal was connected with his grievance, however I accepted Mr Bailey's evidence that he had no dealings with the team, who worked for a separate deputy head, and he had not mentioned it to them. Mr Bailey and Mr Bollen made enquiries as to why the Claimant had been removed. Mr Bailey's evidence was that the team was not happy with what the Claimant was doing. Mr Bollen, of whom the Claimant had no criticism, said in cross-examination that he had been in contact with the line manager and had been advised that the Claimant had been working on a fit of SkySiren to some frigates and was making progress, however he was also straying outside of his scope which was causing stakeholders concern. Mr Bollen was told an example of this was that the Claimant had presented a paper to the customer at a project meeting, which was a surprise because they had been expecting an update on the fitting on the vessels. The Claimant did not question Mr Harrison about his removal from the project. I asked the Claimant if he wanted to put to Mr Bailey whether the removal was connected to a protected disclosure, however he said that the question was

really whether Mr Bailey was aware he had been removed and did not ask the question.

129. On 10 September 2018, the Claimant e-mailed Mr Harrison and said he was concerned about his employment status and Mr Harrison's failure to provide him with tasking as his line manager. He asked for confirmation of a number of things including: role title, assigned project and tasking, task manager and employment status. The Claimant required a written response by 17 September 2018. Mr Harrison replied, copying in Cpt Swanwick and Mr Bailey, that he would speak to DBS and his senior management team and would endeavour to provide it by 17 September 2018. The Claimant responded by saying that if DBS recommended a formal process he would not hold him to the 17th [p726]. On 11 September 2018, Mr Harrison assuming that the request related to the grievance, said that they had two options to resolve it, an informal meeting and said he was free on 13 September, or by formal means. At this time the Claimant sent e-mails to Mr Bollen and the team saying that he was untasked. Mr Harrison did not respond to the Claimant's request. Mr Harrison was not challenged about the contents of witness statement in this respect, namely that he had been surprised by the request and that Mr Bollen had been the Claimant's task manager since April 2018 and it should have been clear that the Claimant's transfer from a project had no impact on his employment status.

130. On 13 September 2018 the Claimant met Mr Harrison. The Claimant took notes of the meeting, which I accepted were broadly accurate. Mr Harrison wanted to deal with the grievance informally and told the Claimant that he had issued a threat to him in the e-mail dated 17 August 2018. The Claimant did not accept that he had threatened Mr Harrison as that was what he had been advised to do and said that he found his approach offensive. The Claimant said that he had sought resolution, but they were now in a formal route. Mr Harrison told the Claimant that "there will be a decision maker and Adrian Bailey has said he is prepared to do that. The Claimant responded that there would need to be a deciding officer and if Mr Bailey was not involved, he could do it. Mr Harrison then queried why the Claimant had not spoken to him for 5 months and referred to being threatened out of the blue. The Claimant did not consider that the meeting was constructive and said it should end.

131. Following the meeting Mr Harrison sent an e-mail [p3325] to Mr Bailey in which he said he had a short conversation with the Claimant about his potential grievance and the Claimant did not want to go down an informal line. He also confirmed he had passed on Mr Bailey's offer to the Claimant that he could discuss the issue further with him. Mr Harrison asked to be relieved of line management duties for the Claimant. I rejected Mr Harrison's evidence that he had not spoken to Mr Bailey before the

meeting or that there had not been discussion about him acting as a deciding officer.

Meeting on 14 September 2018

132. On 14 September 2018 the Claimant e-mailed Mr Bailey and said that there was rumour he had been reassigned and neither Mr Harrison nor Mr Bollen were able to confirm his status and had he currently had no tasking. The Claimant asked for a meeting to discuss it. A meeting was arranged for the afternoon. Prior to the meeting the Claimant telephoned DC Quaite expressing concern that he could be threatened. I did not accept the Respondent's suggestion that the Claimant was trying to set up Mr Bailey.

133. The meeting took place in a glass walled room. It was common ground that Mr Bailey turned the latch on the door because it had a tendency to swing open. The contents of the conversation were fiercely disputed between the parties. Mr Bailey took a single page of bulleted notes during the meeting. The Claimant made notes of the conversation in his car, immediately after leaving the meeting and when the events were fresh in his mind. On 17 September 2018, he wrote a statement for DC Quaite and used his notes to do so. After the Claimant had raised his subsequent grievance, Mr Bailey prepared a statement in response on 25 January 2019. It was significant that the page of notes taken by Mr Bailey corresponded with the order in which the Claimant said the events occurred in his notes and statement to the police. The e-mail which Mr Bailey sent following the meeting referred to the need for health adaptions and that Mr Bailey would investigate why the SkySiren task had ended precipitously. He concluded by saying that other issues that the Claimant had significant and substantiated concerns about should be subject to formal written articulation to him or Jim Robinson for internal pursuit first. There were competing versions of events and although the Claimant's statement had large sections of quoted speech, what he said was contained in his handwritten note, albeit in a briefer form. I accepted that the Claimant made his note immediately after the meeting and it was more likely to be accurate than Mr Bailey's account 4 months later. The reference to significant and substantiated concerns seemed likely to relate to the Claimant revealing he considered he had made protected disclosures. I preferred the Claimant's account of what happened as set out in his handwritten note and recorded in his statement on 17 September 2018. I made the following findings of fact as to what occurred in the meeting:

a. Mr Bailey changed positions in the room shortly after the start of the meeting so that he was sitting closer to the Claimant. Mr Bailey

probably stretched his legs out at various times, but did not keep them stretched out, due to problems with his back.

b. The meeting lasted approximately 2 hours 20 minutes.
c. After some initial pleasantries Mr Bailey told the Claimant that he had to remove the threat of a grievance over Mr Harrison and suggested that it had come out of the blue.
d. It was repeated on a couple of occasions that Mr Harrison could not understand the grievance.
e. I accepted that Mr Bailey was seeking to persuade the Claimant to withdraw his grievance.
f. Mr Bailey asked the Claimant what started the situation and the Claimant said that he could not disclose it. Mr Bailey asked why he could not tell him, and the Claimant said that the subject matter was a protected disclosure. Mr Bailey questioned what a protected disclosure was, and the Claimant said it was protected by law and such things could not be disclosed during an investigation.
g. Mr Bailey asked the Claimant when he reported it and the Claimant said it was in March and he progressively disclosed it to Mr Cairns. 'Stephen Cairns' was the first note made by Mr Bailey.
h. After the Claimant suggested that he and Mr Harrison wanted to find a resolution, Mr Bailey said, 'so you're going to remove your allegation Ian', to which the Claimant did not answer.
i. Discussion then took place about the Claimant's medical condition. There was no reference in the notes or the statement to the police suggesting that Mr Bailey said 'there are people here with far worse disabilities than yours', and I did not accept that it was said. Mr Bailey did not mock the Claimant's disability. Mr Bailey queried whether the Claimant might be mentally unwell.
j. Mr Bailey then returned to the Claimant's report and asked who he had reported the matter to. The Claimant informed him that he had told the police.
k. Mr Bailey said to the Claimant that he should have told him, which he had not done and then this would have gone nowhere. He asked him, 'what do you think you're going to do when this goes nowhere with the police, what do you think your future is then.' When the Claimant said nothing in reply, Mr Bailey said, 'you need to be clear this is going nowhere'.
l. This was followed by Mr Bailey saying, 'I control all of the jobs in IntSys and after your next temporary assignment – and you had better make a good job of it – guess what, you won't have got a job.'
m. Discussion then took place about the P-AIC work and the Claimant said he had reported what was needed on 7 December 2017. Discussion took place about the Claimant's workload, and he estimated he was doing the work of 1 ½ people. Mr Bailey told the Claimant that he would not be able to offer him any work and there

was no place for him in IntSys. He might be able to find temporary work on the transformation campaign, but it would last a maximum of three months and then the only way he could find work would be in Corsham. The Claimant told Mr Bailey that he could not travel to Corsham due to his illness.

n. The Claimant was upset on many occasions during the meeting, and I accepted his account that he found Mr Bailey threatening and intimidating.
o. I did not accept that during the meeting Mr Bailey made references to the Claimant being too old to learn, that he was not quite up to speed, set in his ways, not quick on the uptake, resistant to change or prone to forget.

134. On 19 September 2018, the claimant started a period of sick leave with a diagnosis of work related stress.

Involvement of Ms Singleton

135. On 13 September 2018, the Claimant telephoned DBS and spoke to Sandra Kay asking to speak with Mr Bottle, saying that the situation had escalated and he felt he needed to make a bullying and harassment complaint. The Claimant was sent a copy of JSP 763. The Claimant made further calls on 14 September and 17 September 2018 and provided some details of the allegations and on 17 September said he was looking at instigating a bullying and harassment complaint against the 1* (Mr Bailey).

136. On 18 September 2018, the Claimant spoke to Mrs Singleton, whose office is in Cheshire. Mrs Singleton's witness statement did not refer to the conversation, but did refer to the agreement reached with the Claimant that she would be his point of contact in ES as confirmed in the emails of the same date [p1419-1420]. The Claimant's witness statement referred to her asking questions to infer he was a reluctant worker and that she introduced a question as to when he was going to retire. In cross-examination the Claimant said that he was asked to create a list of options and to indicate when he planned to retire, to which he said he did not have a retirement plan. The Claimant's evidence was that he was upset by the comment and did not think a 35 year old would have been asked the question.

137. When the Claimant cross-examined Mrs Singleton he referred to his supplementary bundle with his records of meetings [s135] and in particular that on 20 September 2018 he had informed her that he had no retirement plan but had assumed it would be his 67th birthday. Mr Singleton's evidence was, that on 18 September 2018 she was not asking him to consider retiring but was asking him to consider his options including transfers, changes of location, changes of jobs, changes or hours and retirement. On the balance

of probabilities, Mrs Singleton asked the Claimant to consider his options, including various job moves, she also specifically asked him to consider what his retirement intentions were. Mrs Singleton said that she was unaware of the Claimant's age, however I considered this unlikely. When asked if she would ask someone younger about retirement, her answer was that she would cover every option, however I considered this unlikely. Mrs Singleton accepted that the Claimant said that he did not want to go back to the same line management structure.

138. On 26 September 2018, Mr Moakes became the Claimant's point of contact at the Confidential Hotline. Mr Moakes decided it was appropriate for a nominated officer to be appointed to help the Claimant have his concerns properly addressed and to reassure him. Mr Moakes spoke to Mr Nancekivell-Smith the same day and followed it up with an e-mail [p1112] in which Mr Nancekivell-Smith would seek the Claimant's permission to share information with other parties to ensure all matters were being addressed.

139. On 28 September 2018, the Claimant spoke to Ms Singleton and confirmed, as requested by Mr Moakes and Mr Nancekivell-Smith that she could speak to them about: his role and income being protected, so he can bring grievances without risking criminal evidence or sub-judice [p1140]. Mrs Singleton then forwarded her contact details as requested.

140. The Claimant, in cross-examination suggested to Mrs Singleton that she had set herself up as the centre of communication, which she denied. I accepted Mrs Singleton's evidence that she only spoke to people to try and broker some progress in line with the authority she had been given. It was not Mrs Singleton that made the proposal, but Mr Nancekivell-Smith.

141. I accepted Mrs Singleton's evidence that she did not have a network and only spoke to others about HR matters such as trying to ascertain the Claimant's employment status. Mrs Singleton's official remit was to concern herself with the Claimant's wellbeing only, however, in order to assist him, she made enquiries about his employment status. She did not have an HR function as to where he was to work and could not exert any influence in that regard. I accepted that she had no contact or association with the IntSys team or its wider department.

142. On 15 October 2018, Ian Clark of Fraud Defence, asked Mrs Singleton to find out from a case worker what could be done when a chain of management is subject to a grievance [p1175]. On 19 October 2018 the Claimant spoke to Mrs Singleton and said that he would submit his

grievances once he had been assured that the case would be considered by Ivan Hooper [p1174]. Mrs Singleton denied organising Lt Gen Hooper as the deciding officer, which I accepted. Mrs Singleton was not involved in identifying an appropriate deciding officer. I also accepted that Mrs Singleton was not involved in the identifying the subsequent Harassment Investigation Officer, as that was dealt with in a completely separate department.

143. On 8 October 2018, the Claimant e-mailed Ms Singleton [p1136] saying that he needed to determine his employment status. He then recited the history of his difficulties as he saw it. He said that he was on extended sickness absence and did not want to return to the core of the stress source and because he had been bullied by Mr Bailey it was impossible for him to return to IntSys. On 15 October 2018, the Claimant e-mailed the Confidential Hotline and Mrs Singleton, saying that he still did not have confirmation of his employment status. The enquiry did not refer to any other queries such as his role or position. The Claimant also suggested to Mrs Singleton that he had made a further enquiry on 19 December 2018 about his employment status. Mrs Singleton accepted that the Claimant had asked the question a number of times to many different people. It was likely that the Claimant asked Mrs Singleton what his employment status was on 19 December 2018.

144. Mrs Singleton's oral evidence that although this was an HR query she had checked and told the Claimant that his status was unaffected. Although this was not mentioned in her witness statement I considered it likely that she simply told the Claimant that his employment status was unaffected, however she did not give him any information about his role or position and the Claimant felt that his query had not been answered.

145. Mrs Singleton was not involved in decisions as to where the Claimant would return to work between October and December 2018. The Claimant did not assert that Mrs Singleton was involved in his witness statement or give oral evidence to that effect. When cross-examining Mrs Singleton, he suggested that she was arranging with Mr Bailey that he should move to Corsham, which she denied and said that she would not have brought it up because Corsham was not on her radar. There was no evidence of any communication between Mrs Singleton and Mr Bailey. The Claimant relied on a note in his supplementary bundle dated 28 September 2018 [s136]. I was not satisfied on the balance of probabilities that Mrs Singleton raised a move to Corsham, it was more likely that the Claimant had referred to Mr Bailey suggesting the only work would be in Corsham and she had then suggested he could consider it. I accepted her evidence that she had no

relationship with the Claimant's chain of command and that she had not been arranging with Mr Bailey that the Claimant should move to Corsham.

