EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr T Mohammed	**v**	Crown Prosecution Service

Heard at: Reading

On: 2, 3, 4, 5, 6, 9 and 10 December 2019, 27 January 2020 (in person)
7 and 8 July 2021 (by CVP video hearing)

And in chambers on 28 June 2021, 2 July 2021, 9 July and 26 July 2021

Before: Employment Judge Hawksworth
Mr J Appleton
Mrs A E Brown

Appearances
For the Claimant: In person
For the Respondent: Ms C Hayward (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is as follows:

1. The respondent having admitted that it failed from September 2015 to make reasonable adjustments, the complaint under sections 20 and 21 of the Equality Act 2010 succeeds in that the respondent failed to make the following adjustments:

    a. Allowing the claimant to work from home for 2 days a week;
    b. Reducing the claimant's workload so as to alleviate his stress;
    c. Allowing the claimant to reduce his contractual working hours so as to enable him to finish his working day at 4pm in order that he may take the prescribed medication; and
    d. Allowing the claimant to perform some court duties, making the necessary arrangements with the court service.

2. The respondent having admitted that it subjected the claimant to discrimination arising from disability in two respects, the complaint under

section 15 of the Equality Act 2010 succeeds in that the respondent subjected the claimant to the following unfavourable treatment because of something arising in consequence of his disability:

a. removing the claimant from court duties on or around 23 February 2016; and
b. refusing or failing to take appropriate action having received reports from the respondent's Occupational Health Advisor.

3. The claimant's complaints of disability-related harassment contrary to section 26 of the Equality Act 2010 fail and are dismissed.

4. The claimant's complaints of victimisation contrary to section 27 of the Equality Act 2010 fail and are dismissed.

5. The complaints of discrimination arising from disability, failure to make reasonable adjustments and indirect disability discrimination in relation to the respondent's decision not to pay the fee for the claimant's practising certificate for 2017/2018 fail and are dismissed.

6. The remedy which the claimant should be awarded will be decided at the next hearing, notice of which has been sent separately.

REASONS

The claims and responses

1. The claimant is a barrister. He was employed by the respondent as a Senior Crown Prosecutor from October 2004.

2. This hearing was a liability hearing in three claims which are being heard together. The first (3323914/2016) was presented on 15 July 2016, the second (3325340/2017) on 13 July 2017 and the third (3327768/2017) on 9 September 2017.

3. The complaints brought by the claimant in these three claims are of disability discrimination contrary to the Equality Act 2010: discrimination arising from disability (section 15), failure to make reasonable adjustments (sections 20 and 21), indirect disability discrimination (section 19), disability-related harassment (section 26) and victimisation (section 27). In short, in the first claim the claimant complains about matters which arose following his return to work from sickness absence in 2015, and during a subsequent period of sickness absence which began in April 2016. The second claim concerns the respondent's decision not to pay the claimant's practising certificate fee while he was on long term sick leave. The third claim concerns failures by the respondent to follow occupational health advice.

4. The respondent presented its ET3 forms and grounds of resistance on 30 August 2016, 18 August 2017 and 26 October 2017.

5. Initially, the respondent defended the claims in full. In a letter dated 2 July 2019 the respondent admitted some parts of the claims. It admitted some of the complaints of failure to make reasonable adjustments and discrimination arising from disability (as explained in more detail below).

6. At this point we mention for completeness and clarity some matters which post-date the presentation of the three claims:

    6.1. The claimant presented a fourth claim against the respondent on 30 October 2019, which was given case number 3324838/2019. The fourth claim is being heard separately;
    6.2. The claimant was dismissed by the respondent on 23 April 2020;
    6.3. The claimant presented a fifth claim against the respondent on 11 August 2020 but this was rejected under rule 12 of the Employment Tribunal Rules of Procedure 2013 because it had no Acas early conciliation number and no exemption applied. That rejection is the subject of an appeal by the claimant to the Employment Appeal Tribunal.

Procedural history

7. We set out some details about the procedural history in these three claims. There have been nine preliminary hearings for case management. The main hearing was postponed four times before it began, and it was then part-heard twice.

8. The full merits hearing of the claimant's first claim was originally due to take place from 4 to 7 September 2017. The parties applied (for different reasons) for that hearing to be postponed. The postponement was granted on 31 August 2017, and the first day of the hearing was converted to a preliminary hearing for case management. A new hearing date was set for 23 to 27 July 2018, for the first and second claims to be heard together. That hearing was postponed by agreement after the third claim was presented. The full merits hearing was rescheduled for eight days between 1 and 11 October 2018. This hearing was postponed on the respondent's application, because of significant slippage in compliance with the case management orders, and was rescheduled for eight days between 20 and 30 August 2019. This date was postponed at a preliminary hearing and relisted for eight days between 3 and 11 December 2019. It was decided that the hearing would deal with liability only in relation to the three consolidated claims.

9. A preliminary hearing for case management took place before Employment Judge Hawksworth on 23 September 2019. By this stage the respondent had admitted some of the complaints. The claimant invited the tribunal to consider whether the remedy hearing in respect of the admitted complaints could take place before the liability hearing in December 2019. Employment Judge Hawksworth decided that it would not be workable or proportionate to have a remedy hearing before all issues of liability had been decided. She confirmed that the upcoming hearing in December 2019 would deal with liability only in respect of those parts of the claim which were not admitted

by the respondent, following which a remedy hearing would be held to decide the remedy to be awarded in respect of the admitted parts of the claim and any parts of the claim which succeeded at hearing.

Liability hearing

10. The liability hearing took place over 10 days with an additional 4 days in chambers. The first 7 hearing days were on 2, 3, 4, 5, 6, 9 and 10 December 2019. Although listed for 8 days, the hearing was reduced to 7 days because of judicial resourcing. The evidence was not completed in those 7 days, and the hearing restarted on 27 January 2020. It was due to continue on 28 January 2020 but was postponed because of the claimant's ill health. There was then, regrettably, a long delay as a result of delays and difficulties caused by the Covid-19 pandemic. The hearing continued on 7 and 8 July 2021. The hearing days in December 2019 and January 2020 took place in person. The hearing days in July 2021 took place by video (CVP). There were four further days on which the tribunal met in chambers (by video).

11. On the in person hearing days, we adopted an adjustment to the timing of the day, as ordered by Employment Judge Chudleigh at a preliminary hearing on 30 January 2018. The hearing days were to end at 3.00pm to allow the claimant to return home to take medication. On three of the in person hearing days the claimant asked to continue later than 3.00pm to allow him additional time for cross-examination of the respondent's witnesses.

12. At the video hearing days in July 2021 we were able to continue later than 3.00pm because the claimant was already at home. We aimed to finish at 4.00pm but the hearing finished a little later than this.

Documents for the liability hearing

13. At the hearing in December 2019 there was a bundle with 4 volumes. Volumes 1 to 3 were prepared by the respondent for the hearing in September 2017 which did not go ahead. Volume 4 was a supplementary bundle prepared by the respondent in October 2019. It included the ET1 and ET3 from the second and third claims, updated tribunal orders and correspondence and additional disclosure. Page references in this judgment are references to the bundle in the form volume/page, for example 1/20 is a reference to volume 1 page 20, 4/20 is a reference to volume 4 page 20.

14. During the course of the hearing we came across a limited number of pages in the bundle which were illegible because of photocopying issues. There were other documents which had some redactions, for example the names of defendants in criminal proceedings. We dealt with the legibility and redaction issues as they came up. Complete copies of some pages were provided at the claimant's request during the hearing. We also made case management orders in December 2019, January 2020 and April 2021 to allow the claimant to request complete copies of any illegible or redacted pages from the respondent, by specifying the page numbers.

15. During the hearing the claimant sought to rely on documents which were not included in the bundle. We made case management orders in December 2019, January 2020 and April 2021 to allow the claimant to provide the respondent with any late disclosure he wished to rely on. A fifth volume of 472 pages was prepared for the hearing in July 2021 containing additional documents supplied or requested by the claimant. References to pages in this volume are prefaced with a 5.

Preliminary issues at the liability hearing

16. The liability hearing started on 2 December 2019 but we did not start hearing evidence until 5 December 2019 because there were some preliminary matters and applications for us to deal with, as follows:

    16.1. On 2 December 2019, the first day of the hearing, we dealt with some case management issues. These included a question raised by the claimant about whether the respondent ought to have provided him with hard copy bundles. He had received hard copies of volumes 1 to 3 of the bundle some time before the hearing, but had only been provided with an electronic copy of volume 4, not a paper copy. The respondent's representative said that the claimant had requested an electronic copy, but that if he wanted a paper copy he could take the paper copy of volume 4 which had been brought for the witness table, and a further paper copy of volume 4 would be provided before the start of the witness evidence. In the course of this discussion, the tribunal explained in detail to the parties the importance of the tribunal, the parties and the witnesses having the same bundle with the same documents. The claimant took the paper copy of volume 4, but in the event, he decided to use the electronic copy of the bundle. After we had dealt with the case management issues, we took the rest of the first day for reading.

    16.2. The claimant was unable to attend the tribunal on the second day of the hearing, as he had a medical appointment which he had forgotten about and which had only come to his attention during the weekend before the hearing started. We decided to take the second day (3 December 2019) for reading as well. During the tribunal's reading, the tribunal became aware that for the period March 2017 to August 2017 the claimant had been represented by Slater and Gordon, a firm of solicitors in which the judge had been a partner and principal lawyer until May 2019, prior to her appointment as a salaried employment tribunal judge. The judge did not have any knowledge of or involvement with the case while at Slater and Gordon.

    16.3. At the start of the third day on 4 December 2019 the judge informed the parties about her role with Slater and Gordon, explained why this had come to light so late in the day and explained that she did not have any knowledge of the case or involvement with it while at Slater and Gordon. She said the panel would consider an application for recusal if either party wished to make one. The respondent had no objection. We took a break of around 15 minutes to allow the claimant

to make a phone call to seek some advice on the issue. When the parties returned to the tribunal, the claimant said that he had no objection to the judge continuing to hear the case.

16.4. The parties had agreed a timetable for the hearing and this was revised on 2 December 2019. Under the revised timetable we were due to begin hearing evidence on the morning of 4 December 2019. The parties had agreed that the first witness was to be the respondent's witness Mr Wilson (his evidence was being heard before the claimant's evidence because of Mr Wilson's limited availability). Before Mr Wilson's evidence began, we were told by the respondent's counsel that the claimant had given her a pack of documents that morning which he wanted to question Mr Wilson about. Some of those documents were not in the bundle and some had not been included in disclosure. The respondent objected to emails which had not been previously disclosed being put to the witness. The claimant said that he anticipated producing further packs of documents prior to his cross-examination of the respondent's other witnesses. There was a discussion between the judge and the parties about this, to explore whether a practical way forward could be found by agreement. During the course of that discussion, the claimant said that he thought the judge was taking a slightly harsh approach to disclosure, and that he may review his position on making a recusal application.

16.5. It was not possible to agree a way forward regarding the documents, and so the claimant made an application for permission to rely on late disclosure of the documents about which he wished to question Mr Wilson. The respondent objected to the application. We took some time to consider the application. Before we had reached a decision on the disclosure application, during an update we were giving to the parties before lunch, the claimant told us that he had reconsidered his position and he did now object to the judge hearing his case. He made an application for the judge to recuse herself. We considered the recusal application for the remainder of the day, and gave our decision on the recusal application on the morning of 5 December 2019. We refused the application and explained our reasons for reaching that decision. The claimant asked for written reasons and these were sent to the parties on 5 February 2020.

The tribunal's reading

17. On 2 and 3 December 2019 we did our reading. We read the witness statements and the documents that were referred to in the witness statements. We also read some documents from the bundle that the parties expressly suggested at the outset of the hearing that we should read:

17.1. Composite List of Issues and respondent's admission letter of 2 July 2019;

17.2. Claim forms and responses, further particulars and amended grounds (tab A, bundle 1 and tab A, bundle 4)

17.3. Medical documents (tab C, bundle 3)

17.4. Grievance documents (bundle 4, informal and formal grievance, investigating officer's report, grievance appeal stage 1 and outcome, grievance appeal stage 2 and outcome).

Evidence

18. We started hearing evidence at 10.30am on 5 December 2019. (Of the original 8 day time allocation, there were only 4 days remaining.)

19. Mr Wilson was no longer available and so we decided that we would hear the claimant's evidence first. We reserved our decision on the disclosure application until after the claimant's evidence. We heard the claimant's evidence on 5 and 6 December 2019. The timetable for the hearing was revised again on 6 December 2019.

20. After the claimant's evidence, we gave our decision on the claimant's application for permission to rely on late disclosure. We refused the application and explained the legal principles and our reasons for refusing the application. We said that if the claimant was intending to produce further documents, he should do so as soon as possible and he should explain why the documents were being produced late. We said we would consider any further application to rely on late disclosure in accordance with the legal principles we had explained. The claimant asked for written reasons of the refusal of his disclosure application. These were sent to the parties on 15 January 2020.

21. After the claimant's evidence and the decision on the disclosure application, we heard from the following witnesses for the respondent:

    21.1. On 6 December 2019: Anne Phillips;
    21.2. On 9 December 2019: Mark Bishop, Sarah Duffy;
    21.3. On 10 December 2019: Wendy Cottee, Manjit Bath and Spencer Golding.

22. The witness evidence was not completed in the time allocated. By the end of the hearing on 10 December 2019, three of the respondent's witnesses and the claimant's witness (his wife) were still to give evidence. The respondent's three witnesses had already attended the hearing to give evidence but had been unable to do so because of the revisions to the timetable. One witness (David Crook) had travelled from four hours away and had stayed overnight in Reading but had not been able to give evidence. Another (Trevor Badenhorst) had attended for four days in the expectation of being able to give his evidence but without being able to do so.

The continued liability hearing

23. With the agreement of the parties, a further 4 days were listed for the continuation of the hearing, on 27, 29, 30 and 31 January 2020. The tribunal made case management orders for the conduct of that hearing including orders for the claimant to make a written request to the respondent if he

wanted to ask for complete copies of any other pages, or if he wanted other documents to be included in the bundle, and for the claimant to send the respondent any late disclosure.

24. On 1 January 2020 the claimant made an application for postponement of the hearing on medical grounds. He sent further evidence on 16 January 2020 including a letter from his GP. The application was not granted. The tribunal wrote to the claimant on 23 January 2020 on the direction of the judge to say that additional medical evidence would be required for a postponement on grounds of ill health. The tribunal said that the claimant's application did not comply with the Presidential Guidance of 4 December 2013 on postponements, because the GP's letter did not include a statement that the claimant was, in the doctor's opinion, unfit to attend the hearing, and it did not give a prognosis or an indication of when (if the claimant was considered by the doctor to be unfit to attend the hearing) he was likely to be fit to attend a hearing. The claimant wrote to the tribunal on the same day to say that he would ask his GP to provide an update and prognosis. No further medical evidence was received.

25. No postponement having been granted, the hearing started again on 27 January 2020. The claimant did not attend. We waited until 10.30am before starting the hearing and considering how to proceed. We had no medical opinion as to whether the claimant was unfit to attend the hearing. The respondent's witnesses had attended to give evidence having been unable to do so on a number of previous occasions. Mr Crook had again stayed overnight. Two of the witnesses, Mr Badenhorst and Mr Crook, were giving evidence about matters which were largely recorded in emails or other documents. The other witness, Paul McGorry, was giving evidence on a discrete point, about one conversation which formed part of the claimant's harassment complaint.

26. We decided to postpone the hearing until 1.00pm and then hear the evidence of the respondent's witnesses who had attended, and give the claimant the opportunity to recall those witnesses later if he had cogent reasons for doing so. We would then postpone the remaining three days and arrange new dates for the claimant's wife's evidence, submissions and tribunal deliberation.

27. The tribunal administration called and emailed the claimant to let him know that the hearing would be going ahead at 1.00pm. The claimant did not respond and he did not attend. The hearing started again at 1.00pm. We heard the evidence of Mr McGorry, Mr Badenhorst and Mr Crook. Mr McGorry and Mr Crook confirmed their statements (other than providing updated job titles). Mr Badenhorst confirmed his statement and clarified a point about one paragraph of his statement.

28. Lastly, we relisted the remainder of the hearing and made case management orders and a provisional timetable for the first day. The case management orders included:

28.1. New dates for the claimant to comply with the case management orders from December 2019;
28.2. An order for the respondent to provide a supplemental statement for Mr Badenhorst dealing with the clarification he provided about his statement; and
28.3. an order for the claimant to request with reasons the recall of any of the respondent's witnesses who gave evidence on 27 January 2020.

29. The three remaining days of the liability hearing were re-listed for 2, 3 and 4 March 2020. In February 2020 the claimant made an application to postpone those dates for medical reasons. His application was accompanied by a letter from his GP which said that the claimant was unfit to attend court during the period 16 January 2020 to 9 March 2020. The application was allowed and, on the direction of the judge, the tribunal wrote to the parties on 28 February 2020 asking for dates to avoid during the period 23 March 2020 to 30 June 2020 or (if the claimant was unfit to attend a hearing during this time) further medical evidence about when he was likely to be fit.

30. This postponement took place very shortly before the first national lockdown for covid-19. In a letter dated 26 March 2020, the claimant wrote to the tribunal to say that he was in a high risk category, that he would be very unlikely to be able to attend a tribunal hearing until the level of risk reduced, and that he would struggle to comply with the orders set out in the 28 February 2020 letter from the tribunal. He also asked the tribunal to strike out the respondent's responses or to order a remedy hearing. On 21 June 2020 the claimant provided a fit note from his GP which said that he was not fit to attend court. In July, August and October 2020 the respondent wrote to the tribunal to ask for a preliminary hearing by telephone or video to be arranged to list the further hearing days required. Unfortunately the parties' correspondence was not referred to a judge, very probably because of the demands on the tribunal administration as a result of Covid-19.

31. On 12 November 2020 the tribunal administration wrote to the parties apologising for the delay in listing the hearing and explaining that the tribunal was facing significant delays due to Covid-19. The parties were asked to provide dates to avoid for the period January 2021 to July 2021. In March 2021 the liability hearing was listed to continue on 26, 27 and 28 July 2021.

32. A preliminary hearing for case management took place on 23 April 2021 before Employment Judge Hawksworth. The dates for the continued liability hearing were brought forward at the respondent's request, to 7, 8 and 9 July 2021. The judge decided that it was in line with the overriding objective to move the hearing to these slightly earlier dates. It meant that the case would be heard sooner, which was in both parties' interests, and that the hearing could take place before the date which was likely to be the start of the respondent's counsel's absence on maternity leave. (The claimant expressed concern about having sufficient preparation time for a hearing starting on 7 July 2021, as there was a public preliminary hearing listed for 7 June 2021 in his fourth claim, which is being heard separately. The judge

told the claimant that consideration could be given to moving the preliminary hearing in the fourth claim, and gave directions for the claimant to apply if he wanted to ask for a postponement of that hearing. In the event, the public preliminary hearing on 7 June 2021 was converted to a private preliminary hearing for case management for other reasons, and the claimant did not apply for it to be postponed.)

33. At the preliminary hearing on 23 April 2021, new dates were set for the case management orders for the claimant to request copies of any illegible or redacted pages, to provide late disclosure and to request the recall of any of the respondent's witnesses who gave evidence on 27 January 2020.

34. At the same preliminary hearing, Employment Judge Hawksworth refused the claimant's application for a remedy hearing to be held before the continuation of the liability hearing. After the preliminary hearing, she also gave written decisions in respect of a number of other applications by the claimant to vary previous case management orders.

35. Before the hearing restarted on 7 July 2021, the claimant made a request of the respondent for complete copies of around 250 pages from the bundle, and provided additional disclosure and documents for inclusion in the bundle. The respondent provided the claimant and the tribunal with:

    35.1. a 17 page bundle including a response to the request for illegible/redacted bundle pages and some copy pages; and
    35.2. a volume of 472 pages containing the claimant's additional documents ('volume 5').

36. The claimant made an application for all three of the respondent's witnesses who had given evidence on 27 January 2020 to be recalled, and this was granted.

37. Before the hearing restarted, the tribunal met (by video) in chambers on 28 June 2021 and 2 July 2021. Because of the length of time which had passed since the hearing in January 2020, we re-read all the witness statements, all the documents we were asked by the parties to read as part of our pre-reading at the start of the hearing in December 2019, and notes of the evidence of all the witnesses we heard in December 2019 and January 2020.