146. I accepted Mrs Singleton's evidence that she considered she was acting within the scope of her role and that she was trying to assist as a point of contact in wellbeing. If she saw that progress was not being made and knew someone who could help she tried to hurry them along. Her evidence was that the Claimant having raised concerns via the confidential hotline had no influence on her at all. I accepted that the Claimant would have been one of 300 callers per day to the wellbeing service that she treated him in the same way as any other caller.

The Claimant's return to work from October 2018

147. On 20 September 2018, the Claimant's line manager changed to Mr Bollen, who was also his tasking manager. Although he was aware that the Claimant had a meeting with Mr Bailey in September 2018, he did not know what happened or what was said. The Claimant accepted that Mr Bollen did not know why he had an issue with Mr Bailey.

148. On 30 November 2018, Mr Boyall, the Claimant's CSO e-mailed various people, including the Claimant, reminding them that he was their CSO for their Performance Annual Reviews. On 5 December 2018, the Claimant e-mailed Mr Boyall about issues with his workload the previous year. He said he had been reassigned again in September 2018 and did not have an assigned role. He referred to his grievance. He also said he could not disclose more due to confidentiality. Mr Boyall contacted Mrs Szopinska-Talbot in HR for some advice. On 10 December 2018, Mrs Szopinska-Talbot suggested to Mr Boyall that he could become line manager, but Mr Boyall did not think it was appropriate as they worked in different areas. Mr Boyall made an enquires and discovered that Mr Bollen was the line manager. On 13 December 2018 he suggested to Scott Turner, Head of Casework, that any discussion about potentially redeploying the Claimant should take place after Mr Bollen conducted a return to work interview with him. Mr Boyall was not aware that the Claimant had raised commercial concerns with Mr Cairns, the Confidential Hotline or the MDP until after the Claimant had presented his claim to the Tribunal.

149. Whist the Claimant had been off sick, Mr Bollen had kept in contact with the Claimant and was providing pastoral support. During the conversations Mr Bollen focused on the Claimant's recovery and finding him meaningful tasks. He became aware that one of the reasons why the Claimant was worried about returning to work was that he would have to engage with Mr Bailey. The Claimant did not say that Mr Bailey was related to the stress he was suffering from, however Mr Bollen inferred that he might be and ensured that the Claimant dealt directly with him. Mr Bollen told the

Claimant that he would manage his output so that he did not have to liaise directly with Mr Bailey. At no stage during the Claimant's employment was Mr Bollen aware that the Claimant had raised concerns about the commercial dealings of Mr Harrison with Mr Cairns, the Confidential Hotline or the MDP.

150. On 14 December the Claimant advised Mr Bollen that he was due to return to work shortly and a return to work meeting was arranged for 18 December 2018. At the meeting they discussed a campaign plan for the Claimant to start in January 2019. Mr Bollen suggested that an occupational health referral should be made so that workplace adjustments could be identified. The Claimant broke down several times and made Mr Bollen aware that there was an ongoing grievance, but he did not provide details.

151. On 19 December 2019, the Claimant provided a GP Statement of Fitness for work, which said that he might be fit for work with the advice that he was not to be placed in the same situation that precipitated the current events. Mr Bollen devised a plan so that the Claimant could work from home for 1 to 2 hours per day and he would be sent campaign plan documents to review. On 19 December 2019, the Claimant thanked Mr Boyall for his professionalism, kindness and courtesy and agreed to attend an Occupational Health Appointment.

152. On 20 December 2018, the Claimant e-mailed Mr Bollen [p1303] and said that the plan was the plan assigned by Mr Bailey and he was the source of his stress injury. On 27 December 2018, Mr Bollen e-mailed the Claimant and said that he was unsighted regarding the event that the was the cause of the Claimant's ongoing complaint and was unaware of the link to the campaign tasking. He would seek further advice, but in the meantime the Claimant was tasked to review his mandatory training and ensure that he populated a skills tool.

153. On 2 January 2019 Mr Tapping reported the outcome of his occupational health assessment, in that he had been told that he must not return to the original source of his stress injury based on the preceding unresolved situation.

154. On 15 January 2019, Mr Bollen had an offsite meeting with the Claimant to discuss workplace adjustments. He was still unsighted as to the nature of the grievance the Claimant had. The Claimant broke down many times and Mr Bollen concluded that he was not fit to return to an office environment. The same day. Mr Bollen was advised to arrange an urgent occupational health appointment by Mrs Szopinska-Talbot.

155. On 16 January 2019 Mr Bollen sent the Claimant three campaign planning documents for background reading and directed him to continue with his online training whilst they waited for Occupational Health.

156. On 24 January 2019, the Claimant informed Mr Bollen that he had found a temporary transfer to Defence, Equipment and Support ("DE&S) on a loan structure, which he had negotiated for up to 23 months. There were delays in completing the paperwork for the loan agreement, which was completed on 25 July 2019. The delays were unrelated to any protected disclosure or grievance and Mr Bollen and others worked hard to resolve them. The Claimant started working for DE&S on 25 April 2019.

157. Mr Bollen was unaware of any protected disclosure and had been provided with very limited information by the Claimant about the grievance.

<u>The Claimant's grievances from 23 October 2018 and the subsequent investigation and decision</u>

158. On 23 October 2018, the Claimant raised a grievance [p1176-1183] with Lt Gen Hooper. In the grievance the Claimant referred to 'Matter 1', which he said was not the subject of the complaint but was provided for background information. He said via the incident on 14 September 2018 his identity as a whistleblower had been revealed to Mr Bailey. He said he had reported concerns about Mr Harrisons ethical behaviour and that was part of a current police investigation. He referred to 'Matter 2' which were the grievances. The grievances related to: (1) interfering with the grievance process and trying to get him to withdraw it, (2) failing to make reasonable adjustments and causing harm by failing to relieve workload, (3) collusion in the dismissal from his role on 15 March 2018, (4) publishing his health issues on 16 March 2018, (5) failing to respond to ethical criticism, (6) Mr Harrison neglecting his line management duties, and (7) failing to confirm his employment status and particulars. He also complained of bullying and harassment by Mr Bailey on 14 September 2018 under 'Matter 3'.

159. On 30 November 2018, Lt Gen Hooper wrote to the Claimant [p3748]. He said that he was mindful of the need to maintain the right level of protection for the Claimant in relation to Matter 1 and to ensure that Matters 2 and 3 could be appropriately addressed. It was proposed that Air Vice Marshall Moore should be the deciding officer, who was not in the Claimant's chain of command and that would enable Lt Gen Hooper to be any appeal officer. He also asked the Claimant to re-present his grievance without reference to matter 1, because it would be necessary to send a copy to the subjects of the complaint, and that would protect his identity.

160. On 4 December 2018, the Claimant agreed to AVM Moore being the deciding officer and said that he was already rewording his grievance. At

this stage AVM Moore was unaware that he had been appointed as the deciding officer.

161. On 4 December 2018, the Claimant resubmitted his bullying and harassment complaint without reference to matter 1 [p3236-3242].

162. On 3 January 2019, AVM Moore was sent the Claimant's formal complaint and he sought advice on the timeline from HR and asked for slots to be put in his diary. He was also provided with the Claimant's original complaint referring to matter 1.

163. The Claimant's evidence was that on 16 January 2019 he was told by DC Quaite that the MDP was withdrawing its investigation. This was not communicated to AVM Moore or any of those associated with investigating the Claimant's grievance/bullying and harassment complaint.

164. On 17 January 2019, AVM Moore acknowledged receipt of the Claimant's bullying and harassment complaint and arranged an interview with the Claimant.

165. On 28 January 2019, the Claimant attended an interview with AVM Moore. AVM Moore set out from the beginning that the grievance specifically excluded the concerns the Claimant raised about commercial practices in the team as they were subject to a separate investigation. AVM Moore asked the Claimant if he thought Mr Harrison was criminal in his actions or simply negligent and the Claimant confirmed there was no suggestion of criminality as part of his grievance. The Claimant explained the nature of his grievance and the events which had occurred. The Claimant was referred to the 'out of scope' whistleblowing case and was asked whether there was a link between the two cases. The Claimant confirmed that there was and detailed the concerns he had raised with Mr Cairns and his e-mail dated 12 February 2018 and said a month later he was pushed out of his job. When asked if this was the trigger, the Claimant said up to this point his relationship with Mr Harrison was OK. AVM Moore acknowledged that there might be a connection between the whistleblowing and his investigation, and that investigation could determine any connection and if there was a link it would fall within the remit of the case. This was to ensure that cause and effect was retained.

166. AVM Moore interviewed Mr Bailey and Mr Harrison on 28 January 2019 and 29 January 2019 respectively. Mr Bailey also provided a written statement to AVM Moore dated 25 January 2019. The Claimant's allegations were denied. Mr Bailey, said in his interview, "that he saw IT as a vulnerable person (based on pre-experience) and he had taken this into account since 2009 when he was IT's Counter-Signing Officer." Mr Bailey explained that this was because he was aware that the Clamant had

medical issues and they appeared to take their toll on him, and it appeared that he had lost confidence and it was having an impact on him at work.

167. After considering the information, AVM Moore decided that a full investigation was required. On 15 February 2019, AVM Moore informed the Claimant, Mr Bailey and Mr Harrison that he had commissioned an independent investigation by a Harassment Investigation Officer. It was decided by Defence Business Services ("DBS") that an external investigator should be appointed, known as a Fee Earning Harassment Investigation Officer ("FEHIO"). DBS had to go through a budget approval process to appoint the FEHIO, which was not given until the end of March.

168. On 12 March 2019, the Claimant was informed that the Confidential Hotline investigation was ongoing. I accepted Mr Moake's evidence that DC Quaite had been spoken to on that day and that he had referred the matter to a 1* for a commercial review, but they had not received anything back that indicated a concern, and he would check with his sergeant as to whether they will chase or close the investigation. A 1* conducted an internal review and was satisfied that there had not been any failures in commercial policy/procedure and that there was no evidence to support the areas of concern raised by the Claimant. On 23 April 2019 the investigation was formally closed.

169. On 19 March 2019 the Clamant confirmed to AVM Moore that his evidence was complete supplied his evidence for his grievance to him.

170. On 4 April 2019, Mr Gallagher was appointed as Harassment Investigation Officer ("HIO") for the Claimant's complaint. In the letter of instruction Mr Gallagher was required to make written summaries of the interviews, which were to be agreed and signed by the interviewees.

171. Mr Gallagher was independent of the MOD and was engaged on a fee paid basis. Mr Gallagher originally contracted with the MOD via a limited company, but after the MOD became concerned about taxation under IR35, he was required to contract in a personal capacity. He was paid by way of the payroll. I accepted that Mr Gallagher was not an employee, and he was a contractor. He was formerly Chief G1 in Northern Ireland and was familiar with MOD systems and procedures and had significant experience in investigating complex bully and harassment complaints. In 1993 Mr Gallagher had been a whistleblower in Nepal and understood the Claimant's situation and the measures required. Mr Gallagher considered that it did not matter whether Mr Tapping was correct in his whistleblowing allegations, but whether he had been treated poorly or bullied and if he established that, there could be a link back to his disclosures. Prior to starting his investigation, Mr Gallagher met AVM Moore and the issues were outlined to him, including that there was a separate investigation into the commercial

concerns. It was agreed that if the allegations of bullying and harassment were upheld that there would be a natural drawing towards the cause being whistleblowing. However, the two matters were being investigated separately and the whistleblowing matters were being investigated by MDP. I therefore accepted that Mr Gallagher was aware that the Claimant might have been a whistleblower and that he had this in mind when conducting his investigation. Mr Gallagher approached his investigation on the basis that he would interview the Claimant, Mr Harrison and Mr Bailey, after which he would search for evidence and interview other witnesses and if any evidence corroborated or contradicted an account he would re-interview them.

172. Mr Gallagher was aware a police investigation was ongoing, which had an unknown outcome, and was conscious that he could not impede or refer to it and he could not let his investigation impeach the police investigation.

173. On 23 April 2019, the Claimant notified ACAS of the dispute he had with the Respondent and the certificate was issued on 22 May 2019. The Claimant presented his first claim on 17 June 2019.

174. Mr Gallagher interviewed the Claimant on 3 June 2019. Mr Gallagher explained to the Claimant that the complaints about commercial practices could not be investigated by him. The Claimant provided his accounts of the matters raised in his grievance. When providing his account, the Claimant referred to the commercial practices and was reminded that Mr Gallagher could not investigate them. The Claimant was asked why he thought that the incidents had occurred, and he said it was in retaliation for challenging Mr Harrison's commercial behaviour and that he had breached the rules.

175. Mr Gallagher also interviewed Mr Bailey and Mr Harrison on 1 and 2 July 2019 respectively.

176. There were some delays in the preparation of the interim investigation report. Mr Gallagher had asked the Claimant, at his interview to provide a consent form so that he could review the Claimant's personnel records. The Claimant misunderstood this to mean his medical records and said he would provide a doctor's letter. The Claimant was sent a consent form by Mr Gallagher, but he did not return it, which meant that Mr Gallagher had to follow MOD processes to gain access to the Claimant's HMRS personnel records causing a delay between 31 July and 13 September 2019.

177. A further delay was caused due to the seeking of agreement of the notes of the Claimant's interview. The Claimant did not agree that the first version accorded with his assisting officer's note. His assisting officer, Ms

Whyte, requested the handwritten notes taken by Mr Gallagher's note taker on 18 June 2019. Mr Gallagher did not think that he could release them until he had concluded his report and did not do so. The Claimant made suggested changes to his interview record which were accepted and included. He then made further changes to the second version of the record. The Claimant was sent a third version and conformed on 26 June 2019 that it was good enough. On 18 July 2019, Ms Whyte sent an email to AVM Moore raising concerns and they mirror an e-mail the Claimant sent to DBS on 22 July 2019. AVM Moore was concerned about friction. In late July/early August Mr Gallagher became aware from Mr Kelly at DBS that the Claimant had raised concerns and he agreed to pause his investigation whilst DBS investigated. On 18 September 2019, Mr Langton concluded that the concerns should not be upheld, but that in order overcome an outstanding subject access request the handwritten notes of the interview should be provided to the Claimant. The Claimant was sent an outcome of the complaint on 9 October 2019, and it was concluded that the DBS training of Mr Gallagher was lacking. I accepted the Claimant's evidence that he did not consider that he had made a formal complaint.