38. The hearing on 7 and 8 July 2021 was arranged as a hybrid hearing. The parties, representatives and witnesses chose to attend by video. After dealing with preliminary matters and timetabling issues at the start of the hearing, we heard evidence from the respondent's witnesses, Mr Badenhorst on 7 July 2021 and Mr Crook and Mr McGorry on 8 July 2021. The claimant was intending to call his wife, but the respondent's counsel confirmed that she did not have any questions for the claimant's wife on liability, and so she did not give evidence. Her evidence will be heard at the remedy hearing.

39. We heard oral submissions from the respondent's counsel and from the claimant on the afternoon of 8 July 2021. Both parties had also provided detailed written submissions 7 days before the hearing restarted. The claimant's written submissions included some documents and were 241 pages long, the respondent's counsel's written submissions were 45 pages long.

40. The tribunal deliberated in chambers on 9 and 26 July 2021. The tribunal regrets the length of time it has taken for this judgment to be promulgated. It reflects the complexity of the case, the number of issues to be determined, the detailed submissions made, and the current pressures of work in the tribunal.

41. A remedy hearing has been listed for 16 and 17 June 2022 and case management orders have been made for that hearing.

The admitted complaints

42. The issues to be decided by the tribunal in these three claims were agreed by the parties and set out in a document called 'Composite List of Issues'. This was attached to the case management orders made after the preliminary hearing on 23 September 2019 (pages 4/93E to 4/93H). The composite list of issues was based on the earlier agreed list of issues prepared by the parties for the first claim (page 1/96), amended to include issues arising from the second and third claims.

43. In the letter of 2 July 2019, the respondent admitted a complaint brought as part of the first claim (paragraphs 9 to 14 of the agreed list of issues in the first claim (page 1/97)) of a continuing failure from September 2015 to make the following reasonable adjustments:

    43.1. Allowing the claimant to work from home for 2 days a week;
    43.2. Reducing the claimant's workload so as to alleviate his stress;
    43.3. Allowing the claimant to reduce his contractual working hours so as to enable him to finish his working day at 4pm in order that he may take the prescribed medication;
    43.4. Allowing the claimant to perform some court duties, making the necessary arrangements with the court service.

44. The respondent accepted that the claimant's third claim was also covered by the admissions of 2 July 2019. That amounts to an admission of unfavourable treatment contrary to section 15 of the Equality Act, namely a continuing refusal or failure to take appropriate action having received reports from the respondent's Occupational Health Advisor (page 4/38 to 4/43).

45. During submissions at the hearing before us, the respondent's counsel accepted that the respondent's admission of 2 July 2019 also encompasses the complaint of discrimination arising from disability (section 15 of the Equality Act 2010) in respect of the first claim (paragraphs 4 to 9 of the

Composite List of Issues) in which the unfavourable treatment was the removal of the claimant from court duties on or around 23 February 2016. Liability in respect of that complaint is therefore now admitted, and is no longer for us to decide.

46. The complaints which were set out in paragraphs 9 to 14 of the agreed list of issues in the first claim (page 1/97), paragraphs 4 to 9 of the composite list of issues (page 4/93E) and the third claim are therefore no longer in dispute between the parties. Judgment has been given for the claimant in respect of those complaints.

The issues for us to decide

47. The issues on liability which remain for us to decide are therefore as set out below. (We have retained the original numbering from the Composite List of Issues, for ease of reference.) We have not included the remedy issues as these will be decided at the hearing in June 2022.

Jurisdiction

1. Are any of the claims outside the time limits set down by s.123 Equality Act 2010?

2. If so, is it just and equitable for the Tribunal to extend time?

Disability (second claim only)

3. Did the Respondent have knowledge of the Claimant's disability (depression/anxiety) before April 2016, or alternatively, ought the Respondent to have known about the Claimant's disability (Second and Third Claims only)?

Discrimination arising from disability s.15 Equality Act 2010

4. to 9. *First Claim – now admitted*

Second Claim

10. Was the Respondent's decision not to renew the Claimant's practising certificate whilst he was on long term sick leave unfavourable treatment, having regard to the Respondent's policy that the practising certificate would be renewed on a pro rata basis when a return to work date was identified. It is accepted by the Respondent that the Claimant's long term absence from work arose in consequence of his disability.

11. In the event the Tribunal finds that Claimant was subjected to unfavourable treatment because of something arising in consequence of his disability, was the treatment a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent is not incurring the cost (at tax payer's expense) of the practising certificate fee for lawyers who

are employed to work only for the Respondent, when the lawyer is off work and not in a position to practice, and when there is no detriment to the lawyer in not having the practising certificate whilst they are not able to work.

Reasonable Adjustments (s.20 Equality Act 2010)

Second Claim

12. The provision, criteria or practice (PCP) relied on by the Claimant is the practice of renewing practising certificates.[1]

13. The comparator relied on by the Claimant is those who are not disabled but also on long term sick.

14. Did the PCP relied on by the Claimant place him at a substantial disadvantage in comparison with non-
disabled persons? The substantial disadvantage advanced by the Claimant is (i) the Respondent has averred that the practising certificate of employees on long term sick absence due to a disability is not renewed compared to employees that are on long or short term sickness for another reason (ii) compared to other prosecutors he can no longer call himself a barrister and/or employed as a Senior Crown Prosecutor. The Respondent will aver that the Claimant was not placed at a substantial disadvantage compared to those who do not share his disability.

15. The reasonable adjustment contended for by the Claimant is that the Respondent should have paid the practising certificate fee. The Respondent denies that this is a reasonable adjustment, and if so one that would have removed the disadvantage.

Indirect discrimination (s.19 Equality Act 2010)

Second Claim

16. The provision, criteria or practice (PCP) relied on by the Claimant is as set out at paragraph 12 above.

17. The particular disadvantage, when compared with someone who does not share the Claimant's disability, relied on by the Claimant is as set out at paragraph 14 above. The Respondent will aver that the PCP did not put the Claimant at a particular disadvantage when compared with someone who does not share his disability as he would be unable to practice anyway whilst he was off sick and the practising certificate would be renewed on a pro rata basis when he returned to work.

18. In the event the Tribunal finds that Claimant was subjected to a particular disadvantage, was the PCP a proportionate means of achieving a legitimate

[1] See paragraph 8 of the claimant's Response to Orders document sent on 15 January 2018 (page 4/66).

aim? The Respondent will rely on the legitimate aim identified at paragraph 11 above.

Harassment - First Claim only

19. The Claimant alleges that the Respondent engaged in the following conduct:

a. In or around 28 July 2015, two colleagues (Mr Nicholas Wilson and Ms Manjit Bath) ganging up and disposing of the Claimant's water bottles in the First Floor, Guildford office. Witnessed by Caroline (Police staff, Civil);
b. In or around August 2015, Paul McGorry made derogatory comments about the Claimant's medication side effects due to his bowel issue in the following (or similar) terms "do you have to bloody do that in here" alleged at paragraph 24.2.3.3 of the Grounds of Claim;
c. Between 1 - 10 September 2015, the Claimant was bullied and harassed by Mark Bishop (emails) to travel to Brighton when he knew or ought to have known the Claimant is unable to travel because of his medical condition alleged at paragraph 24.2.3.5 of the Grounds of Claim;
d. On 29 September 2015, Wendy Cottee removed his effects (including work papers) and put them in a mobile drawer [unit] and told the Claimant to sit outside (referring to a communal working area);
e. On or around 8 October 2015, Mark Bishop knowingly misled the Court that the Claimant was the prosecutor when one failed to attend;
f. On numerous occasions, Spencer Golding (in charge of the rota), has failed to update the rota or changed it at the last moment without informing the Claimant;
g. On or about 8 October (one occasion), Spencer Golding made a false claim to Anne Phillips that he was AWOL;
h. Between 3 July 2015 and February 2016, Anne Phillips repeatedly delaying to provide reasonable adjustments as alleged at paragraph 24.1 of the Grounds of Claim;
i. Failure to deal with the Claimant's grievance (presented on or about 8 March 2016) as alleged at paragraph 25 of the Grounds of Claim.

20. Did these events occur as alleged or at all?

21. If so, was such conduct unwanted?

22. Did they relate to disability?

23. If so, did it have the purpose or effect of:

a. Violating the Claimant's dignity? Or
b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

24. If it did [have that effect], was it reasonable to have that effect?

25. Whether the Respondent took such steps (as set out at paragraph 64(v) of the Amended Grounds of Resistance) as were reasonably practicable to prevent the employee from acting as they did/doing anything of that description?

Victimisation – First Claim only

26. Did the Claimant do a Protected Act? The Claimant relies on the following matters:

a. Complaints against Anne Phillips in various meetings and emails on 1 September 2015, 13 November 2015 and 24 November 2015;
b. The Grievance he submitted on or about 8 March 2016

27. Did the above matters happen as alleged or at all (the Respondent accepts that the Claimant submitted a grievance)?

28. The Respondent accepts that the Grievance does amount to a Protected Act. Whether the other meetings and emails amount to a Protected Act?

29. The Claimant complains of the following treatment:

a. On or around 18th March 2016, Anne Phillips accused the Claimant of failing to review the cases to the standard expected as alleged at paragraph 24.2.4 of the Grounds of Claim;
b. From on or about February 2016 refused overtime as alleged at paragraph 24.2.3.4 of the Grounds of Claim;
c. On or around 4th March 2016 Anne Phillips accused the Claimant of being rude and stormed out of a meeting with the Claimant in the Guildford office;
d. Failing to investigate complaints he made against other prosecutors, Nick Wilson, and Manjit Bath made on 28 July 2015, against Mark Bishop and Spencer Golding made on 26 October 2015, and against Staines Security staff and a police officer made on 19 November 2013, which still remained outstanding on 20 November 2015;
e. From 1- 10 September 2015, demanding the Claimant travel to Brighton as alleged at paragraph 24.2.3.5 of the Grounds of Claim;
f. From 18 February 2016 to 4 March 2016, micro-managing and scrutinizing the Claimant's work, referring every case the Claimant decided to discontinue as alleged at paragraph 24.2.4 of the Grounds of Claim;
g. Failure to update, change or inform the Claimant of changes to the rota in respect of:

i. Hospital Appointments - On 1 December 2015, 15 December 2015, 18 December 2015, 10 February 2016 and 2 March 2016;

ii. Meeting with Anne Phillips on 4.11.2015 and Caroline Mitchell on 24.11.2015, 1 December 2015 and 18 December 2015;
iii. Court Deployment – on 7 October 2015, 8 October 2015, 28 January 2016 and 13 February 2016, 28 January 2016, and 5 March 2016.

30. Did such treatment occur as alleged or at all?

31. Was it a detriment?

32. Was it because:

a. The Claimant did a Protected Act? or
b. The relevant person believed the Claimant had done, or may do, a Protected Act?

33. Whether the Respondent took such steps (as set out at paragraph 64(v) of the Amended Grounds of Resistance for the First Claim) as were reasonably practicable to prevent the employee from acting as they did/anything of that description?

Interim payment application

48. We also have to decide an application by the claimant for an interim payment and injunction. The claimant raised this at the end of the liability hearing but there was insufficient time for it to be dealt with, so, with the consent of the parties, case management orders were made for the application to be dealt with in writing. The claimant made a written application, the respondent responded in writing. We deal with this application below, starting at paragraph 308.

Findings of fact

49. We make the following findings of fact. We do not attempt to summarise here all of the evidence we heard and read over the course of the hearing. We record our findings of fact on those matters which we found most helpful to decide the remaining issues of dispute between the parties.

50. In setting out our findings, we have kept the events in chronological order as far as possible, while grouping our findings to reflect the issues we have to determine.

51. The claimant was employed by the respondent as a Senior Crown Prosecutor from October 2004.

52. By 2013/2014 the claimant was based at Guildford and deployed to Staines, Redhill and Woking. On around 19 November 2013 the claimant made a complaint about the court security staff and a police officer at Staines Court.

The claimant's ill health

53. In October 2014 the claimant had a heart attack and had to take sick leave. The respondent's Occupational Health provider (OH) reported to the respondent on 19 January 2015 that the claimant was unfit for work at that time, because of the severity of his symptoms, and that his condition was likely to be a disability (page 1/121).

54. As part of the claimant's treatment for his heart condition, he has to take a particular medication at a regular time each day. The side effects of this medication mean that he has to remain at home for several hours after taking the medication.

The claimant's return to work

55. The claimant returned to work in March 2015. The claimant's manager at the time was David O'Driscoll. When he first returned to work, the claimant had no court duties. He worked in the office on case reviews. Mr O'Driscoll did not expect the claimant to complete the normal review caseload during this time. This working arrangement enabled the claimant to return home to take his medication at 4.00pm.

56. In May 2015 the claimant felt ready to return to some court duties, and Mr O'Driscoll agreed that the claimant would do court duties 3 days a week and work from home 2 days a week (page 1/141). Mr O'Driscoll agreed that the court duties would be at Guildford Magistrates Court as this was close to the claimant's home and meant that, with a 4.00pm finish, he could get home shortly after 4.00pm to take his medication.

57. At lunchtime on 29 May 2015 the claimant was asked by the magistrates' clerk to take a case which would have required him to stay later than 4.00pm. The claimant explained to the magistrates and the clerk that he was not able to stay late for medical reasons, but they insisted he must take the case. In the event the case did not proceed for other reasons, but the claimant found the discussions very stressful and was concerned about whether in future he would be allowed to finish at 4.00pm on days he was working at court.

58. The day after this incident, the claimant collapsed at home. He was admitted to hospital and diagnosed with unstable angina due to work related stress. At around this time a MRI scan revealed a heart defect which required further surgery. The claimant had a further period of sickness absence from 1 June 2015 to 22 June 2015 when he returned to work.

59. After he returned to work the claimant worked in an office based role, including work on a team managed by Mark Bishop called Transforming Summary Justice (page 1/170).

60. The claimant's line manager changed in July 2015 when Mr O'Driscoll left. From 15 July 2015 the claimant's line manager was Anne Phillips. Ms

Phillips was not as experienced a manager as Mr O'Driscoll and she found managing the claimant more difficult than Mr O'Driscoll had.

The water bottle incident

61. On 28 July 2015 there was an incident at work at the CPS Guildford office. The office operated hot-desking and, to make this work, staff were required to clear the desk they had been using when they finished working, so that it was available for someone else to use. This was sometimes referred to as a 'clear desk policy'.

62. When Manjit Bath, a Senior Crown Prosecutor, arrived for work in the morning on 28 July 2015, she noticed that the desk the claimant had been using previously was untidy. There were four or five used Evian water bottles scattered on the desk, some of which still had some water in them. Another Senior Crown Prosecutor, Nick Wilson, arrived shortly afterwards and Ms Bath commented to him about the messy desk. Mr Wilson cleared the desk by putting the bottles in the rubbish bin.

63. When the claimant arrived at work he was very upset that his water bottles had been thrown away. There was a brief but heated discussion between the claimant and Mr Wilson. Mr Wilson explained that he thought the bottles were rubbish. He offered to buy the claimant some more water. The claimant raised his voice during this conversation and his attitude was confrontational. Ms Bath intervened, saying that no-one should leave desks messy. The claimant said she was misguided in her support of Mr Wilson, and equally to blame. The exchange made Ms Bath uncomfortable, and she left the office and worked from home for the rest of the day.

64. Neither Mr Wilson nor Ms Bath knew any details about the claimant's heart attack, his medication or any side effects of his medication.

65. Later that day the claimant made a complaint to his manager Ms Phillips about the incident (page 1/165). She spoke to the claimant and Mr Wilson. She sent the claimant an email on 7 September 2015. She said that Mr Wilson accepted that he should not have thrown the claimant's water away, but that the claimant should leave the desk he had been working at clear at the end of the day (page 1/197). We find that the delay in dealing with this complaint is likely to have been because Ms Phillips was a new manager and needed to seek advice on the matter.

The quiet room conversation

66. Another of the claimant's complaints concerns a conversation between him and Mr McGorry, another Senior Crown Prosecutor. The claimant said that this took place in around August 2015. Mr McGorry said he thought it was more likely to have been April 2016. We consider that Mr McGorry's recollection of the date is more likely to be accurate because he explained that the claimant began sitting near him shortly after the police had moved

out of the Guildford office, and he knew that move took place in February 2016. (Nothing turns on the difference in recollection of the date.)

67. While most of the Guildford office was open plan, there were some separate areas. Mr McGorry sat in a small separate room which was originally the charging room and was referred to as the quiet room.

68. After the police moved out of the Guildford office, there was more space in the quiet room and the claimant began sitting there from about February 2016. After two or three days of the claimant working in the room, Mr McGorry noticed that the claimant had flatulence. He did not know why. Mr McGorry was aware that the claimant had had a heart attack but he was not aware of what medication the claimant was taking or that flatulence was a side effect of the medication.

69. There were repeated incidents of flatulence in the quiet room. On one occasion Mr McGorry asked the claimant, 'Do you have to do that Tarique?' The claimant said it was due to his medication. Mr McGorry asked if he could step outside to do it. The claimant said that he could not. The conversation ended there. Neither Mr McGorry or the claimant mentioned the matter again.

70. The claimant found the short discussion embarrassing but was not obviously upset and did not make any complaint about the incident (prior to providing further particulars in the context of his tribunal claim).

Travel to Brighton for training

71. Mark Bishop was a District Crown Prosecutor based in Brighton. In April 2015 he took over management of the Transforming Summary Justice team. From about July 2015 the claimant was doing some work for the Transforming Summary Justice team. Mr Bishop was not line managing the claimant but he was overseeing that work.

72. On 1 September 2015 Mr Bishop emailed the claimant to ask him to come to Brighton for a meeting on 3 September 2015 so that Mr Bishop could run through some new procedures, in particular a new police file monitoring form and a new resource efficiency model (page 1/194). As these were new procedures, the claimant would not have been briefed on them previously.

73. At around this time, on 2 September 2015 Ms Phillips told Mr Bishop that the claimant had an OH appointment in Southampton (page 1/190).

74. The claimant did not check his emails in time to see Mr Bishop's email before 3 September, and so he did not attend the meeting (page 1/195). The claimant and Mr Bishop agreed to meet on 9 September 2015 at 2.00pm instead (page 1/195). Mr Bishop was not aware of the arrangements that the claimant and Mr O'Driscoll had agreed for the claimant to return home by 4.00pm to take his medicine. The claimant did not mention these arrangements to Mr Bishop.

75. At 17.14 on the evening of 8 September 2015 the claimant emailed Mr Bishop to say that he thought the meeting would have to be re-arranged as he had not been able to find out who was responsible for authorising his travel to Brighton and had not organised his travel tickets (page 1/202). At 18.02 he emailed Mr Bishop again to say that he was not able to attend because of the travel arrangements (page 212). It is clear from the chronology that the reason the meeting had to be cancelled was because the claimant had not taken steps to make his travel arrangements in time.

76. On 10 September 2015 Mr Bishop emailed the claimant to say that he was disappointed to note that the appointment of 9 September 2015 was the second appointment the claimant had failed to keep (page 1/212). The claimant replied by email. The claimant's email was confrontational in tone, apparently in reaction to Mr Bishop's comment that he had failed to attend two appointments. He said that it appeared that Mr Bishop was not familiar with his medical condition and that he did not appreciate Mr Bishop's language (page 1/211). He said that Mr Bishop appeared to be biased, that he would appreciate it if Mr Bishop used more professional language, and that it was not courteous for Mr Bishop, who was not his line manager, to think he could summons him.

77. Mr Bishop replied by email on the same day (page 1/210). He said that he did not think his language was unprofessional. He explained that he was leading the team the claimant was working on and the claimant's line manager had been copied in to the emails. He said that the claimant had not raised any health problems with travelling. He said there were to be some changes to his and Ms Phillips' roles, and that they would consider who would line manage the claimant and let him know. Mr Bishop did not repeat his request for the claimant to attend a meeting in Brighton.

78. Mr Bishop was not aware of the claimant's requirement to be at home from 4.00pm for medical reasons or of any restriction on travel which arose from this. He was aware that the claimant had had a heart attack but he was not aware of any other details of the claimant's condition or medication.