178. The Claimant had provided a CD Rom with 357 pages of evidence, which had 137 embedded documents within it. This was given to Mr Gallagher. The documents related to the history of the matter and included matters relating to the commercial concerns. The Claimant questioned Mr Gallagher on the basis that the documents made clear his suspicion of criminal activity and provided the background causation and was almost entirely what he had given to the police. I accepted that Mr Gallagher reviewed the documents on the CD and considered that the vast majority referred to or applied to his commercial concerns. They could not be released to Mr Harrison or Mr Bailey because they would upset the police investigation. Further I accepted that the documents related to the commercial concerns rather than subsequent actions of Mr Harrison or Mr Bailey, which was the subject matter of Mr Gallagher's investigation.

179. On 12 September 2019, the Claimant's DE&S role ended.

180. On 14 September 2019, the Claimant sent AVM Moore an e-mail saying that he considered himself to be in appeal. The Claimant explained in evidence that this was due to the time it had taken since the incident with Mr Bailey on 14 September 2018. AVM Moore replied saying that there had not been a decision against which the Claimant could appeal.

181. On 10 October 2019, the Claimant was sent the intermediate investigation report ("IRR"). On 25 October 2019, the Claimant wrote to AVM Moore saying that he was unable to respond to the IRR in its form and condition.

182. On 30 October 2019, AVM Moore was sent the final investigation report. I accepted Mr Gallagher's evidence that he had attached the Claimant's CD to AVM Moore's version of the report. The report referred to that it excluded concerns about commercial practices and that the Claimant had provided 350 pages the majority of which related to those practices. The report set out a summary of the evidence and I accepted that Mr Gallagher approached each witness on the basis that they were telling the truth and it was a matter for the deciding officer to decide who was correct. Mr Gallagher considered that the witnesses the Claimant cited were not relevant to the complaint he was investigating and were connected with the commercial concerns. Mr Gallagher interviewed previous line managers of the Claimant to see if they could shed any light, however none of those witnesses were called by the Respondent at the final hearing and therefore limited weight was attached to what they told Mr Gallagher. Mr Gallagher summarised the evidence given by the Claimant, Mr Bailey and Mr Harrison and made reference to documents he considered might be helpful. Mr Gallagher did not proffer any conclusions to the allegations.

183. Mr Gallagher was cross-examined about whether he had tampered with the evidence. The Claimant referred to a redaction on [p3641]. I accepted that the document had come from the Claimant's CD. It was likely that the part redacted related to the commercial matters and was not therefore subject to the investigation. The Claimant also said that the page had been included to show that he was a troublemaker on the basis that it referred to a legal threat against him by Mr Oliver. I accepted Mr Gallagher's evidence that it was included to show that the Claimant was correct that he had been saying legal action had been threatened against him. I accepted Mr Gallagher's evidence that he had only interviewed witnesses to the incidents alleged in the complaints he was investigating and that he did not interview witnesses suggested by the Claimant, Mr Bailey and Mr Harrison. The Claimant cross-examined Mr Gallagher on the basis that by excluding his witnesses he had halved his timescale, but by interviewing previous line managers the Respondent's timescale had been doubled. I accepted Mr Gallagher's evidence that he was looking for anything that might assist the Claimant and that included looking in the HMRS records as to whether the Claimant had said anything about his illnesses which would contradict what Mr Harrison was saying.

184. I accepted Mr Gallagher's evidence that he had to remain impartial, and he was working on the basis that everyone was telling their version of the truth and unless there was corroborating or contradictory evidence he presumed they were. I accepted that he included everything in the report which related to the allegations and everything else he put in Bundle D for AVM Moore, which included the Claimant's CD. Mr Gallagher did not refer to the CD rom in his report because of his concern about the police investigation.

185. Mr Gallagher included in his report, documents which he thought could assist AVM Moore, for example the Claimant's and Mr Bailey's accounts of the incident on 14 September 2018.

186. I accepted Mr Gallagher's evidence that he was trying to explore every avenue and that having been a whistleblower, he knew how the Claimant felt and if there was any evidence that the Claimant had been treated badly because of it he would find it, however he was unable to find such evidence.

187. I accepted that Mr Gallagher was investigating what had caused the events complained of, and that the evidence which was not referred to in the report was included in bundle D and related to the raising of the commercial concerns and not the alleged poor treatment. I accepted that the Respondent's policy was to investigate the matters separately and that Mr Gallagher was following that policy.

188. On receipt of the final report Mr Moore considered all of the documentation and considered that there was no independent evidence to support the Claimant's allegations.

189. I accepted that throughout the process AVM Moore was concerned about the time it was taking and where possible he was trying to keep the matter progressing. I also accepted that he considered that the investigation was complex and that if more time than normal was required he was prepared to allow that additional time so that it could be properly conducted.

190. I accepted AVM Moore's evidence that he was aware of the commercial concerns and that he did not need the detail from the other investigation into whether wrongdoing had occurred to make a judgment as to whether the Claimant had been bullied or harassed or treated badly. AVM Moore considered that the investigations were separate, and he was not informed as to what was happening with the Confidential Hotline investigation. When asked by the Claimant if he was aware that a whistleblower has the right not to be subjected to a detriment or harm for doing it, he replied "entirely right and I applaud it." I accepted that was the genuine view of AVM Moore. I accepted AVM Moore's evidence in cross-examination that he was aware that there was a risk of retaliation if a manger had been caught in the cross-hairs of a concern, however he saw no evidence of it in the report. I accepted AVM Moore's evidence that he was looking for characteristics of bullying and harassment.

191. AVM Moore was aware of the e-mails passing between the parties at the time of the alleged incidents. He considered that Mr Gallagher's report was factual and signposted possibly relevant evidence.

192. Although AVM Moore was aware of the referral to the Confidential Hotline, he said that did not change his approach or mindset to the investigation. He required that an independent investigator should be appointed, and I accepted that he adopted the same approach as with any other case.

193. On 16 December 2019, AVM Moore wrote to the Claimant with his findings [p2414]. AVM Moore concluded that in the absence of documentary evidence or other witnesses to the allegations that they were not upheld. He did not consider the e-mail of 16 March 2018 to be bullying, harassment or discrimination but considered that it was not well managed. The Claimant was informed of his right to appeal in accordance with JSP 763.

194. The Claimant misinterpreted by when he had to appeal, and thought it was due by Boxing Day.

195. The Claimant resigned on 5 January 2020 and worked out his notice.

196. The Claimant accepted in evidence that the Respondent had disability, equal opportunities, bullying and harassment and grievance policies and that everyone had to do mandatory training. He said that for bullying and harassment that there was refresher training every two years and he considered it was good. He accepted that the scope and depth of the policies was good, but adherence was problematic. Neither the Claimant nor the Respondent's witnesses gave any evidence as to whether Mr Bailey or Mr Harrison had received refresher training and as such I was not satisfied that they had.

Time

197. I accepted the Claimant's evidence that he presented his first claim when he did because ACAS had suggested to him that he exhausted the internal process first. When he thought that the internal time limits for his grievance had been exceeded he asked ACAS what he should do and was told that it was not a fixed thing. When the internal process had reached 52 weeks, he decided to present his claim. He accepted that there was nothing physically stopping him from bringing the claim and he wanted to try and resolve the dispute by way of the internal process first.

198. The Claimant started taking advice from ACAS in about November 2017. He was aware of detriment against him in November 2017 and the need to take it further in March 2018. He was always aware that he could bring a claim, which was why he had contacted ACAS. Any other advice he obtained was from research on the internet.

199. The Respondent's grievance procedure referred to the possibility of bringing claims and he did not think anything was misrepresented to him.

200. In terms of hardship, the Claimant observed that he brought the first claim before the internal process had finished and because the dispute was never resolved he had suffered a psychiatric injury.

The law

Protected disclosures

201. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

202. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

203. Under Section 47B a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. This provision does not apply to employees where the alleged detriment amounts to dismissal.

204. Section 48(1) and (1A) of the Act state that an employee may present a claim that he has been subjected to detriment contrary to s. 44 and 47B of the Act. Under section 48(2) of the Act, on a complaint to an employment tribunal, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

205. s. 48(3) provides: An employment tribunal shall not consider a complaint under this section unless it is presented—
(*a*) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(*b*) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(*a*) where an act extends over a period, the 'date of the act' means the last day of that period, and
(*b*) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer[,a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonable have been expected to do the failed act if it was to be done.

206. The tests were most recently re-stated by the Employment Appeal Tribunal in Martin v London Borough of Southwark UKEAT/0239/20/JOJ reaffirming that the definition for a qualifying protected disclosure breaks down into a number of elements: (1) there must be disclosure of information, (2) the worker must believe that the disclosure is made in the public interest, (3) if the worker does hold such a belief, it must be reasonably held, (4) the worker must believe that the disclosure tends to show one or more matters in sub-paragraphs a to f, and (5) if the worker holds such a belief, it must be reasonably held. The Court of Appeal in Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73, also restated the tests.

207. First, I had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of Geduld-v-Cavendish-Munro [2010] ICR 325 in light of the caution urged by the Court of Appeal in Kilraine-v-Wandsworth BC [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on

their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances. A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

208. I also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(a), (b) or (d) had been or were likely to have been covered at the time that any disclosure was made. To that extent, I had to assess the objective reasonableness of the Claimant's belief at the time that he held it (Babula-v-Waltham Forest College [2007] IRLR 3412 and Korashi-v-Abertawe University Local Health Board [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in Kraus-v-Penna [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979; [2017] IRLR 837, para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

209. 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (Ibrahim-v-HCA UKEAT/0105/18). In Twist DX v Armes UKEAT/0030/20/JOJ the EAT concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

210. Next, I had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see Babula and

Korashi above). That test required me to consider his personal circumstances and ask myself the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made.

211. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Nurmohamed* [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

212. The Court of Appeal [2017] IRLR 837 dismissed the appeal. At paragraph 31 Underhill LJ said that he did not think "there is much value in adding a general gloss to the phrase 'in the public interest. … The relevant context here is the legislative history explained at paragraphs 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest."

213. At paragraph 36 it was observed, "…The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest."

214. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker (para 37). In this regard, it was suggested that the following factors might be relevant:

(a) the numbers in the group whose interests the disclosure served
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
(c) the nature of the wrongdoing disclosed, and

(d) the identity of the alleged wrongdoer.

215. Finally, I did not have to determine whether the disclosures had been made to the right class of recipient since the Respondent accepted that if they had been made, they were made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

Detriment (s. 47B)

216. The next question to determine was whether or not the Claimant suffered detriment as a result of the disclosure.

217. Section 48 (2) was also relevant, in that, "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

218. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah 1980 ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

219. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

220. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 in Harrow London Borough Council-v-Knight [2002] UKEAT 80/0790/01). It will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower (NHS Manchester-v-Fecitt [2012] IRLR 64 and International Petroleum Ltd v Osipov UKEAT 0229/16).

221. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in NHS Manchester-v-Fecitt [2012] IRLR 64). It was important to remember, however, if there was a failure on the part of the Respondent to show the ground on which the act was done, the Claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (International Petroleum Ltd v Osipov EAT 0058/17).

222. As observed in (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73) after citing Lord Nicholls in Chief Constable of West Yorkshire v Kahn [2001] UKHL 48; [2001] ICR 1065: "*Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.*" (para 37)

Time limits

223. Put simplistically, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing relevant employment tribunal proceedings. Section 18 of the Employment Tribunals Act 1996 ("the ETA") defines "relevant proceedings" for these purposes. This includes a claim of detriment under s. 47B ERA .

224. Section 207B ERA provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

225. Where the EC process applies, the limitation date should always be extended first by S.207B(3) or its equivalent, and then extended further under S.207B(4) or its equivalent where the date as extended by S.207B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim — Luton Borough Council v Haque [2018] ICR 1388, EAT. In other words, it is necessary to first work out the primary limitation period and then add the EC period. Then it should be considered if that date is before or after 1 month after day B (issue of certificate). If it is before, the limitation date is one month after day B, if it is afterwards it is that date.

226. The question of whether or not it was reasonably practicable for the Claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

227. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119 the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any

substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204 on this point were preferred to those expressed in Lawal:-

228. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

229. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees) and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

230. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

231. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at

"stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Equality Act 2020 claims

232. The claim alleged discrimination because of the Claimant's disability and his age.

233. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

234. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(20, this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

235. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

236. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

237. The definition of victimisation is set out in s. 27 EqA: (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 Act; (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…

238. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

Direct Discrimination

239. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

240. I approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

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

241. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, I had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

242. The treatment ought to have been connected to the protected characteristic. What I was looking for was whether there was evidence from which I could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others because of his disability or age.

243. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: “The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an act of discrimination”. The decision in Igen Ltd and Ors v Wong [2005] IRLR 258 CA was also approved by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18. The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

244. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the “more” which is needed to create a claim requiring an answer need not be a great deal.

245. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

246. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

247. The test within s. 136 encouraged me to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. I was permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (Network Rail-v-Griffiths-Henry [2006] IRLR 856, EAT).

248. I needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

249. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to

prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

250. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

251. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM). In Shamoon-v-Royal Ulster Constabulary [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

Discrimination arising from disability

252. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned

treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

253. When considering a complaint under s. 15 of the Act, I had to consider whether the employee was "*treated unfavourably because of something arising in consequence of his disability*". There needed to have been, first, '*something'* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

254. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

255. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC).

Reasonable adjustments

256. In relation to the claim under ss. 20 and 21 of the Act, I took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that I should approach those sections. The Tribunal must identify

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant

before considering whether any proposed adjustment is reasonable.

257. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

258. The Respondent conceded that it applied PCPs 1 and 2 and the Claimant did not pursue PCP 3. This was not a physical feature or auxiliary aid case.

259. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled, and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

260. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

Harassment

261. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

262. As to causation, I reminded myself of the test set out in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The

relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

263. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Victimisation

264. There was also a claim to consider under s. 27.

265. The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised '*because*' he had done a protected act or that the Respondent believed he had done or may do a protected act, but I was not to applied the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

266. In *Martin-v-Devonshire Solicitors* [2011] ICR 352 the then President of the EAT, Underhill J, encouraged tribunals to concentrate upon the statutory language on causation (in the context of this case, the word '*because*') and he referred back to Lord Nicholls' test in *Nagarajan-v-London Regional Transport* [1999] ICR 877; "*whether the prescribed ground or protected act 'had a significant influence on the outcome'*" (paragraph 36).

267. In order to succeed under s. 27, a claimant needs to show two things; that he was subjected to a detriment and, secondly, that it was because of the protected act(s). I applied the 'shifting' burden of proof s. 136 to that test as well.

Knowledge of disability/substantial disadvantage

268. In relation to reasonable adjustments Schedule 8 EqA provides:

20. Lack of knowledge of disability, etc.
(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
(b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

269. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(i) first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

(ii) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

270. I also had regard to the EHRC Code of practice on employment paragraph 6, relating to the duty to make reasonable adjustments (2011), in particular paragraphs 6.19 and 6.21:

"*6.19. For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially*."

"*6.21. If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act."*

271. In relation to discrimination arising from disability s. 15 (2) provides: *"Subsection (1) not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*"

272. In the case of direct disability discrimination, the Respondent also has to have had actual or constructive knowledge of the Claimant's disability before a claim under s. 13 can succeed (*Morgan-v-Armadillo Managed Services Ltd* [2012] UKEAT/057/12/RN).

273. Ignorance itself is not a defence under these sections. I had to ask whether the Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, had to consider whether, in light of Gallop-v-Newport City Council [2014] IRLR 211 and Donelien-v-Liberata UK Ltd [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, I had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew, and I had in mind Lady Smith's Judgment in the case of Alam-v-Department for Work and Pensions [2009] UKEAT/0242/09, paragraphs 15 – 20.

274. Under s. 15, a respondent cannot claim ignorance in respect of the causal link between the 'something arising' and the disability and benefit from the defence (*City of York Council-v-Grosset* [2018] EWCA Civ 1105). The defence relates to the Claimant's possession of the disability, not other elements of the test and an employer cannot, for example, readily claim ignorance of the fact that the Claimant's actions had arisen in consequence of his disability.

Justification

275. in assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

276. In Hensman v Ministry of Defence UKEAT 0067/14/DM, Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3) (see also Hampson v Department

of Education and Science [1989] ICR 179. Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

277. The test of proportionality is an objective one.

278. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 in which Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213

> *20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 151:*
> *"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*
>
> *He went on, at para 165, to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80:*
> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*
>
> *As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31, 32, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.*

279. At paragraph 24 Lady Hale said

> *"24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."*

280. Pill LJ's comments in Hardy & Hansons plc v Lax [2005] IRLR 726 in relation to the Sex Discrimination Act 1975 at paragraph 32 also provide assistance in that the statute:

"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary…"

And further at paragraph 33

"The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action."

281. If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section (*Buchanan-v-Commissioner of Police for the Metropolis* UKEAT/0112/16).

282. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence), but the tribunal must make its own assessment on the basis of the evidence then before it.

283. In The City of Oxford Bus Services Ltd trading as Oxford Bus Company v Mr L Harvey UKEAT/0171/18/JOJ: (in the context of section 19(2) EqA) - when carrying out the requisite assessment there was a distinction between justifying the application of the rule to a particular individual, and justifying the rule in the particular circumstances of the business (SC decisions of both Homer and Seldon applied). In the present case, the ET's focus had been on the application of the PCP to the claimant;

it had failed to carry out the requisite assessment of that PCP in the circumstances of the business (see Hardys & Hansons plc v Lax [2005] ICR 1565 CA).

Defence of reasonable practicability s. 109 EqA

284. Section 109 (4) of the Act reads as follows;

"*In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -*
(a) from doing that thing, or
(b) from doing anything of that description."

285. The burden of proof of establishing the defence is on the employer (Enterprise Glass Co Ltd v Miles [1990] ICR 787.

286. In considering that defence, I had to focus upon what the Respondent did *before* the acts complained of occurred, not how it reacted after it was aware.

287. I looked at the Respondent's policies (and the extent to which they were reviewed), its training regime on equality and diversity issues. I also considered the EHRC's Code of Practice (2011) and, in particular, paragraph 10.50-10.53 and, in the context of the Respondent's policies.

288. I also took into account the guidance from cases such as that of *Canniffe-v-East Riding of Yorkshire Council* [2000] IRLR 555 in which the Employment Appeal Tribunal stated that the proper approach to the defence was to consider whether the Respondent had taken any steps to prevent the employee from doing the act or acts complained of and, secondly, having considered what steps were taken, then considering whether they could have taken any further steps which were reasonably practicable. It was important to remember that an employer would not be exculpated if it had not taken reasonably practicable steps simply because, if it had taken those steps, they would not necessarily have prevented the thing from occurring

289. Canniffe was considered by the EAT in Allay (UK) Ltd v Gehlen UKEAT/0031/20 in which it was suggested that there were 3 stages to consider: (1) identify any steps that have been taken, (2) consider whether they were reasonable, and (3) consider whether any other steps should reasonably have been taken. It was further said that Canniffe supports the proposition that if there is a further step that should reasonably have been taken by the employer to prevent harassment the defence will fail even if that step would not have prevented the harassment that occurred in the

case under consideration. That does not mean that in deciding the anterior question of whether a further step was one that it would have been reasonable for the employer to have taken, the tribunal cannot consider the likelihood that it would have been effective. [para 25 and 26]

Time

290. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

291. A prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing relevant employment tribunal proceedings. Section 18 of the Employment Tribunals Act 1996 ("the ETA") defines "relevant proceedings" and includes the discrimination at work provisions under section 120 of the Equality Act 2010.

292. Section 140B of the EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) … (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.. (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

293. Where the EC process applies, the limitation date should always be extended first by S.140B(3), and then extended further under S.140B(4) or its equivalent where the date as extended by S.140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim — Luton Borough Council v Haque [2018] ICR 1388, EAT. In other words, it is necessary to first work

out the primary limitation period and then add the EC period. Then consider is that date before or after 1 month after day B (issue of certificate). If it is before the limitation date is one month after day B, if it is afterwards it is that date.

294. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);
c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

295. In a claim under s.20, time starts to run for the purposes of s.123 of the Act from the date upon which an employee should reasonably have expected an employer to have made the adjustments contended for (*Matuszowicz-v-Kingston upon Hull City Council* [2005] IRLR 288 and *Abertawe Bro Morgannwg University Local Health Board-v-Morgan* [2018] EWCA 640), which may not have been the same date as the date upon which the duty to make the adjustments first arose. Time does not start to run, however, in a case in which a respondent agreed to keep the question of adjustments open and/or under review (*Job Centre Plus-v-Jamil* UKEAT/0097/13)

296. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot

hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - *Pathan v South London Islamic Centre EAT 0312/13*.

297. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

298. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”

299. In exercising its discretion, tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and in particular ,

a. the length of and the reasons for the delay.
b. the extent to which the cogency of the evidence is likely to be affected by the delay.
c. the extent to which the party sued has cooperated with any requests for information
d. the promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

e. the steps taken by the claimant to obtain appropriate professional advice.

300. In *Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

301. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: *Pathan v South London Islamic Centre EAT 0312/13* and also *Szmidt v AC Produce Imports Ltd* UKEAT 0291/14.

302. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice

Conclusions

Did the Claimant make the following protected disclosures?

In November or December 2017, the Claimant spoke to Mr Cairns and said that he had continued ethical concerns and invited him to intervene in what he considered to be a wrongful contracting method.

Was information disclosed by the Claimant?

303. On 10 December 2017, the Claimant told Mr Cairns that he was refusing to be instructed to commit a criminal offence and that he was being asked to receipt work which had not been done, so that payment could be authorised by Mr Harrison. This was a disclosure of information that that the Claimant was being asked to sign off work as completed when it had

not been. This was something more than a mere allegation, the Claimant had explained the basis for his concern and given they were both civil servants, the rules should have been known to the Claimant and Mr Cairns.

What did the Claimant believe that information tended to show and was that belief reasonable?

304. The Claimant believed that civil servants were under an obligation not to cause a loss to the Treasury and that causing a loss to the Treasury was a criminal offence and that this was well known. He believed that he was providing information which tended to show that he was being asked to receipt matters which had not been done and therefore there was a breach of the rules, and a potential criminal offence was being committed. The Respondent submitted that the information had to show that there had been a breach of obligation or a criminal offence. I rejected that submission, the information provided needed to tend to show that there had been a breach of legal obligation or a criminal offence and not that it had occurred, and the Claimant believed that he did.

305. The Claimant was aware of the rules, and they were and should have been well known to civil servants. He perceived that PSIT was not acting in accordance with the contract or statement of Requirements and that he was being asked to say that they had complied, which was a breach of the rules. The Claimant considered it was well known that the rules had to be complied with and a breach was potentially a criminal offence. On the basis of the understanding the Claimant had, his belief was reasonable.

Did the Claimant believe that the disclosure was made in the public interest and was that belief reasonable?

306. The Claimant believed that because the matters he raised involved public funds and that because civil servants were expected to act in the best interests of the nation that it was in the public interest to make the disclosure.

307. The Claimant considered that he was being asked to pay money for work which had not been done. Unnecessary expense is a burden for the taxpayer and the Treasury, and I was satisfied that the Claimant believed it was in the public interest and that belief was reasonable.

308. The Claimant accordingly made a protected disclosure.

On 12 February 2018, the Claimant spoke to Mr Cairns and said that situation was ongoing and that an uplift had now been applied to the contract and that no commercial officer had been present on 7 February 2018 and that Mr Harrison

had accepted lavish entertainment whilst he was negotiating that uplift. The Claimant provided dates and incidents of when the entertainment and proffering of a settlement sum took place, namely 6 February 2018 (proffering of sum), on 8 February 2018 Mr Harrison came into to the office looking worse for wear and said to a colleague, Dan Thornes, that 'I got so bladdered yesterday, that I am absolutely amazed that I made it back on the last train.' He also had said that he had been given a lavish lunch and dinner by the contractor.

Was information disclosed by the Claimant?

309. On about 12 February 2018, the Claimant spoke to Mr Cairns about his concerns regarding the PSIT contract. He said that Mr Harrison had blurted out a figure of £600,000 in a public meeting about the AIC contract and had given a verbal commitment to the contractor. He then informed him that Mr Harrison said he was having a meeting with contractor the following day. He also informed him that whilst at the meeting Mr Harrison had lunch at a roof top restaurant and had been given lavish entertainment and that he had then gone on to dinner and consumed large quantities of alcohol. He said to Mr Cairns that you cannot accept lavish entertainment when negotiating a contract. The matters raised related to the same contract as raised in October 2017 and Mr Cairns was aware of the link.

Did the Claimant believe that the information tended to show and was that belief reasonable?

310. The Claimant was aware of the civil service code in terms of accepting entertainment and referred to it when he said lavish entertainment cannot be accepted when negotiating a contract. The Claimant had in mind that a civil servant must not abuse their position for their own or other's gain and that gifts or entertainment must not be accepted that might be seen to compromise personal judgment or integrity. The Claimant had also previously raised concerns in December 2017. The Claimant believed that the information provided tended to show that Mr Harrison was in breach of the civil service code and that his behaviour suggested that there was a corrupt relationship and therefore there might be a criminal offence.

311. As experienced civil servants the Claimant and Mr Cairns should and would have been aware of the strict nature of the civil service code. He was reliant on what he had seen and what he thought Mr Harrison had said after he returned to the office after his trip to London. The Claimant was aware of the importance for integrity to be maintained when accepting gifts or entertainment and even more so when negotiating a contract, and his belief in what the information tended to show was reasonable.

Did the Claimant believe that the disclosure was made in the public interest and was that belief reasonable?

312. The Claimant's belief in the public interest was the same as for his first disclosure and on the basis of the earlier reasoning, that belief was reasonable.

313. The Claimant accordingly made a protected disclosure.

On 19 March 2018 the Claimant, by telephone, spoke to Mr Lansbury via the Confidential (whistleblowing) Hotline (CHL), and said had concerns about his line manager's (Mr Harrison) behaviour and that there might be a risk of corruption. The Claimant summarised what had taken place in relation to 'PSIT2 contract' namely that Mr Harrison had altered the terms of the contract in a way that greatly favoured the contractor by increasing the contract sum, whilst decreasing the work content and by doubling the delivery period. The Claimant also said that he had been removed from his role as a pretext, because he had refused to make payments to the contractor on the basis that the work had not been performed.

Was information disclosed by the Claimant?

314. On 19 March 2018, the Claimant told Mr Lansbury about the contractual changes whilst he was on holiday, that the contractor was underperforming, and Mr Harrison was appearing to act as its advocate and was not challenging underperformance. He was being forced to say work had been done by the contractor when it had not, and that Mr Harrison had accepted lavish entertainment. He had said he thought that there might be something criminal due to his suspicions about the pattern of behaviour. The pattern had been to amplify the contract and ignore the underperformance at the cost of the Treasury. He said that they were supposed to act in the interests of the nation and preserve best value for money. I accepted that this was a provision of information.

What did the Claimant believe that the information tended to show and was that belief reasonable?

315. The Claimant believed that the information tended to show that there had been a breach of the civil service code and that a criminal offence might have occurred. He relied on the same matters as with his previous disclosures. The Claimant had referred to suspected criminal behaviour and the obligations on civil servants. He had a belief that the information tended to show that there had been or could be a criminal offence and that there had been or could be a breach of legal obligation. The Claimant was aware of the civil service rules and that it is important for integrity to be

maintained and his belief in what the information tended to show was reasonable.