Hot-desking issues

79. On 17 September 2015 when the claimant attended the office he found that some things he had left on a desk had been moved. He asked the group in general who had moved his things. Wendy Cottee, a Crown advocate, said that all the desk were hot desks. She said someone else had moved the claimant's things. He asked why the person who moved his things hadn't just sat at another desk. Ms Cottee said she was just the messenger and didn't want to argue with the claimant. The claimant said he wasn't arguing and just wanted to know why his things were moved and perhaps get a response from others that it was not appropriate to move things. After this exchange the claimant moved his things back to the desk where they had been, and carried on working.

80. On 29 September 2015 Ms Cottee was working in a small separate room when the claimant came in towards the end of the day. He asked if he could sit at a neighbouring desk which had some things on it. Ms Cottee said that the desk was being used by her colleague. She pointed out a desk the claimant had been using previously which still had his things on. There were no other spare desks in the room. The claimant became agitated. There was a short but heated exchange during which the claimant raised his voice and in response Ms Cottee did as well. The claimant asked, 'Is this going to be the norm?'. Ms Cottee said that Mr Bishop had told her that all the desks were hot desks. She pointed to the general seating area and said there were plenty of other empty desks there.

81. The claimant said that both of these discussions happened on 29 September 2015. We find that there were two different incidents, because this is what the claimant recorded in an email he wrote at the time (page 1/223).

82. Ms Cottee did not know any of the detail of the claimant's heart condition at the time these incidents happened.

The rota for court on 8 October 2015

83. Since his return to work from sick leave on 22 June 2015, the claimant had been doing office based work only. An OH report of 7 September 2015 said that the claimant could now do court duties with adjustments. At a meeting on 11 September 2015 the claimant told Ms Phillips that he felt well enough to return to court duties. It was agreed that his court duties would initially be limited to trial courts at Guildford court only, to ensure a manageable case load and to limit the need to travel (page 1/219). He returned to court duties on 21 September 2015 (page 1/253).

84. On the morning of 8 October 2015 Mr Bishop was contacted by a clerk at Guildford Magistrates' Court. She was expecting the claimant at court that day but he had not arrived. She was concerned about him as he had not been well the previous week, and she wanted to send a police officer to his home address to check on him (pages 1/246 and 1/249). Mr Bishop arranged for another prosecutor to attend court (page 1/245A). He made enquiries about the claimant's home address and was given the address by the respondent's Area Operations Centre (page 1/248). By the time Mr Bishop had the address, a police officer had already attended the claimant's home and had established that the claimant was fine. It is not clear how the police officer found the claimant's home address, but it was not provided by Mr Bishop.

85. There was a dispute between the parties as to whether it was correct that the claimant was on the rota to attend court in Guildford on 8 October 2015. We set out first some background about how the rota worked.

86. The respondent's magistrates' court rota is prepared by Spencer Golding, the resource and deployment manager for the respondent's South East

Area. It is essentially a table which allocates prosecutors for court duties at each of the magistrates' courts in the area. It is put together a week in advance and once the rota is completed, an email is sent to let everyone involved know that the rota for the forthcoming week is ready to view online on the respondent's intranet. The rota was described to us as a 'living document'. This means that if changes have to be made to the rota, for example because trials are discontinued, or because of staff sickness, they are made on the online document. The respondent's practice was that prosecutors were notified by email of changes if the change was to the next working day. Prosecutors were expected to check the online rota regularly to ensure they were aware of any changes made more than one day in advance. When the claimant was about to return to court duties in September 2015, Ms Phillips reminded him of this in an email on 11 September 2015 (page 1/219). Prosecutors were also told that they should not save or print copies of the rota (because that would mean they may not have an up to date version). The way in which the rota is updated online as needed means that earlier versions of the rota are not routinely retained by the respondent.

87. In relation to the dispute about 8 October 2015, the claimant said that he was not rota'd to attend Guildford Magistrates' Court on that day. He relied on a copy of the rota which showed his duties from 21 September 2015 to 9 October 2015. It showed that he was in court 2 in Guildford on 7 October 2015 and in the office on 8 October 2015 (pages 1/252 and 1/258). He said that the lack of a prosecutor in Guildford Magistrates' Court on 8 October 2015 must have been caused by another prosecutor failing to attend or by a mistake with the rota which Mr Bishop and/or Mr Golding sought to cover up by blaming him.

88. Mr Golding said that the claimant was rota'd to attend Guildford Magistrates' Court on 8 October 2015. He said that the claimant was originally scheduled to attend court on 7 October 2015 and the office on 8 October 2015 but the rota had been changed. However, the hearing on 7 October 2015 had been cancelled on 1 October 2015, and so the claimant was scheduled for court on 8 October 2015 instead. This change was recorded in an exchange of emails between the magistrates' court, Mr Golding and Ms Phillips on 1 October 2015 (page 4/596). Mr Golding said that the rota had been changed, and the claimant must have saved or printed the rota before this change, and then relied on the earlier version instead of viewing the up to date rota online. There was a further change to the rota on 8 October 2015, when the claimant did not attend court, after which the previous rota was no longer available.

89. We decide disputes of fact by deciding what we think is most likely to have happened, considering the evidence we have heard and read. The rota is 'live' and the respondent does not keep copies of previous versions to record every change, and so there was no copy document illustrating definitively that the claimant was allocated to attend court on 8 October 2015. However, we find that it is most likely that Mr Golding changed the rota on 1 October 2015 and that the claimant was rota'd to attend Guildford Magistrates' Court

on 8 October 2015, not 7 October 2015. We reach this finding because it is consistent with the email exchange between Mr Golding and Ms Phillips, and because the magistrates' court clerk was expecting the claimant on 8 October, which suggests that the rota was changed as anticipated in the email exchange. Also, the copy rota the claimant relied on showed his duties starting from 21 September 2015, which suggests that it was saved or printed before that date, in other words before the hearing on 7 October 2015 was cancelled. We find that the copy rota the claimant had was out of date, and so he was not aware that he had to attend court on 8 October 2015. We find therefore that it was the claimant's error with the rota which led to his failure to attend court on 8 October 2015 when he should have done. We do not find that Mr Bishop or Mr Golding lied to or misled the court in any way.

90. In an email to Mr Bishop and Ms Phillips on the afternoon of 8 October 2015 about the claimant's copy of the rota, when Mr Bishop was trying to establish what had happened, Mr Golding raised the question of whether the claimant had attended the cancelled hearing on 7 October 2015 (page 1/265). He said:

> *"I am guessing he did not attend court yesterday and if so, why did he not make contact when he discovered there was no court sitting??!!"*

91. On 26 October 2015 the claimant wrote to Ms Phillips as he wanted to explain in detail his version of events surrounding the 8 October 2015 incident (page 1/278). The claimant said, and we accept, that he had in fact attended Guildford Magistrates' Court on 7 October 2015 and, when he discovered that the hearing in the courtroom to which he had been allocated had been cancelled, he covered another courtroom (page 1/281).

92. Later, in a grievance letter concerning Mr Golding, the claimant said that it was a matter of 'concern and regret' that Mr Golding had 'participated with [Mr Bishop's] plot' regarding 7 and 8 October 2015 (page 2/306). In his formal grievance, the claimant requested an apology from Mr Golding for suggesting that he was AWOL (absent without leave) on 7 October 2015 (page 4/555).

<u>Other changes to the rota</u>

93. As explained above, the respondent's practice was that prosecutors were only notified by email of rota changes if the change was to the next working day. Changes further in advance were expected to be identified by the prosecutor checking the online rota.

94. An example of a late rota change was 29 October 2015. Mr Golding changed the rota for this day because the prosecutor originally on the rota for this day was unable to attend because of a medical appointment (page 1/287). Mr Golding allocated the duty to the claimant instead and informed the claimant of the change by email at 09.02 the day before (page 1/288).

95. The claimant said that on numerous occasions, Mr Golding had failed to update the rota or had changed it at the last moment without informing the claimant (issues 19f and 29g). Our findings of fact about the changes relied on by the claimant are as follows:

    95.1. Hospital appointments: 1, 15 and 18 December 2015: The claimant advised Ms Phillips of hospital appointments on these days and she said she would inform Mr Golding (pages 2/404, 2/399 and 2/426). The 1 December 2015 appointment was recorded on the rota. On 14 December 2015 the claimant complained to Ms Phillips that the rota had not been changed to reflect either of his appointments on 15 and 18 December 2015. We find that there was a delay in recording the 15 and 18 December appointments on the rota. The 18 December 2015 hospital appointment had not been recorded in the rota by 8 December 2015 (page 2/420).

    95.2. 10 February 2016: The claimant was recorded on the rota as attending a medical appointment on this day, but this was not correct. On 9 February 2016 the claimant asked Mr Golding if he could take the day as annual leave instead (page 2/506).

    95.3. 2 March 2016: the claimant had a hospital appointment at 16.00. Ms Phillips said that she would expect the claimant to be in the office before the appointment (2/559). The rota showed him as working in the office.

    95.4. Meetings: 4 November 2015: On 22 October 2015 Ms Phillips asked the claimant to attend a meeting with her on 4 November 2015 and said she would ask Mr Golding to keep the claimant in the office that day (page 2/296). However, the claimant was allocated court duty on 4 November 2015. On 3 November 2015 the claimant informed Mr Golding that he could not cover court duty as he had a meeting with Ms Phillips. Mr Golding initially told the claimant that he was unable to alter the rota as he had no other prosecutors available, but then an agent became free so the claimant's rota was changed to office on 4 November 2015 (page 2/298).

    95.5. 24 November 2015: the rota correctly showed the claimant as attending a meeting with Caroline Mitchell on this day. The claimant requested annual leave on this day, after being notified of the meeting, but this was not granted (page 2/390 and 2/399).

    95.6. 1 December 2015: as explained above, the rota correctly recorded that the claimant had a hospital appointment on this date.

    95.7. 18 December 2015: Ms Mitchell asked Mr Golding if he could remove the claimant from the court rota for this day, as she wanted to meet with him (page 2/419 and 2/420). However, he had a hospital appointment on this day as previously notified to Ms Phillips.

    95.8. Court deployment: 28 January 2016 Mr Golding made a mistake in the rota for this day. The claimant was not allocated to court on 28 January 2016 when he should have been because it was the

second day of a two day trial. Mr Golding informed the claimant of the error on the afternoon of 27 January 2016 and corrected the rota (2/480).

95.9. 13 February 2016 and 5 March 2016: these were Saturdays. The claimant had included these two days when asked to express a preference for Saturday working (pages 2/556F and 2/556G). He assumed that he would be on the rota for the days he had identified, however, he had not in fact been allocated work on both of these days (pages 2/556C and 2/556D).

96. There were therefore five occasions when there was an error or delay with the rota (4 November 2015, 15, 18 December 2015, 28 January 2016 and 10 February 2016). These were either errors caused by Ms Phillips not passing on information to Mr Golding, or by Mr Golding not entering the information (or a combination of the two).

97. The claimant found the errors frustrating, and stressful but we find that they did not have the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Complaints about the claimant by Guildford Magistrates' Court

98. On about 5 November 2015 Ms Phillips received a detailed email from a clerk at Guildford Magistrates' Court raising a number of issues and concerns about the claimant's behaviour and conduct at court (page 2/309). The clerk asked about the claimant's health issues and said that if adjustments had been put in place for him, the court should have been informed and the respondent should have arranged cover for him when he was unable to work. The clerk went on to say that secondly and 'perhaps more concerningly is his demeanour and attitude'. The clerk gave an example of an occasion when the claimant shouted at the bench and the legal adviser, 'probably through frustration because things were not going his way'. The email also said that there was 'a feeling that [the claimant] does not want to conduct any trial and will make decisions to crack them or not proceed which seem surprising.' (A cracked trial is a trial where, on the trial date, the prosecution offers no evidence or accepts a plea from the defendant.) The email included extracts from three email complaints by magistrates about the claimant's conduct, case handling and preparation.

99. Portia Ragnauth, the Deputy Chief Crown Prosecutor, asked Laura Witten, a District Crown Prosecutor, to conduct a fact finding exercise about the complaints (page 2/312). Following that exercise Caroline Mitchell was appointed to carry out a formal investigation into the complaints (page 2/380). Her final report was produced on 10 March 2016 (page 2/622). She concluded that there was a case to answer in relation to the complaints about the claimant's attitude and demeanour, and about his decision making. She recommended that a full investigation be carried out under the respondent's disciplinary procedure.

100. Ms Phillips was notified of another complaint against the claimant on 23 March 2016 (page 2/659). This was a complaint by police that a witness in a case dealt with by the claimant on 28 January 2016 had been offended by the claimant's attitude. The claimant was told about the complaint on 11 April 2016 and was told that it would also be investigated by Ms Mitchell.

Delays in providing reasonable adjustments

101. The respondent has admitted that it failed to make adjustments for the claimant. The claimant also complains that delays in providing reasonable adjustments during the period 3 July 2015 and February 2016 amounted to harassment by his line manager Ms Phillips. We set out below our findings of fact in relation to the delays in providing reasonable adjustments.

102. Ms Phillips became the claimant's line manager on 15 July 2015. In early August 2015 she made a referral for an up to date OH report (page 1/172). The respondent's OH doctor provided the report on 7 September 2015 (page 1/198). He said that the claimant was "fit for work within limitations, eg his start/finish times may need to be modified; his workload may need to be adjusted so that he only deals with his cases; some home-working may also help him."

103. The respondent's HR advisor for the South East Area replied to the doctor on 9 September 2015 seeking clarification on a number of points (page 1/203 and 1/221). The doctor replied on 21 September 2015 (page 1/221). The HR advisor forwarded the report to Ms Phillips on 30 September 2015 (page 1/226).

104. Ms Phillips emailed the claimant on 6 October 2015 and 22 October 2015 to ask him to a meeting to discuss the OH report (page 1/242 and 1/289). He said he was hoping the meeting would be sooner (page 1/277). Other commitments and Ms Phillips's lack of availability prevented an earlier meeting.

105. The claimant sent a document headed 'Reasonable adjustments' to Ms Phillips on 3 November 2015 (page 2/299). In this document the claimant set out the reasons he had been seeking reasonable adjustments to enable him to continue to do his job. The claimant and Ms Phillips met on 4 November 2015 to discuss reasonable adjustments and Ms Phillips sought advice on his request from the HR advisor (page 2/304).

106. Ms Phillips replied to the claimant on 13 November 2015 to say that he had to return to his full time contracted hours from 17 November 2015. She suggested that they meet again on 24 November 2015 (page 2/355). At the meeting the claimant explained to Ms Phillips what reasonable adjustments he felt should be made to support him in his role.

107. After the meeting Ms Phillips wrote to the claimant on 27 November 2015. She said that a reduction in the claimant's contractual working hours was not a reasonable adjustment that could be made and that she was unable

to agree to working from home because she did not accept that his disability required it. She suggested that the claimant move to an office based role with a permanent desk in a quiet part of the office. She said that the claimant should apply for flexible working (under the respondent's Flexible Working Policy) if he wished to reduce his hours (page 2/403). The discussions around the claimant having a permanent desk were prompted by the various issues which had arisen around the claimant's use of hot-desks as explained above.

108. The claimant replied on 21 December 2015 (page 2/429). He provided further clarity on the adjustments he was seeking and made an alternative proposal that he continue with the current pattern of 2 days at home and 3 days at court with a finish time of 4.00pm. Ms Phillips replied to the proposal in an email on 15 January 2016 (page 2/457). She said she could not agree to the claimant finishing court at 4.00pm and that she could not agree to home working.

109. Ms Phillips and the claimant met to discuss reasonable adjustments again on 4 February 2016. Ms Phillips said that from 23 February 2016 the claimant would move to work on a team called the Not Guilty and Plea team (page 2/501). This did not require the claimant to attend court. Ms Phillips said that another OH report would be obtained.

110. On 10 February 2016 Ms Phillips confirmed the claimant's working arrangements including his new role, workload and the availability of flexi-time (a flexible start/finish times policy which applied to all staff) (page 2/510). She said that now that the police had moved out of the Guildford office, she was confident that the claimant would be able to find a quiet spot to work.

Overtime and work issues

111. On 28 and 29 January 2016 the respondent emailed staff including the claimant to invite them to express an interest in working weekend overtime to clear a back log of case reviews (page 2/481 and 2/483). The claimant expressed an interest at 7.35pm on 29 January 2016, which was a Friday night. The claimant's email was too late for that weekend, but Ms Phillips replied to say that she would let the claimant know if overtime was available the following weekend (page 2/483). On 5 February 2016 Ms Phillips told the claimant he would not be required to work overtime that weekend, but she said he should let her know if he wanted to work overtime the next weekend (page 2/503). The claimant replied to say that he did wish to work overtime the next weekend (page 2/504).

112. On 12 February 2016 Mr Badenhorst advised Ms Phillips that because of the claimant's health condition, the claimant's GP should be asked to confirm whether the claimant was able to work weekend overtime (page 2/513). The claimant told Ms Phillips that his GP had said there was no reason why he could not do overtime, unless he did not feel up to it. Ms

Phillips approved overtime for the claimant the following weekend (page 2/516). The claimant worked the weekend of 13/14 February 2016.

113. When she became the claimant's line manager and took over supervision of his work, Ms Phillips had some concerns that the claimant seemed too ready to discontinue cases. (This was one of the concerns raised in the complaint from Guildford Magistrates' Court in November 2015, page 2/453.) Ms Phillips had raised this with Ms Ragnauth. In February 2016 Ms Ragnauth said that any decision by the claimant to discontinue a case should be authorised by someone at Ms Phillips' level (page 2/489A). Ms Phillips told the claimant about this requirement on 10 February 2016 (page 2/510).

114. On 15 February 2016 the claimant emailed Ms Phillips to ask for approval for his recommendations to discontinue 7 of the 16 cases he had reviewed during his weekend overtime working (page 2/529). On 17 and 18 February 2016 Ms Phillips emailed the claimant about one of the reviews because she had come across a sentence that she did not understand (page 2/533). The claimant replied and explained what he had meant to say, which was that the work should be completed by another team. Ms Phillips replied to say that it was the claimant's responsibility to complete the work, as the case had been allocated to him.

115. On 18 February 2016, having looked at some of the other cases in which the claimant was recommending discontinuance, Ms Phillips emailed the claimant to say that she was concerned that the claimant may not be clear as to the expectations for a file review, and she said that there may be a training need. She said she could not allow the claimant to do overtime at present because the work he had produced was not of a satisfactory standard. She said that once these issues had been addressed, she would agree to the claimant working at the weekend again (page 2/535). In a later email of the same day, Ms Phillips raised some other concerns about the work the claimant had done over the weekend, and said she would organise some training so that the claimant was 'equipped to deal with cases fully' (page 2/537).

116. On 25 February 2016 the claimant was absent from work. When Ms Phillips queried this, the claimant said that he had been unwell and had intended to text her to let her know this, but he had sent his text to a hospital appointments number in error. He asked to do some overtime to catch up on the work that he missed (page 2/545 and 2/547). Ms Phillips declined to authorise overtime. The work that the claimant had been allocated for 25 February had been reassigned.

117. On 1 March 2016 the claimant told Ms Phillips he would not be in the office the following day because of a hospital appointment. He forwarded details of the appointment from which Ms Phillips could see that the appointment was in Guildford at 4.00pm. She said that she saw no reason for him to be absent all day if his appointment was not until 4.00pm and was near the office. She said that she would need details of all forthcoming hospital

appointments (page 2/559). She suggested that they meet on 4 March 2016. The claimant replied to say that he felt Ms Phillips was over managing him and it was making him feel harassed. He said that it was fine to speak on 4 March 2016 but he would not be interrogated (page 2/558).

118. On 4 March 2016 the claimant met with Ms Phillips. She asked that he work one day a week in Brighton with the rest of the Transforming Summary Justice team. The claimant refused to agree to this. Ms Phillips said that the claimant had been taken off court advocacy work as a reasonable adjustment. The claimant said that this was not a reasonable adjustment and that Ms Phillips had not responded appropriately to his medical needs.