Did the Claimant believe that the disclosure was made in the public interest and was it reasonable?

316. The Claimant's belief in the public interest was the same as his earlier disclosures and I was satisfied that it was reasonable.

317. The Claimant accordingly made a protected disclosure.

On 23 March 2018, the Claimant sent to the Confidential Hotline a document titled '20180321 Concerns about uncommercial activity'. This set out the Claimant's understanding as to what had occurred.

Was information disclosed by the Claimant?

318. On 23 March 2018, the Claimant sent an e-mail and a lengthy attachment to the Confidential Hotline, in which he set out the factual background to his concerns. He suggested that Mr Harrison had breached the commercial firewall. He also said that he had been told to make a payment following a report when in the Claimant's mind it was a pre-payment which could not have possibly met the Treasury rules. He also said that the contract did not meet commercial policy. He suspected that the way in which invoices were loaded onto the system was illegal and he believed that the way in which Mr Harrison was behaving inferred corruption. The Claimant provided a significant amount of information as to what he said was occurring.

What did the Claimant believe that the information tended to show, and was that belief reasonable?

319. The Claimant had made references to the Treasury rules, breaches of the commercial firewall and that he thought there might be corruption. The Claimant had in mind the civil service code and that civil servants were supposed to act in the best interests of the nation and breaching the obligation was a criminal offence. These were not bare allegations but accompanied by a narrative of what had happened. The Claimant believed that the information tended to show that there had been a breach of the civil service code and therefore a legal obligation and that there had been or might be a criminal offence being committed. The Claimant had a good understanding of the civil service code and that breaches can mean that a criminal offence had been committed and the Claimant's belief that the information tended to show a breach of legal obligation or a criminal offence had happened was reasonable.

Did the Claimant believe that the disclosure was made in the public interest and was it reasonable?

320. The Claimant's belief in the public interest was the same as his earlier disclosures and I was satisfied that it was reasonable.

321. The Claimant accordingly made a protected disclosure.

Between 4 July 2018 and October 2018, the Claimant prepared and provided a witness statement to the MOD police about what had happened with the contract. This was the same information as provided to Confidential Hotline but was in a police witness statement format and referenced the evidence that the Claimant had.

Was information disclosed by the Claimant?

322. In the Claimant's final statement to the MDP he set out an account of what happened in a narrative form and included the changes to the statement of requirements, instructing him to make payments when work had not been completed, the events on 6 and 7 February and that Mr Harrison had accepted entertainment and negotiated a contract extension whilst drunk. The Claimant said that he considered the events tended to show that there was a perversion of the contract to favour the contractor and to the MOD's disadvantage, Mr Harrison was biased in favour of the contractor and was colluding with it. The contents of the Claimant's statement were more than mere allegation, he had provided a factual account of what he considered had happened and were a provision of information.

What the Claimant believe that the information tended to show and was that belief reasonable?

323. The Claimant had made references in his statement to the legal duty to refuse payments for work which was not complete. He had in mind the civil service code in terms of not using position to further the private interests of others and not to accept gifts or hospitality that might reasonably be seen to compromise personal judgment of integrity. The Claimant considered that Mr Harrison, by accepting hospitality and getting drunk on 7 February 2018, had breached the code and that the information he provided tended to suggest that. He also had in mind that causing a loss to the Treasury by requiring it to pay funds which were not due was a criminal offence and that civil servants were under an obligation not to cause a loss. The Claimant believed that the information he provided tended to show that a loss to the Treasury was being caused and that Mr

Harrison was colluding with CGI in relation to it and that there therefore had been a breach of the civil service code and/or a criminal offence committed. The Claimant had a good understanding of the civil service code and the requirements on civil servants and was conscious that he was under a duty to report concerns it was not being complied with. The Claimant's belief was therefore reasonable.

Did the Claimant believe that the disclosure was made in the public interest and was it reasonable?

324. The Claimant's belief in the public interest was the same as his earlier disclosures and I was satisfied that it was reasonable.

325. The Claimant accordingly made a protected disclosure.

Detriment

Was the Claimant subjected to a detriment on the ground that he made a protected disclosure by:

On 15 March 2018, the Claimant was removed from his role and transferred to a role that did not exist, by Group Captain Clouth and Mr Harrison.

326. On 15 March 2018 the Claimant was removed from his role as project manager on the P-AIC contract. The Claimant considered that the phase of the project was close to success and considered it was to his disadvantage that he was removed from it. I accepted that a reasonable employee would have considered that being removed from the project would be to their disadvantage and the removal was a detriment.

327. The Claimant was not transferred to a role which did not exist. He was moved to assist with a campaign plan to launch the Transformation Project within IntSys. This role was suited to the Claimant's skill set and therefore there was not a detriment in this respect.

328. There had been a fundamental disagreement between the Claimant and Mr Harrison as to whether PSIT had been complying with the SoR, had met the milestones and whether payments were due. The Claimant regularly said that he had not agreed with the way the milestones had been agreed and that he disagreed with the changes to the SoR. The SoR had been changed and PSIT was complying with it, however the Claimant considered that they were not complying with his original SoR. There were a number of disputed invoices and the relationship between the Claimant and PSIT became strained. Invoices had not been paid in January and February 2018. The Claimant had informed Mr Oliver on 7 March 2018 that

the schedule of payments had been agreed in his absence and he would not have accepted it and that he did not think that meetings and progress reports were deliverables and there was nothing to pay against. The situation escalated and CGI threatened the Claimant with legal action and at that stage Mr Harrison considered that the relationship had broken down. The Respondent was aware that CGI were about to send a formal letter of complaint. The stakeholders in the project were concerned about the amount of friction between the Claimant and PSIT and that relationships were being damaged. Gp Cpt Clouth considered that the biggest issue was losing the support of the stakeholders and suggested that the Claimant was moved to the IntSys transformation project. I accepted that Gp Cpt Clouth had no knowledge that the Claimant had made protected disclosures to Mr Cairns and there was no evidence that Mr Harrison had been told either.

329. The Claimant submitted that Gp Cpt Clouth and Mr Harrison colluded to remove him because he made raised his concerns. They had been involved in discussions, however I accepted that was to address the serious concern about the nature of the relationships in the project. I accepted that the Claimant had never had a failure in a project before, however on this occasion the relationships had broken down. I was satisfied that the reason for the move of role was to try and repair the damaged relationship between the IMAGE team and PSIT. There was a real risk that the project could fail if something was not done. I was not satisfied that Mr Harrison or Gp Cpt Clouth had any knowledge of the disclosures to Mr Cairns. The Claimant had been referring to his original SoR and how he had not agreed to any changes. The Claimant's protected disclosures had no influence on the decision to remove the Claimant from his project manager role and he was not subjected to a detriment as a result.

On 19 April 2018 Mr Bailey made an ageist remark and derogatory remark about disability and said that the Claimant was causing trouble for a friend.

330. The Claimant did not cross-examine Mr Bailey on the basis that he had made a derogatory remark about disability or that he was causing trouble for a friend and no such findings of fact were made. At the meeting Mr Bailey did not suggest that the Claimant was over the hill or make any reference to rust 'out' . As such the factual basis for the Claimant's allegation was not established and there was no detriment.

331. In so far as 'rust out' was referred to in the e-mail which followed, an employee unfamiliar with a little known management expression could find it offensive and potentially to their disadvantage. However, Mr Bailey was unaware that the Claimant had made a protected disclosure at this stage. Mr Bailey intended the phase to be used in connection with no longer

finding the work interesting or challenging. I was not satisfied that the Claimant's protected disclosures had any influence on the sending of the e-mail.

On or about 30 May 2018, the Respondent silently closed the Claimant's first grievance.

332. The Claimant was not put in contact with Mr Sixsmith after contacting Speaksafe, rather it was after e-mailing the performance and recognition team. The Claimant spoke to ES many times and he did not fully appreciate its role, namely that it provided wellbeing services and advice on policy and procedure and that it did not adjudicate on complaints. After the Claimant had sent Mr Sixsmith the details of his complaint on 18 May 2018, Mr Sixsmith had responded and made comments and told him that the Claimant needed to submit the complaint to the appropriate deciding officer. The Claimant said in his closing submissions that it was clear in cross-examination that he and Mr Sixsmith had misunderstood each other. Mr Sixsmith considered that he had resolved the process query by the Claimant by signposting him to the policy and saying he needed to submit it to deciding officer. In the circumstances a reasonable employee would not have considered that their grievance had been accepted and then closed. The policy was clear that it had to be submitted to a deciding officer and Mr Sixsmith was not such a person. Accordingly, this was not a detriment.

333. In any event, the reason why Mr Sixsmith marked the enquiry as resolved was because he was not a deciding officer and had told the Claimant to send the grievance to one. Mr Sixsmith thought he had complied with his duties under his role and because he was not a deciding officer under the policy did not consider that a grievance had been raised. The Claimant considered that there had been a misunderstanding between them. I was satisfied that if this had been a detriment that none of the protected disclosures had any influence on Mr Sixsmith's decision.

On 6 September 2018, The Respondent removed the Claimant's project manager role on Skysiren. It is believed Mr Bailey instigated this and that this followed the second grievance being raised.

334. The Claimant was told that his role with Skysiren was ending and was asked to resign, which he considered was to his disadvantage. I accepted that a reasonable employee being told that their role was to end would consider it a disadvantage and I accepted that it was a detriment.

335. Mr Bailey only discovered that the Claimant had been removed after the event and was not involved in the Claimant's removal. The Claimant

submitted that he had been asked to resign shortly after having raised discussing his grievance, about reasonable adjustments, with Mr Harrison. The Claimant did not question Mr Harrison about his removal from the project and no finding of fact was made that he had any involvement. When the Claimant was prompted as to whether he wanted to question Mr Bailey about whether his removal was connected to the disclosure, he said the real issue was whether he was aware of his removal and did not ask the question. There was no evidence from those running the SkySiren project as to why the Claimant was removed. Mr Bailey and Mr Bollen both made enquiries. I accepted Mr Bollen's evidence that he was told that the Claimant was straying outside of his scope and the stakeholders were concerned, this was supported by what had happened in operation Thundercloud. Although there was no direct evidence as to what happened, the lack of involvement of Mr Harrison and Mr Bailey and the information given to Mr Bollen were such that I was satisfied that a protected disclosure played no part in the Claimant's removal from the role.

Between 10 and 17 September 2018 Mr Harrison failed to confirm what the Claimant's particulars of employment consisted of.

336. Mr Harrison had been told that the Claimant was concerned about his employment status and had been asked to provide details such as his role title, assigned project, task manager and employment status. Mr Harrison said he would endeavour to provide the information by 17 September 2018. Mr Harrison did not provide the information and the Claimant considered that it was to his disadvantage given his level of uncertainty and I was satisfied that a reasonable employee would have also considered it to their disadvantage.

337. Between the request for the information and the 17th of September 2018, the Claimant had confirmed that he did not want to informally resolve his grievance in relation to reasonable adjustments. Mr Harrison asked on 13 September 2018 to be relieved of line management duties for the Claimant. There was no evidence that Mr Harrison had knowledge of the Claimant having made a protected disclosure. It was significant that Mr Harrison had originally agreed to make the enquiry and that the cessation was brought about by the discussion of the grievance. I was satisfied that the cessation of enquiries was due to Mr Harrison asking to be relieved of line management duties due to the grievance and that the protected disclosures had no influence on it.

Between September 2018 and January 2019, Mrs Singleton, on two occasions failed to confirm the details of the Claimant's employment particulars.

338. The Claimant had asked Mrs Singleton on 8 October and 19 December 2018 as to what his employment status was. There was no evidence that the Claimant asked for any more detail than what his status was. Mrs Singleton made enquiries with HR and told the Claimant simply that his status was unaffected. In the circumstances a reasonable employee would not have considered the response to be to their disadvantage and this was not a detriment.

339. In any event, I accepted that Ms Singleton was trying to assist the Claimant. She was not as the Claimant suggested at the centre of a network she had set up. Mrs Singleton's department dealt with approximately 300 calls per day, and it was very unlikely that Mrs Singleton would be concerned about disclosures that were not in relation to her or her department. I was satisfied that the Claimant's protected disclosures had no influence on what Ms Singleton did.

On 14 September 2018 Mr Bailey as the first Grievances Deciding Officer, held a meeting with the Claimant in a locked room, during which he made multiple threats to his employment, including that 'the Claimant would suffer'.

340. During the meeting on 14 September 2018, the Claimant revealed to Mr Bailey that he had made a disclosure about commercial practices to Mr Cairns and also the police and that he considered they were protected disclosures. After doing this Mr Bailey told the Claimant that the concern would go nowhere and when it went nowhere what did he think his future was. Mr Bailey also told the Claimant that he controlled all of the jobs in IntSys and after his next temporary assignment, 'you better make a good job of it, guess what you won't have a job'. I accepted that the atmosphere in the meeting was threatening and that threats were made. The Claimant considered that they were threats to his employment and therefore were to his disadvantage and detriment. I accepted that a reasonable employee would have also considered that they were to their detriment.

341. The threats followed the Claimant having revealed that he had made a protected disclosure, they were also linked to the police investigation in that they formed part of the same sentence. Mr Bailey denied that they had occurred and therefore could not put forward a suggestion as to why he had said them. The burden of proof was on the Respondent to show why the detriment occurred. On the basis of the proximity of the threats to the Claimant revealing he had made a protected disclosure I was satisfied that the Claimant's protected disclosures had a material influence on Mr Bailey when he made the threats. Accordingly, the threats were made on the grounds that Claimant had made protected disclosures to the police and to Mr Cairns.

Between October and 17 December 2018, the Claimant was seeking to return to work from a period of sick leave. The Respondent required the Claimant to return to work in the same role, which was still under the control of Mr Bailey.