119. There was a factual dispute about how the meeting ended. The claimant said that Ms Phillips accused him of being rude and stormed out of the meeting. Ms Phillips did not accept that she stormed out. She said that she told the claimant that she considered his attitude towards her to be rude, and that she was going to wind up the conversation because of that. Ms Phillips sent an email to the claimant later on 4 March 2016, at 3.41pm, recording their meeting. She wrote that the claimant's 'tone has been rude and I have felt unable to continue my conversation with you' (page 2/561). We accept that Ms Phillips' account as recorded in her contemporaneous email is likely to be accurate. We have found that on other occasions when upset, the claimant raised his voice and was confrontational and we find that it is likely that he took a similar approach on this occasion. We think that in describing Ms Phillips as 'storming off', the claimant was intending to convey that Ms Phillips brought the meeting to an early end because she felt he was being rude.

<u>The claimant's grievance complaints</u>

120. We go back slightly in the chronology here, to explain events relating to the claimant's grievance complaints. At the claimant's meeting with Ms Phillips on 4 November 2015 the claimant said he wanted to make a grievance complaint (page 2/304). He handed her a document headed 'Letter of Informal Grievance Against Mark Bishop and Spencer Golding and general issues' (page 2/305).

121. The claimant took some time to consider whether he wanted to proceed with his complaint of 4 November 2015. On 21 December 2015 he told Ms Phillips that after considerable thought he had decided to pursue the complaint (page 2/430). On 22 January 2016 Ms Phillips told the claimant that he would need to complete the grievance form to progress his grievance (page 2/473). The claimant completed a formal grievance form against Mr Bishop and Mr Golding on 15 February 2016 (page 4/555). The grievance was initially being dealt with by Ms Phillips but, when the claimant began a formal grievance against Ms Phillips on 8 March 2016, a new manager had to be appointed to consider the grievance against Mr Bishop and Mr Golding. The claimant was told about the appointment of the new manager on 11 April 2016 (page 2/655).

122. The claimant's formal grievance against his line manger Ms Phillips was dated 7 March 2016 but the claimant sent it to HR on 8 March 2016 (page 2/570 and 2/565). This grievance was about Ms Phillips' failure to grant the reasonable adjustments the claimant had requested.

123. Ms Ragnauth wrote to the claimant on 15 March 2016 to acknowledge receipt of the grievance and to tell him that David Crook had been appointed as Investigating Officer (page 2/582). At the time Mr Crook was a solicitor and Crown Advocate for CPS North East based at Middlesbrough.

124. The claimant was on leave from 19 March 2016 and Mr Crook waited for him to return from leave before contacting him. Mr Crook emailed the claimant on 29 March 2016 suggesting a meeting at Guildford on 14 April 2016 (page 2/603).

125. On 1 April 2016, Mr Crook emailed the claimant to say that he would have to re-schedule the grievance meeting because of a family bereavement (page 2/605). Both Mr Crook and the claimant then had leave booked and Mr Crook had a serious firearms trial which started on 16 May 2016 (page 2/613). On 7 April 2016 Mr Crook suggested 24 or 25 May 2016 for the meeting.

126. The claimant replied on 11 April 2016 (page 2/640). He requested a copy of the grievance policy timescale. On 13 April 2016 the claimant was signed off sick for five weeks (page 2/668). Mr Crook was not told that the claimant was on sick leave.

127. Mr Crook send a link to the policy on 14 April 2016 (page 2/670). In his reply to Mr Crook the following day, the claimant said that he was on sick leave. He said he was not able to attend on either of the proposed dates, due to ill health. He said he hoped to meet Mr Crook when he was well and back to work (page 2/669).

128. Mr Crook sought advice from the respondent's HR advisor Trevor Badenhorst, following which it was agreed that Mr Crook would take no further action until he heard from Mr Badenhorst again (page 2/680). The claimant's earlier grievance against Mr Bishop and Mr Golding was put on hold at the same time.

129. By 15 July 2016 when the claimant's presented his first employment tribunal claim (which included his complaints about the grievance process), the claimant was still on sick leave, and no further steps had been taken to progress either of the claimant's grievances. For completeness, we include here some more details about what happened with the claimant's grievances after the presentation of his claim about the grievance.

130. While the claimant was absent on sick leave and his grievances were paused, Mr Badenhorst checked in with the claimant and asked whether he wanted to continue with his grievance, for example on 21 October 2016 and

on 8 December 2016 (pages 3/850, 3/871 and 3/869). The claimant did not want to go ahead.

131. On 31 March 2017 the respondent's OH advisor said that resolution of the claimant's grievance against his line manager as soon as possible would be likely to benefit his health (page 3/990). Mr Badenhorst arranged for the investigation of the grievance to be resumed. Melanie Trust was appointed as investigating officer on 29 June 2017 (page 4/519) because Mr Crook's commitments at the time preventing him from continuing in the role.

132. Ms Trust's report into the claimant's grievances is dated 23 January 2018 (page 4/554). It is a detailed report, 37 pages long with 17 annexes (a further 83 pages). Ms Trust found that while Ms Phillips had made some reasonable adjustments for the claimant, including arranging an office based role to allow more control over start and finish times, Ms Phillips did not make the reasonable adjustments recommended by OH. She found that Ms Phillips 'allowed her perception of the claimant as a poor performer to dictate her response', and that she approached the OH advice 'through the prism of this being a problem with poor performance, as opposed to disability' (page 4/538). Ms Trust highlighted that this had happened during a period of significant change within the respondent, and that Ms Phillips, who was new to the role and to line management and under significant work pressure, needed support and guidance (page 4/552). Ms Trust also concluded that it was reasonable to believe that the claimant was confrontational in his approach. She recommended that Ms Phillips should have management training including on managing performance and disability.

133. Ms Trust's findings form the basis for the admissions by the respondent in respect of some of the claimant's complaints.

134. Ms Trust also dealt with the claimant's grievance against Mr Bishop and Mr Golding. She did not uphold any of the claimant's complaints against Mr Bishop or Mr Golding.

135. On 5 March 2018 the claimant submitted an appeal against the outcome of the grievance investigation. The appeal was heard by Tim Cole. He met with the claimant on 3 April 2018. A second stage appeal was heard by Paul Stimson. This was, as provided for in the respondent's grievance policy, a paper based review only. Neither appeal was upheld.

<u>The claimant's practising certificate fee</u>

136. We go back again in the chronology at this point, to explain our findings of fact which relate to the claimant's practising certificate.

137. Practising barristers, including those who work for the respondent, must have a practising certificate which is issued by the Bar Standards Board. It is the responsibility of each individual barrister to ensure that they are authorised to practise. The practising certificate year runs from 1 April to 31 March and renewal normally takes place in March each year, although the

certificate itself expires on 30 April, giving an extra month's grace if there is any delay in renewal.

138. The respondent pays the practising certificate fee for those practising barristers who it employs, as those barristers practise exclusively on behalf of the respondent. This payment is processed centrally by CPS Pay and Benefits section, as a block fee payment.

139. The Bar Council has advised the respondent that barristers who are on long-term sickness absence or other absence such as career breaks or maternity leave should suspend their practising certificates, and then re-register on their return to work. They can then renew their practising certificate for the remainder of the year at a reduced fee for the part year.

140. In light of this advice, the respondent does not pay for practising certificates for employed barristers who are on long term absence. The respondent manages public funds and cannot justify incurring the expense of renewing practising certificates for those of its barristers who are not at work. An individual barrister employed by the respondent who is not actually working might however, if they wanted to, choose to renew their practising certificate and pay the fee themselves.

141. In the claimant's case, renewal of his practising certificate for 2015/2016 took place in March 2015 and the respondent paid the fee in full. This payment was made at a time when the claimant had been on sick leave since October 2014. However, in January 2015 the claimant had told his line manager (Mr O'Driscoll) that he would like to return to work in March 2015 if possible, and gradually work back up to full-time hours (page 1/120). It seems clear that although the timescale could not be predicted exactly, the respondent reasonably understood that the claimant would be returning to work in the coming months.

142. The following year, 2016/2017, the claimant was at work at the time of renewal of practising certificates in March 2016. The fee for his certificate was again paid in full by the respondent.

143. On 16 February 2017, before the start of the 2017/2018 practising certificate year, the respondent's pay and benefits officer sent an email to each of the respondent's areas. She explained what was required for the block fee payment process, and asked to be provided with the names of barristers who '*are/will be on maternity leave, career break etc or who are due to leave CPS before or after 1 April 2017'* (page 4/114). The finance manager for the South East area replied on 1 March 2017 giving the names of barristers who had left and two barristers (one of whom was the claimant) who were on long term sick leave (page 4/112 and 4/115).

144. At this time the claimant had been off work since 13 April 2016. His most recent sick note was dated 24 February 2017 and was for three months, meaning that he would be unfit to return to work until at least 24 May 2017

by which time his period of sickness absence would be more than one year (page 3/971).

145. The respondent did not pay for the claimant's practising certificate fee for the 2017/2018 year.

146. On 28 March 2017 the claimant contacted the respondent's HR advisor to say that the fee for his certificate had not been paid by the respondent and that there was a deadline of 31 March 2017. Sarah Duffy, an HR Business Partner looked in to this and advised that the claimant did not need to worry about the practising certificate until he returned from sick leave. At that point his certificate would be reactivated. It could be processed once a return date for the claimant's return to work was known, and the process would only take a couple of days (page 4/116).

147. On 30 March 2017 the HR advisor for the South East area informed the claimant that he should contact the Bar Council to unregister and then register again before his return to work. The re-registration would generate a practising certificate and payment for the part-year remaining (page 4/121).

148. The claimant did not unregister. He informed the Bar Council that he wanted to maintain his practising certificate whilst on sick leave. On 11 April 2017 a Bar Council records officer contacted the respondent to enquire whether the respondent would be paying the fee for the claimant (page 4/124).

149. On 12 April 2017 Ms Duffy advised that, in line with usual practice for staff on long-term sickness, the respondent would not renew the claimant's practising certificate until there was a date for his return to work. She said that once there was a return to work date, the respondent could immediately initiate payment and renew the practising certificate (page 4/132).

150. In an email of 12 April 2017 the Bar Council told the claimant that he could pay the fee himself or suspend his practising certificate until the date of his return to work was confirmed (page 4/15). The claimant changed his status to unregistered barrister on or about 2 May 2017.

151. The Bar Council subsequently wrote to the claimant about his authorisation to practice between 1 and 2 May 2017 (this was a period after the expiry of the grace period for the previous year, but before the claimant changed his status to unregistered barrister).