342. When the Claimant was due to return to work at the end of 2018 Mr Bollen was his line manager. After the incident on 14 September 2018, the Claimant did not want to return to a role in which Mr Bailey would be part of his line management. The Claimant had made Mrs Singleton aware of this, however she did not have any contact with the IntSys team, she was not HR and had no influence on line management. The Claimant had also raised his grievance about what had occurred with Mr Harrison and Mr Bailey by this stage, and he considered that a return to the department would be harmful and to his detriment. I accepted that a reasonable employee would also consider that it was a detriment.

343. Mr Bollen, who was the Claimant's line manager was responsible for his return to work. Although Mr Bollen inferred that the Claimant might have raised a grievance against Mr Bailey, he had no idea that the Claimant had made protected disclosures. Similarly, Mr Boyall did not have any knowledge that the Claimant had made the disclosures until after the events. Mr Boyall as CSO decided that any redeployment should take place after Mr Bollen had a return to work interview. Mr Bollen tried to find the Claimant tasking which meant that he was not in contact with Mr Bailey. There was no contact between Mr Bollen and Mrs Singleton. Mr Bollen was trying to find a way to get the Claimant to return to work, but was wholly unaware that a protected disclosure had been made. I was satisfied that the protected disclosure had no influence in the attempts to get the Claimant to return to work in IntSys between October and 17 December 2018.

On 16 December 2019, the Claimant's Third Grievance set, submitted 23 October 2018, in relation to bullying and harassment was dismissed. The Claimant says that this involved an unfair process including that the harassment investigation officer removed almost all of the Claimant's evidence, framed evidence in an unfair manner in that evidence was embroidered. In June or July 2019, the Harassment Investigation Officer removed references in the Claimant's evidence to the root cause of bullying and harassment (ethical misconduct by Harrison) as part of what the Claimant says was a pre-determined outcome. The Claimant says that the investigation officer directed the Deciding Officer (2B) (AVM Moore) on the outcomes, contrary to policy (in JSP 763)

344. The Claimant had provided a CD with a document consisting of 357 pages and a further documents embedded within it. The Respondent's policy was that the whistleblowing concerns were investigated under the whistleblowing policy via the Confidential Hotline, however any allegations

of detriment or bullying arising from a protected disclosure were investigated separately under the grievance and/or bullying and harassment procedures. The documents provided by the Claimant predominantly related to the commercial concerns raised by the Claimant rather than the subsequent actions of Mr Harrison or Mr Bailey. Mr Gallagher did not refer to the vast majority of the documents in his report, although he included them in an appendix for AVM Moore. The Claimant considered that this removed the cause and effect from his grievance and as such that the investigation process was unfair. Mr Gallagher had been a whistleblower in the past and was looking for evidence that would corroborate the Claimant's complaints that he had been poorly treated or bullied. He was aware that the Claimant had raised the commercial concerns and that retaliation against the Claimant was a possibility.

345. The Claimant submitted that Mr Gallagher went about destroying his evidence and only referred to salacious detail. He suggested that Mr Gallagher was an employee, which I rejected. Mr Gallagher investigated the complaints within the confines of his remit and looked for evidence that tended to support or undermine what the Claimant, Mr Harrison and Mr Bailey had said about those matters. His remit did not extend into investigating the commercial concerns. Mr Gallagher was looking for things that tended to suggest that there had been bullying or harassment or retaliation for raising the concerns and referenced those in his report

346. I accepted that the Claimant considered that the lack of referral to the documents in the CD was to his detriment. It had been explained on many occasions that the investigation would not look into the commercial concerns and that they would be investigated separately. A reasonable employee would not have considered that the lack of reference to the details of the allegations of commercial concern would have been contrary to the investigation remit and therefore would not have considered them to be to their detriment.

347. I did not accept that Mr Gallagher had only chosen evidence which undermined the Claimant's case or that he had embroidered what he had found. Mr Gallagher wrote a factual report and did not form any conclusions as to the outcome. There was accordingly no detriment in this respect.

348. In any event I was satisfied that Mr Gallagher was trying find evidence that supported the Claimant's contentions, as demonstrated by his searching the HRSS records and referring to the corroboration that the Claimant had been subjected to a legal threat by Mr Oliver. I accepted that Mr Gallagher's reason for not including the contents of the Claimant's CD was that the documentation related to the commercial concerns which were being investigated separately in accordance with the MOD policy and that he did not want to interfere with the police investigation. The reason they

were not included was that he did not consider they were necessary to determine whether the poor treatment had occurred, and he always had in mind that the cause could be the raising of the concerns. I accepted that the fact the Claimant had made protected disclosures had no influence in why Mr Gallagher had not included the documents in his report. They were not included because the commercial concerns were being investigated elsewhere, in accordance with the policies, and AVM Moore was aware that investigation was taking place.

349. The Claimant's grievance was dismissed, which a reasonable employee is likely to consider to be to their detriment. AVM Moore considered the report and appendices provided by Mr Gallagher he concluded that there was not any corroborating evidence for the Claimant's allegations or any independent witnesses. The conclusions he reached were ones which a reasonable deciding officer could reach. I accepted that AVM Moore applauded the protection of whistleblowers, and he was alive to the possibility of retaliation. He knew that the Claimant had raised the commercial concerns. He decided that an investigation should be carried out by an independent Harassment Investigation Officer and DBS appointed a fee paid officer to ensure that independence. AVM Moore was looking for characteristics of bullying or harassment however concluded that he was not satisfied that the events had occurred as the Claimant suggested. I accepted he approached the case in the same way as any other complaint. AVM Moore commissioned the report in line with the MOD's policies. I was satisfied that the Claimant's protected disclosures had no influence on the decision of AVM Moore. I was satisfied that he considered that the treatment by the Claimant alleged had not been proved and if he had thought there was any connection to the Claimant having raised commercial concerns he would have made such a finding.

Time limits in relation the Detriment claim.

350. The only proven allegation of detriment which occurred because of a protected disclosure were the threats made by Mr Bailey on 14 September 2018. Time to bring such a claim runs from the date of the act and therefore the claim should have been presented by 15 December 2018. The Claimant notified ACAS of the dispute on 23 April 2019, which post-dated the primary limitation date and therefore he did not get the benefit of any extension of time for the early conciliation period. The ACAS certificate was issued on 20 July 2020. The claim was presented on 17 June 2019 and was therefore presented 6 months out of time.

351. The Claimant had started taking advice from ACAS in about November 2017 and was aware of possible detriment against him at that time and he knew he should take it further in March 2018. He was always aware that he could bring a claim. He accepted that there was nothing

physically stopping him from presenting the claim and he wanted to try and resolve the claim internally first. Although the internal process is a factor to take into account, the Claimant was aware of the ability to bring a claim in the Tribunal and that he should take it further in March 2018. He decided to bring the claim when the internal process had reached 52 weeks. The Claimant was aware of his rights, the time limits and the need to notify ACAS at all times. It was reasonably feasible for the Claimant to have presented his claim in time. Accordingly, the claim was not presented in time, and it was reasonably practicable for him to have done so. Therefore, the claim was dismissed on the basis that the Tribunal did not have jurisdiction to hear it.

Discrimination claims

Did the Claimant carry out a protected act?

In his requests for reasonable adjustments on to Mr Harrison on 2 October 2017 and November 2017 and to Mr Boyall on 18 January 2018.

352. On about 2 October 2017, the Claimant had a discussion with Mr Harrison and told him that he was suffering from Fibromyalgia, he was struggling with his workload, was becoming ill and needed to reduce his workload. The Claimant considered, and I accepted, that he was requesting reasonable adjustments. The duty to make reasonable adjustments is contained in section 20 of the Equality Act 2010 and the Claimant was making the request in connection with that Act. This therefore was a protected act within the meaning of s. 27(2)(c) EqA.

353. In November 2017, the Claimant informed Mr Harrison that his workload was too high, but he did not refer to his fibromyalgia. This followed on from his earlier discussion and was a further request for a reasonable adjustments and it was also a protected act.

354. On 18 January 2018, the Claimant informed Mr Boyall that his workload was high and that he was ill. The Claimant had raised the matter because he was unwell with Fibromyalgia and was seeking an adjustment to his workload. This was connected to the Equality Act and was a protected act.

In the e-mail dated 7 December 2017 to Mr Harrison

355. The Claimant had informed Mr Harrison that he was weakened by many weeks of illness, having previously told him that he had fibromyalgia. The Claimant also sent his workload analysis and was asking for an additional person to be allocated to the team. Mr Harrison was aware that the Claimant had fibromyalgia and that he had already asked for his

workload to be reduced. Although the Claimant did not specifically state that he was seeking a reasonable adjustment it was clear that he was seeking an adjustment to his workload. The e-mail taken in conjunction with the earlier conversation was connected to the Claimant seeking reasonable adjustments and was a protected act.

In the Claimant's e-mail dated 24 April to Mr Bailey

356. The Claimant said in his e-mail "I cannot believe you meant to offend me but the expressions rust out and burn out concern me. The first reads like an age/disability euphemism…". The Respondent submitted that this did not go far enough to be a protected act. I accepted that the Claimant was not directly saying that what had been said was discriminatory or harassment. However, the Claimant was inferring that it might be. There is not a requirement that an allegation that the EqA has been infringed is express. It was an implied allegation of age discrimination and as such was a protected act under s. 27(2)(d).

In the Claimant's e-mail dated 17 August 2018 to Mr Harrison.

357. In the Claimant's e-mail to Mr Harrison, he said that he had been advised to pursue a formal grievance against him for failing to assess reasonable adaptions for his disabilities and made suggestions as to how they could resolve the matter. The Respondent submitted that it was not a grievance, but an indication that a grievance would be raised and that it did not go far enough to be a protected act, I rejected that submission. The Claimant was alleging that there had been a failure to make reasonable adjustments, which is an allegation that the EqA had been infringed. Further he was saying that he would raise a formal grievance in relation to the same, which was something done in connection with the EqA. This was a protected act within the meaning of s. 27(2)(c)and (d).

In the Claimant's grievance dated 2 May 2018, formalised on 18 May 2018

358. Although the Respondent did not accept that it was a formal grievance it was accepted that it was a protected act.

<u>Reasonable Adjustments</u>

359. The Respondent accepted that it had the following provisions, criteria or practices: (1) It required employees to meet targets and deadlines, and (2) it required projects to be completed on time.

<u>Did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?</u>

360. The Respondent disputed that the Claimant was put at a substantial disadvantage in comparison to those not suffering with fibromyalgia, although it did not expand upon this in closing submissions. A flare up of fibromyalgia made the Claimant prone to other illnesses and caused extreme tiredness. Long periods of sitting caused pain and muscle atrophy and the silent migraines caused him 'brain fog'. The symptoms were made worse by stress. If the Claimant was suffering from a flare of fibromyalgia the pressure of targets and deadlines would increase the Claimant's stress levels, this would in turn increase his symptoms of fibromyalgia. The symptoms of tiredness, pain and brain fog would mean that the Claimant was able to perform less well and make it more difficult to meet the deadlines and targets. Those difficulties which in turn would increase the pressure and thereby increase his stress levels and make it even more difficult for the Claimant to meet the deadlines. In other words, the Claimant would end up in a cycle which made him less and less able to complete his work on time. A non-disabled person would not experience those effects or the cycle whereby they were increasingly physically unable to complete their work. The disadvantage was more than minor or trivial and the Claimant was placed at a substantial disadvantage in comparison to those who were not disabled.

Did the Respondents do not know, or could they not be reasonably expected to know that the Claimant was likely to be placed at such a disadvantage?

361. On 2 October 2017, the Claimant told Mr Harrison that he had been diagnosed with fibromyalgia and he explained the condition. He also informed him that he was becoming ill and needed to manage his workload. Mr Harrison and therefore the Respondent was aware from 2 October 2017 that the Claimant's condition caused him difficulty to complete his work and therefore that it would make it more difficult for him to meet targets and deadlines. Even if Mr Harrison did not expressly know, the Claimant had explained the effect of his condition and that he needed to manage his workload, this was something which should have put the Respondent on enquiry that the Claimant might be at a substantial disadvantage by reason of a disability and should have sought assistance from occupational health. The Claimant further told Mr Harrison that his workload was too high in November and provided a workload analysis on 7 December 2017 saying he was doing the work of 1 ½ people and that he needed an extra person to carry out work of the equivalent of 60% of a full time person. These events would have further placed the Respondent on notice that they should make enquiries as to whether the Claimant needed reasonable adjustments. The Respondent accordingly knew or ought to have known that the Claimant was disabled and knew or ought to have known that he was placed at a substantial disadvantage by reason of the PCPs.

Did the Respondents take such steps as were reasonable to avoid the disadvantage?

362. The adjustment which the Claimant was seeking was to be given a workload which was equivalent to a normal person, rather than his workload of the equivalent to 1 ½ people, in other words to reduce his workload. I accepted that the Respondent extended the time for completing the phase of the project and that it requested PSIT to undertake some of the Claimant's tasks, however that did not occur until the end of January/beginning of February 2018, when it became clear that PSIT could not deliver the ADR phase by 14 February 2018.

363. At the end of November 2017, the Claimant and PSIT agreed that it was not possible to complete the ADR phase of the project by 14 February 2018. The Claimant had already expressed to Mr Harrison that his workload was too high on two occasions, when on 4 December 2017 the Claimant and PSIT were told that the ADR deadline of 14 February 2018 would be maintained. This had the effect that the Claimant would have to complete the equivalent of 6 months work in about half the time and in reality the Claimant's workload was increased. Mr Harrison wanted to push the team to try and achieve the deadline.

364. I was not satisfied that the Respondent could not have allocated a 50% full time equivalent person to assist the Claimant with his work from mid-October onwards. By the end of November 2017, it should have been obvious that the Claimant was going to have extreme difficulty in meeting the deadline, however he was required to complete it without any additional resources. It would have been a reasonable adjustment to have allocated a part time worker to assist with the project. Further at the end of November 2017 it would have been a reasonable adjustment to have requested PSIT to assist the Claimant with some of his tasks, as occurred at the end of January/beginning of February 2018. Further in the absence of allocating an additional resource to the Claimant, it would have been a reasonable adjustment to extend the date of the ADR, when it was clear to the Claimant and PSIT that it was unachievable. The measures were not put in place until end of January/beginning of February 2018. According there was a failure to make reasonable adjustments from mid October 2017 and the effect of that failure lasted until the end of January 2018.

Direct Disability Discrimination

Did the Respondent carry out the following treatment and was it less favourable than the Claimant's non-disabled comparators by:

On 16 March 2018, the Respondent by way of a mass e-mail, disclosed to the Claimant's team, that the Claimant was not well and inferred that he no longer had capacity to manage the work.

365. The e-mail sent by Mr Harrison on 16 March 2018 said that they had become increasingly concerned about the Claimant's well being and the impact that the P-AIC contract was having on him. Although the Claimant's medical condition was not specifically mentioned there was an allusion to the Claimant being unwell and I accepted that Claimant's submission that he was visibly unwell at the time.

366. The Claimant was moved from the P-AIC project, however the reason for the move was due to the deteriorating relationships with PSIT and the stakeholders concern of the risks to the project. That reason was not provided in the e-mail. The Claimant did not provide an explanation as to why an e-mail in relation to a non-disabled person would have been different. However, because the reason for the Claimant's removal was principally something else, it raised the question as to why the Claimant's wellbeing was mentioned. I was satisfied that the Claimant had adduced primary facts from which it could be concluded, in the absence of an explanation from the Respondent, that a non-disabled employee's wellbeing might not be mentioned.

367. Mr Harrison worded the e-mail in the way that he did because he was trying to provide a reason which did not reveal the stakeholder concerns or say that the principal reason was the concerns about his management of the project. He thought it was a kinder way of explaining the move. I was satisfied that the reason why the e-mail was worded as it was, was to avoid criticising the Claimants work and his relationships with PSIT. It was not worded in that way because the Claimant was disabled, and it was done so for a non-discriminatory reason. I was satisfied that if a non-disabled employee had been in the same situation as the Claimant and was becoming unwell, that Mr Harrison would have sent a similarly worded e-mail. Accordingly, the Respondent did not directly discriminate against the Claimant in this respect.

On 14 September 2018, Mr Bailey mocked the Claimant's fibromyalgia. Intimate details about the condition were requested, together with the medication taken and problems encountered. When this was provided Mr Bailey said, 'so is that it then' and '… there are people here with far worse disabilities than yours'.

368. I was not satisfied that Mr Bailey mocked the Claimant's fibromyalgia and found that he did not say the words alleged. Accordingly, the Claimant failed to adduce primary facts that what was alleged to have occurred was

said or that a non-disabled person would have been treated more favourably. This element of the claim was dismissed.

Discrimination arising from disability

369. The 'something arising' from the Claimant's disability was that when he had a flare of fibromyalgia he was more prone to illness, he would suffer from extreme tiredness, silent migraine and long periods of sitting would cause pain and muscle atrophy. When experiencing a flare, he looked pained, tired and exhausted

Were the following matters unfavourable treatment and did they happen because of the something arising from the Claimant's disability:

Between October 2017 and February 2018, Mr Harrison increased what the Claimant was required to do and shortened the timescale resulting in the Claimant undertaking a role equivalent to 1.5 persons' work.

370. On 4 December 2017, Mr Harrison told the Claimant that the ADR deadline of 14 February 2018 would remain, and this meant that effectively 6 months work would have to be completed in about half the time. The Claimant and PSIT had agreed that the deadline was impossible to meet, however Mr Harrison wanted to push the team to try and achieve it. I accepted that to require a team to meet a deadline that was impossible to achieve, was something adverse rather than beneficial, because it requires people to maintain something that they know will fail. It was therefore unfavourable treatment.

371. In closing submissions, the Claimant said that he could not show a hard link between the refusal to extend the deadline and the things arising from his disability, and all he could point to was that he had requested reasonable adjustments. There was a requirement to complete projects on time and the decision of Mr Harrison was not just related to the Claimant, but also the PSIT 2 team. The Claimant failed to adduce primary facts which tended to show that the reason the deadline was not extended was due to the things arising from his disability and therefore he had not discharged the initial burden of proof.

372. In any event the Respondent has a policy of meeting targets and deadlines and there was a desire for projects to be completed on time. Mr Harrison wanted to push the team to complete the project and not just the Claimant. PSIT would have also been required to complete a large amount of work. I was satisfied that the deadline was not extended because Mr Harrison wanted to push the team to comply with deadline and that the Claimant's difficulties had no influence on that decision. Accordingly, this head of claim was dismissed.

In a meeting in July 2019, Mr Bailey said in his witness statement as part of the grievance investigation, "I have always seen Tapping as a vulnerable person".

373. Mr Bailey did not say he saw Mr Tapping as a vulnerable person in a meeting in July 2019, however he did say it to AVM Moore in his interview on 28 January 2019. Describing that you consider somebody as vulnerable is neither positive nor adverse. It is a statement as to whether a person is considered to be more likely to be put to a disadvantage. The Claimant said in evidence that it was unfavourable because it was said in public, however that was not the case, because it was in an interview of part of the grievance process and would not have been disseminated publicly. Mr Bailey's explanation was that the Claimant's medical issues appeared to have taken their toll on him and they were having an impact on his work and confidence. I was not satisfied that in the context the comment was made that it was objectively anything more than a neutral expression of how Mr Bailey saw the Claimant's situation. I was not satisfied that it was adverse and therefore it was not unfavourable treatment, and this allegation was dismissed

On 16 March 2018, the Respondent disclosed to the Claimant's team, without his consent, details of his ill health as a reason for his departure. The Claimant was not leaving his post due to ill health.

374. The e-mail sent by Mr Harrison on 16 March 2018 said that they had become increasingly concerned about the Claimant's well being and the impact that the P-AIC contract was having on him. Although the Claimant's medical condition was not specifically mentioned there was an allusion to the Claimant being unwell and I accepted that Claimant's submission that he was visibly unwell at the time.

375. The principal reason that the Claimant was moved from the project was because the relationships with PSIT 2 had broken down and that the stakeholders were concerned that the project was at a risk of failure. This reason was not provided in the e-mail. The Claimant's wellbeing was used as an explanation however it was not true reason for his removal. Providing a reason, which is not the true reason is something adverse because it is a distortion of the actual position. It was not correct that the reason for the Claimant's removal was his health, and I was satisfied that it was unfavourable to say that the this was the only reason.

376. The Claimant had been unwell and was visibly showing signs of illness. He had said his workload had been too high and had sought adjustments. Mr Harrison's evidence was that he thought that it was a kinder explanation rather than that the relationships had deteriorated. I was satisfied that the Claimant had adduced primary facts that the mention of his wellbeing was connected to the matters arising from his disability. Mr

Harrison's evidence also confirmed that it was connected, and I was satisfied that the matters arising from the Claimant's disability were more than a minor or trivial influence and the Respondent failed to discharge its burden of proof. Accordingly, there was discrimination arising from disability.

377. The Respondent asserted that the wording of the e-mail was justified on the basis of the aim or need to inform staff of the allocation to the project. When there are changes of personnel to a project it is necessary to inform staff of those changes and to say who is carry out each role and I accepted that would be a legitimate aim or need. It was reasonable for the Respondent to say that the Claimant was moving roles, however it was not reasonably necessary for the Respondent to provide a reason which was not the true reason for the decision. Mr Harrison chose to refer to something to provide an explanation, but it gave the impression that the reason was because the Claimant was too unwell to do his job and it gave a misleading impression.

378. Further it was not proportionate to achieve the aim. The Respondent could have said that the Claimant was being moved so that he could be involved in the IntSys transformation programme, which was an area in which he had an ideal skillset. The Respondent could have also provided an explanation that they had agreed that he would move to the transformation programme. It was unnecessary to draw attention to the Claimant's health when it was not the true reason for the decision and as such it was not proportionate. Accordingly, the Respondent failed to prove that it should be availed of the defence of Justification and this part of the claim succeeded.

<u>Harassment on the grounds of disability</u>

379. The Claimant relied on the following matters as harassment related to his disability.

The conduct of Mr Bailey in the meeting on 19 April 2018, in particular the Claimant being instructed to leave the division

380. I was not satisfied that there was any behaviour in the meeting of 19 April 2018 that referred to the Claimant's disability. The Claimant was not instructed to leave the division, but was reminded that his current role was temporary and he was encouraged to look for other roles in his current division and outside. I was not satisfied that the conduct alleged had occurred. This element of the claim was therefore dismissed.

On 14 September 2018 Mr Bailey threatened the Claimant with disciplinary action and/or termination of employment. The Claimant was interrogated at length in a locked room in an aggressive manner and was directed to withdraw his grievances

381. During the meeting on 14 September 2018, Mr Bailey told the Claimant that he had to remove the threat of his grievance over Mr Harrison. The grievance was in relation to a failure to make reasonable adjustments and Mr Bailey was seeking to get the Claimant to withdraw it. After discussing the Claimant's medical condition, Mr Bailey suggested that he thought that the Claimant could be mentally ill, the Claimant suffered from 'brain fog' and tiredness as a result of his fibromyalgia. Mr Bailey discussed the Claimant's workload and told him that he might be able to find him some temporary work and that after that he would not be able to offer him any work and there would be no place for him in IntSys. I accepted that the Claimant considered that it was unwanted conduct, and it was reasonable for him to have concluded that.

382. The incident occurred because the Claimant had complained about a failure to make reasonable adjustments and was seeking to raise a formal grievance. The Claimant's 'brain fog' and tiredness made it difficult for him to work and function properly and the suggestion that he might be mentally ill was something which could be related to the mental aspects of the disability. If the Claimant had not been seeking to raise the grievance it was unlikely that the meeting would have unfolded in the way that it did. The Claimant established primary facts which, without an explanation from the Respondent, tended to suggest that the reason for the behaviour was related to the Claimant's disability. Mr Bailey denied that the events occurred and did not proffer an alternative explanation. Mr Bailey was pressurising the Claimant to remove his grievance and suggested he could be mentally ill. In the circumstances the Respondent failed to demonstrate that the conduct was not related to disability and thereby failed to discharge its burden of proof. Accordingly, the conduct was unwanted and it related to disability.

383. Mr Bailey was seeking to pressurise the Claimant into withdrawing his grievance and the conduct had the purpose of creating an intimidating environment in which to do so. Further the Claimant found the incident intimidating , hostile and offensive. It caused him to break down on a number of occasions and he found the situation threatening. In the circumstances of seeking to raise a grievance it was reasonable for the conduct to have had that effect on the Claimant .

384. Mr Bailey harassed the Claimant on 14 September 2018 and that harassment was related to his disability.

On 16 March 2018 Mr Harrison disclosed the Claimant's condition in a mass e-mail and implied that he had an incapacity to perform the work.

385. I accepted the Claimant's evidence that the reference to his wellbeing was unwanted. It was something adverse and to his detriment and therefore he succeeded in his claim of discrimination arising from disability in that respect. Under s.212 EqA detriment does not subject to subsection (5) include conduct which amounts to harassment. Accordingly, it is not possible for an incident to be both discrimination and harassment. Therefore, this claim failed.

386. If the claim for discrimination arising from disability had failed. The reference to the Claimant's health condition was unwanted conduct. It related to the Claimant's disability in that he was visibly unwell at the time and drew attention to his wellbeing. The Claimant found the reference to his health humiliating and offensive because it was not the true reason and I accepted that it had that effect on him. I would not have accepted that Mr Harrison intended it to have that effect. Accordingly in such circumstances the Claimant would have succeeded in his claim of harassment.

On 14 September 2018 Mr Bailey mocked the Claimant's fibromyalgia. Intimate details about the condition were requested, together with the medication taken and problems encountered. When this was provided Mr Bailey said, 'so is that it then' and '… there are people here with far worse disabilities than yours'.

387. For the reasons set out above, I was not satisfied on the balance of probabilities that the Claimant's fibromyalgia was mocked or that the words alleged were said. Accordingly, I was not satisfied that the alleged conduct occurred and therefore this claim was dismissed.

Direct Age Discrimination

Did the Respondent carry out the following treatment and was it less favourable than the Claimant's non-disabled comparators?

On 14 September 2018, Mr Bailey told the Claimant he was 'too old to learn', that he 'was not quite up to speed', 'set in his ways', 'not quick on the uptake like others', 'resistant to change' and 'prone to forget'.

388. I was not satisfied that Mr Bailey made references to the Claimant being too old to learn, he was not quite up to speed, set in his ways, not quick on the uptake like others, resistant to change or prone to forget. Accordingly, the Claimant failed to establish the factual basis for the allegation and therefore failed to adduce primary facts that tended to

suggest that discrimination on the grounds of age had occurred. This claim was dismissed.

On 19 April 2018 Mr Bailey said in an e-mail, "As always, your health is of primary concern; I recognise this includes rust out as well as burn out."

389. The words in the e-mail were used by Mr Bailey. The Claimant considered the term 'rust out' was a reference to being decrepit or beyond useful life. It was not a well known management term as demonstrated by Mr Sixsmith not having heard of it before the Tribunal proceedings had been bought. The word 'rust' tends to suggest something old and decayed and is not a reference to something young or new. I was satisfied that the Claimant had adduced primary facts which tended to suggest that the words 'rust out' would not have been said to a younger person.

390. Mr Bailey considered that the term 'rust out' was a well known management expression for when an employee no longer finds work interesting or challenging, leaving them lacking in motivation disinterested and ultimately disengaged. I was shown various documents in the bundle which acknowledged that it was a management term, including NHS documents. Those documents used the term 'rust out' in connection with its opposite, 'burn out', which is what Mr Bailey did in his e-mail. During the meeting the Claimant had been concerned that he would be under-tasked in the transformation role, and I accepted that Mr Bailey had this in mind and that he was concerned that the Claimant would not find the role challenging. Mr Bailey considered that this was a known management term and that it described the potential risks for the Claimant. I was satisfied on the balance of probabilities that Mr Bailey would have used the same term for any employee in the same circumstances as the Claimant, including those who were significantly younger than the Claimant. Mr Bailey used the term to describe the twin risks of being over or under worked and it was unrelated to the protected characteristic of age and the Claimant was not treated less favourably than a younger person would have been.

391. Accordingly, this head of claim was dismissed.

On 18 September 2018 Ms Singleton asked the Claimant when he planned to retire.

392. On 18 September 2018, Mrs Singleton specifically asked the Claimant to consider all of his options, including when he intended to retire. I accepted that Mrs Singleton was aware of the Claimant's age when she had the discussion.

393. The Claimant was in his 60s and therefore he was someone who could be considered to be entitled to start drawing on a pension at that time or in the relatively near future. A person in their 30s would not be in such a position as they would not be able to take a pension at that age. I was satisfied that the Claimant had adduced primary facts that tended to suggest that a younger person would not have been asked to consider when they intended to retire. The Claimant had also established primary facts that the treatment was less favourable. The Claimant was in a situation where he had raised a grievance and was very concerned about his employment with the MOD. Suggesting that someone retires and leaves is not a solution to the subject matter of the grievance, it is a means of removing the aggrieved person from the problem.

394. Mrs Singleton said that she would have asked a younger person about retirement because she would cover every option. I rejected that evidence as unlikely. Younger people at the start of their careers would not be able to consider retirement in the short term. They would not be able to draw on a pension and would generally have no form of income if they retired at that age. Mrs Singleton failed to establish that she would have treated a younger person in the same way and the Respondent failed to discharge its burden of proof.

395. The Respondent relied upon a defence of justification and in particular the aim or need to effectively manage staff and ensure effective succession planning. I accepted that they would be legitimate aims and needs of a business.

396. Mrs Singleton did not give evidence that this was the intention behind her asking the Claimant to consider it. The question was being asked in the context of asking the Claimant to consider all of his options as a means of seeking some form of resolution for him in relation to his grievances and the situation in IntSys. The Claimant was concerned about his career and had shown no indication of wanting to leave his job. In the circumstances of someone who wanted to know that his position was secure it was unreasonable to ask him to consider when he intended to retire. In the context of someone who has complained about behaviour against them to suggest that they could leave employment is not a step which is supportive or one which would address the fundamental concern. For someone who is seeking reassurance that their position and employment is safe, it is not reasonably necessary and therefore proportionate to ask if they are considering leaving. I was not satisfied that the intention was to implement the stated aim and in any event, in the Claimant's circumstances it was not reasonable and was not proportionate. The Claimant was therefore treated less favourably on the grounds of his age in this respect and this part of his claim succeeded.

Harassment related to age.

Did the following unwanted conduct occur

In a meeting on 19 April 2018, Mr Bailey said to the Claimant, words to the effect of that he was over the hill and invited him to leave his division.

397. I found as a fact that at the meeting Mr Bailey did not use words to the effect that the Claimant was over the hill. Further Mr Bailey did not invite the Claimant to leave his division. The Claimant was encouraged to look for roles to ensure his career progression, but that was inside and outside of the division. Accordingly, the factual basis of the allegation did not occur and therefore it was dismissed.

On 14 September 2018, Mr Bailey told the Claimant he was 'too old to learn', that he 'was not quite up to speed', 'set in his ways', 'not quick on the uptake like others', 'resistant to change' and 'prone to forget'.

398. I was not satisfied that Mr Bailey made references to the Claimant being too old to learn, he was not quite up to speed, set in his ways, not quick on the uptake like others, resistant to change or prone to forget. Accordingly, the Claimant failed to establish the factual basis for the allegation and therefore failed to adduce primary facts that tended to suggest that unwanted conduct related to age had occurred. This allegation was therefore dismissed.

Victimisation

Did the following treatment occur because the Claimant carried out a protected act?

On 19 April 2018, Mr Bailey effectively told the Claimant that he wanted him out of his unit.

399. Mr Bailey did not by implication or expressly tell the Claimant that he wanted him out of his unit on 19 April 2018. There was a concern that the role the Claimant was in was temporary and the Claimant was encouraged to consider all options as part of his career progression. For the reasons outlined earlier, the Claimant was not told and was not effectively told that he was wanted out of the unit. The Claimant failed to establish the factual basis of the allegation and accordingly failed to discharge the initial burden of proof and it was dismissed.

On 14 September 2018, Mr Bailey bullied, intimidated and harassed the Claimant in a meeting. On 14 September 2018, Mr Bailey instructed the Claimant to drop

his grievances against Mr Harrison. On 14 September 2018, Mr Bailey threatened the Claimant with effective dismissal if he did not drop his grievances

400. During the meeting on 14 September 2018, Mr Bailey told the Claimant that he had to remove the threat of his grievance over Mr Harrison. He also said, when the Claimant wanted to seek a resolution, 'so are you going to remove the allegation.' The grievance was in relation to a failure to make reasonable adjustments and Mr Bailey was seeking to get the Claimant to withdraw it. Mr Bailey discussed the Claimant's workload and told him that he might be able to find him some temporary work and that after that he would not be able to offer him any work and there would be no place for him in IntSys. Mr Bailey also made references to, 'if the Claimant did not make a good job of his next assignment that he would not have a job'. The meeting lasted 2 hours 20 minutes, the Claimant broke down on many occasions and he found the meeting hostile and intimidating. What was said by Mr Bailey was a threat to the Claimant's future career and was and an effective instruction to drop his grievance.

401. The Respondent submitted that the e-mail dated 17 August 2017 did not amount to a grievance on the basis that it was only an intent to raise a formal grievance. I rejected that submission. The Claimant informed Mr Harrison that he had been told to raise a grievance and was suggesting ways of trying to resolve it. Under the grievance policy employees are encouraged to try and resolve the grievance informally at first instance, which is what the Claimant was trying to do. He was raising a grievance with Mr Harrison that reasonable adjustments had not been made. Further the Claimant had said Mr Harrison had failed to make reasonable adjustments and as concluded earlier that in itself was a protected act, irrespective of whether it was a grievance. In any event the test under s. 27 is whether the person victimising the other person believes that they have done or may do a protected act. The Claimant at the very least clearly said that he was intending to raise a formal grievance. Following the meeting on 13 September 2018 Mr Harrison told Mr Bailey that the Claimant did not want to go down the informal line. On 14 September 2018 Mr Bailey told the Claimant to remove the threat of his grievance against Mr Harrison. The Claimant therefore adduced primary facts which tended to show that the Respondent considered that he might at the very least do a protected act. Mr Bailey denied that the event occurred, and the Respondent failed to discharge its burden of proof that the Claimant had not done a protected or that it did not believe he might do a protected act.

402. The specific reference to the grievance and the comments about the Claimant's future were primary facts from which it could be concluded that the threats and hostile behaviour occurred because the Claimant had done a protected act and the Claimant discharged the initial burden of proof. The

Respondent denied that the alleged acts occurred. The instruction to remove the threat of grievance was powerful evidence against the Respondent. I was satisfied that Mr Bailey was trying to get the Claimant to withdraw his grievance and he was seeking to put pressure on him to do so.

403. The treatment occurred because the Claimant had told Mr Harrison that he was going to raise a formal grievance against him and that he was seeking to initially resolve his grievance that reasonable adjustments had not been provided. The Claimant was victimised for having done a protected act and the claim succeeded.

From September 2018 to May 2019 attempted to force the Claimant to return to work in his original department, under the management of Mr Bailey

404. When the Claimant was due to return to work at the end of 2018 Mr Bollen was his line manager. After the incident on 14 September 2018, the Claimant did not want to return to a role in which Mr Bailey would be part of his line management. The Claimant had made Mrs Singleton aware of this, however she did not have any contact with the IntSys team, she was not HR and she had no influence on line management. The Claimant had also raised his grievance about what had occurred with Mr Harrison and Mr Bailey by this stage. Mr Bollen, who was the Claimant's line manager was responsible for his return to work. Although Mr Bollen inferred that the Claimant might have raised a grievance against Mr Bailey, he did not know that was the case.

405. The Claimant accepted that Mr Bollen did not know what the issue was that he had with Mr Bailey. Mr Bollen had been supportive and was trying to find the Claimant meaningful tasks. The Claimant had not said that the stress he was suffering was related to Mr Bailey, however Mr Bollen inferred that it might be and therefore tried to manage the Claimant so that he did not have direct contact with Mr Bailey. After the receipt of the outcome of the occupational health report on 2 January 2019, Mr Bollen decided that the Claimant should work from home, and he was tasked training and light duties that he could do remotely.

406. The Claimant accepted that Mr Bollen was acting in his best interests and was very kind to him. The Claimant said that this was a corporate decision; however, the return to work process was being organised by his line manager, Mr Bollen. The Claimant told Mr Bollen very little about the background. The Claimant was unable to explain how his proposed return to work was related to having raised grievances. The Claimant's view of what Mr Bollen had done was the opposite of being

victimised and he failed to adduce primary facts that tended to show that he was being returned because he had done a protected act.

407. In any event I was satisfied that Mr Bollen was seeking to assist the Claimant in a return to work in an environment in which he felt safe and when the opportunity came for the Claimant to move to DE&S he worked very hard to facilitate it. Mr Bollen worked hard to ensure that the Claimant would not come into contact with Mr Bailey, despite having no knowledge about the issues. I was satisfied that the protected acts had no influence in the decisions taken when trying to enable the Claimant's return to work and this allegation was dismissed.

Reasonable steps defence

408. The Respondent had comprehensive bullying and harassment, diversity and grievance policies, which the Claimant accepted were good. Further the Claimant accepted that the training on those policies was also good and refresher training occurred about every 2 years. The Claimant was unable to give evidence as to whether Mr Harrison, Mr Bailey or Mrs Singleton had received refresher training and the Respondent adduced no evidence in this respect. The Respondent must prove that it is availed of the defence. The Respondent had processes by which complaints could be raised and investigated, however they are only a limited deterrent effect. It is important that managers are reminded about their duties when a complaint is raised and in particularly when it is raised against them or an employee's line manager, it is an obvious risk that retaliation could follow a complaint. Refresher training is necessary to ensure that there is a robust system to ensure that proper processes are followed and employees are treated fairly and to remind managers how to behave when personally involved.

409. For the Respondent to succeed in its defence it was necessary for it to show that its policies and its training and refresher training were sufficiently robust. It adduced no evidence as to when Mr Harrison, Mr Bailey or Mrs Singleton received refresher training, if at all. It would have been reasonable for the Respondent to have provided such training to those individuals and I was not satisfied that it had done so. The Respondent failed to establish that it had taken all reasonable steps to prevent the discrimination and therefore it failed to prove that it was availed of the defence.

410. The Respondent accordingly discriminated against, harassed and victimised the Claimant as set out above.

Time

411. The allegations of discrimination and harassment found proven stemmed from an initial failure to make reasonable adjustments for the Claimant. After the failure to make adjustments, the Claimant's health deteriorated. The Claimant's health was referenced in Mr Harrison's e-mail dated 16 March 2018. The Claimant informed Mr Harrison that he had a grievance about the failure to make adjustments in August 2017 and after it was apparent that an informal approach would not be appropriate the Claimant was harassed and victimised in the meeting with Mr Bailey on 14 September 2018. When Mrs Singleton was exploring options with the Claimant shortly afterwards she suggested that he should give consideration to retiring as a means of resolving his problems. I took into account that different people were involved, however the events themselves were connected. These were not isolated specific events and were part of a discriminatory state of affairs and were a continuing course of discriminatory conduct.

412. The claims were presented out of time, the last act of discrimination occurred on 18 September 2018 and therefore the claims should have been presented by 17 December 2018. The Claimant notified ACAS of the dispute on 23 April 2019, which post-dated the primary limitation date and he does not get the benefit of any extension of time for the early conciliation period. The ACAS certificate was issued on 20 July 2020. The claim was presented on 17 June 2019 and was therefore presented 6 months out of time.

413. The Claimant had started taking advice from ACAS in about November 2017 about his situation and that he should take it further in March 2018. He was always aware that he could bring a claim. He accepted that there was nothing physically stopping him from presenting the claim, but he wanted to try and resolve the claim internally first.

414. I took into account that the onus is on the Claimant to prove that it is just and equitable to extend time and that time limits should be exercised strictly in Employment Tribunals.

415. It was significant that the Claimant was seeking to resolve a factually complex case by using the Respondent's internal procedures. He had raised his grievance within a reasonable period of time and the Respondent was investigating it. The Respondent's final investigation took more than a year to complete, and the Claimant decided to present his claim after he had considered the Respondent had taken enough time to investigate.

416. In terms of hardship and prejudice, the Claimant would be deprived of bringing a claim if time was not extended. The Respondent did not

adduce any evidence as to the hardship or prejudice it would experience if time was extended. It was notable that the respondents to the Claimant's grievance complaint were interviewed and accounts taken, the Respondent was able to call witnesses who were material to the incidents, and it was able to investigate the allegations many months before the Claimant presented his claim. The witnesses were able to provide explanations and a substantial bundle of documents was produced.

417. Taking into account that the Claimant had been trying to resolve his grievances without recourse to the Tribunal, that the grievance process took a very long time and that there was minimal prejudice, if any, to the Respondent the balance of prejudice was greater to the Claimant than the Respondent. In all the circumstances of the present case it was just and equitable to extend the time for the Claimant to present his claims and the Tribunal had jurisdiction to hear the claims.

Conclusion

418. Accordingly, the claims of detriment for making protected disclosures were dismissed. The claims of direct disability discrimination and harassment related to age were dismissed. The Claimant's claims that there had been a failure to make reasonable adjustments, discrimination arising from disability, harassment related to disability, direct age discrimination and victimisation succeeded as set out above.

419. Directions in respect of remedy were given by a separate order.

Employment Judge J Bax
Dated: 8 November 2021

Judgment sent to parties: 1 December 2021

FOR THE TRIBUNAL OFFICE