152. The claimant returned to work on 24 September 2018. He was dismissed by the respondent on 23 April 2020.

The law

153. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010.

Discrimination arising from disability

154. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:

a. A treats B unfavourably because of something arising in consequence of B's disability, and
b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

155. There are therefore four elements to section 15(1):

i. there must be unfavourable treatment;
ii. there must be something that arises in consequence of the claimant's disability;
iii. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
iv. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

156. The EHRC Employment Code says that unfavourable treatment should be construed synonymously with 'disadvantage'. In Williams v Trustees of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230, SC the Supreme Court held that little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in section 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions of the Equality Act. It accepted that the EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage section 15.

Indirect discrimination

157. Section 19 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Reasonable Adjustments

158. The Equality Act also imposes on employers a duty to make reasonable adjustments. The duty comprises three requirements. Here, the first requirement is relevant, this is set out in sub-section 20(3). In relation to an employer, A:

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

159. Paragraph 20(1)(b) of Schedule 8 of the Equality Act provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage.

Harassment

160. Under section 26 of the Equality Act, a person (A) harasses another (B) if

> *"a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *b) the conduct has the purpose or effect of –*
> *i) violating B's dignity, or*
> *ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

161. Because of the focus on the effect of the conduct (as an alternative to considering its purpose), lack of intent is not a defence to complaints of harassment.

162. In deciding whether conduct has the effect referred to, the tribunal must take into account:

> "*a) the perception of B;*
> *b) the other circumstances of the case;*
> *c) whether it is reasonable for the conduct to have that effect."*

163. There are therefore subjective and objective elements to the test but overall the criterion is objective, the tribunal being required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for them to do so (Richmond Pharmacology v Dhaliwal [2009] IRLR 336.

Victimisation

164. Victimisation is another type of discrimination which is prohibited under the Equality Act. Under section 27:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because*
>
> *B does a protected act…"*

165. 'Protected act' is defined in section 27(2). It includes:

> *"(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."*

Overlap between the different types of discrimination

166. Section 212(1) of the Equality Act provides that detriment does not include conduct which amounts to harassment. Therefore any conduct which amounts to harassment cannot also amount to a detriment for the purpose of a direct discrimination or victimisation claim.

167. This means that a finding of direct discrimination or victimisation cannot be made in respect of conduct which is held to be unlawful harassment.

168. There is no similar provision in respect of a failure to make reasonable adjustments and harassment.

Burden of proof

169. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

> *"(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) This does not apply if A shows that A did not contravene the provision."*

170. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of disability. If there is a prima facie case and the explanation for

that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

171. If the burden shifts to the respondent, the respondent must then provide an explanation which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability. The respondent would normally be expected to produce cogent evidence to discharge the burden of proof.

172. Finally, the tribunal must adopt a holistic rather than fragmentary approach. This means looking not only at the detail of the various individual acts but also stepping back and looking at matters in the round.

Conclusions

173. We have applied these legal principles to our findings of fact and reach the following conclusions on the issues we have to decide. We have set out our conclusions in a different order to the list of issues, as we found it more helpful to follow the chronology as far as possible. We have first dealt with the issue of disability. We have next considered the harassment and victimisation allegations, then the complaints which relate to the failure to pay the practising certificate fee (complaints of discrimination arising from disability, failure to make reasonable adjustments and indirect discrimination). We have left the question of time limits (jurisdiction) to the end. Finally, we have dealt with the claimant's application for an interim payment/injunction.

Disability

174. In his first claim the disability relied on by the claimant is his heart condition. The respondent admits both that the claimant was disabled within the meaning of section 6 of the Equality Act, and that it had knowledge of his heart condition.

175. In his second claim, the claimant relies on his heart condition and depression. Again, the respondent accepts that the claimant was disabled at the material time by reason of his heart condition, and that it had knowledge of that condition. As to depression, the respondent admits that the claimant was disabled by reason of depression at the time the decision not to renew the claimant's practising certificate was taken.

176. There are no complaints that remain in issue in the third claim, so there is no need for the tribunal to consider whether the claimant was disabled by reason of his depression for the period complained of in his third claim (2015/2016).

Harassment

177. The conduct which the claimant alleges amounts to harassment is set out in the consolidated list of issues at paragraph 19, sub-paragraphs a to i. We

have considered these in turn. In respect of each allegations, we need to consider our findings of fact and whether we have found the conduct to have occurred as alleged, then consider whether the conduct as we have found it to have occurred was unwanted conduct related to disability with the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

a. In or around 28 July 2015, two colleagues (Mr Nicholas Wilson and Ms Manjit Bath) ganging up and disposing of the Claimant's water bottles in the First Floor, Guildford office.

178. We have found that Mr Wilson did clear a desk in the office by throwing away four or five used water bottles, some of which still had some water in them. The bottles belonged to the claimant and had been left overnight. Ms Bath intervened in the discussion between the claimant and Mr Wilson, because she felt that the claimant's attitude was aggressive. We would not describe these interactions as Mr Wilson and Ms Bath ganging up on the claimant.

179. The conduct was unwanted. The claimant was very unhappy that his water bottles had been moved.

180. We have considered whether the conduct related to disability. There was nothing to suggest that it was. The claimant said in his supplemental witness statement that he had been diagnosed with plantar fasciitis and told to drink plenty of water. He does not rely on plantar fasciitis as a disability. There was no medical evidence before us to suggest that the claimant was required to drink plenty because of his disability (his heart condition) or that Mr Wilson's disposal of the claimant's used water bottles or Ms Bath's intervention were connected in any way with the claimant's heart condition. Neither of them were aware of any details of the claimant's medication or any side effects.

181. In a working environment where people are required to share desks, there is always a risk of friction being caused by personal items being left on desks. The unwanted conduct arose in that context, and was not related to disability.

182. For completeness, we have gone on to consider the remaining elements of the legal test. The respondent accepted that the claimant's subjective view was that the incident created a hostile environment for him. However, we agree with the respondent that it was not reasonable for the incident to have that effect. We take into account in reaching that conclusion the fact that the claimant had left his things on a desk overnight in a hot-desking workplace, that the bottles were disposable bottles even though they were not finished with, that Mr Wilson offered to replace the bottles and that the claimant raised his voice to Mr Wilson. We agree with Ms Bath that the way the claimant responded in this situation was an overreaction. There had been no discussions prior to this about the claimant having a permanent desk.

183. This conduct did not amount to disability-related harassment because it was not related to disability and, further, it was not reasonable for it to have had the required effect on the claimant.

b. In or around August 2015, Paul McGorry made derogatory comments about the Claimant's medication side effects due to his bowel issue in the following (or similar) terms "do you have to bloody do that in here" alleged at paragraph 24.2.3.3 of the Grounds of Claim;

184. We have found that Mr McGorry asked the claimant, 'Do you have to do that Tarique?' The claimant said it was due to his medication. Mr McGorry asked if he could step outside to do it. The claimant said that he could not. Neither Mr McGorry nor the claimant mentioned the matter again.

185. We conclude that the exchange amounted to unwanted conduct.

186. The conduct did relate to disability because the claimant's flatulence was a side effect of medication the claimant was taking because of his heart condition. Mr McGorry was not aware that it was disability-related, but knowledge of disability is not a requirement under section 26.

187. However, the conduct did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Mr McGorry's questions to the claimant were not asked with the purpose of violating the claimant's dignity or creating such an environment. He was not aware of the link with the claimant's medical condition. The questions did not have that effect either: we have found that the claimant found the discussion embarrassing but he was not obviously upset and did not make any complaint about the incident prior to providing further particulars in the context of his tribunal claim.

188. Even if Mr McGorry's questions had had the required effect on the claimant, it would not have been reasonable for them to do so. It was not an unreasonable question to ask, when there had been repeated incidents of flatulence in a small office. Although knowledge of disability is not a requirement under section 26, we consider it to be a relevant consideration when looking at the context of the comments, which is important in complaints of harassment; there was no indication in the way the questions were asked to suggest that Mr McGorry was aware that the claimant's flatulence was related to disability. There was a very brief one-off discussion, and the questions were expressed in a neutral way. Mr McGorry did not discuss the matter again. In those circumstances, it was not reasonable for the discussion to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

189. Therefore this conduct did not amount to disability-related harassment because it did not have the required purpose or effect and if it had the required effect, it was not reasonable for it to do so.

c. Between 1 - 10 September 2015, the Claimant was bullied and harassed by Mark Bishop (emails) to travel to Brighton when he knew or ought to have known the Claimant is unable to travel because of his medical condition alleged at paragraph 24.2.3.5 of the Grounds of Claim;

190. We have found that Mr Bishop asked the claimant to attend a meeting with him in Brighton on 3 September 2015, and that the meeting was then rescheduled to 9 September 2015. We have not found that Mr Bishop knew or ought to have known that the claimant was unable to travel because of his medical condition. Rather, we have found that Mr Bishop did not know about the claimant's need to be home by 4.00pm to take medication. The claimant did not mention any difficulty travelling to Brighton when the meetings were being arranged. Mr Bishop was aware that the claimant was able to travel to Southampton for his OH appointment.

191. We do not consider Mr Bishop's conduct to amount to unwanted conduct. His emails were reasonable management requests sent as the manager of a team on which the claimant was working. The meetings he proposed were to ensure that the claimant was updated on some recent developments to assist with his work. Mr Bishop was offering support and training with a role, which is very far removed from conduct which it would have been apparent was unwelcome or to which anyone could have objected. The claimant agreed to attend and corresponded with Mr Bishop about arrangements without suggesting that there was any problem with him attending a meeting in Brighton. There is no suggestion from the claimant's email responses to Mr Bishop prior to 10 September 2015 that Mr Bishop's emails were unwanted conduct.

192. Also, Mr Bishop's conduct did not relate to disability. After the claimant raised issues with travel because of his health, Mr Bishop did not try to rearrange the meeting in Brighton.

193. Even if the conduct had related to disability, it did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Mr Bishop's emails to the claimant did not have the purpose of violating the claimant's dignity or creating such an environment. He was making a reasonable request to the claimant without being aware of any medical issue the claimant had with travel. As reasonable management requests, the emails also did not have such an effect. That seems very clear from the content of the emails and the way in which the claimant responded to them prior to 10 September 2015, without raising any concerns. If the emails had had that effect on the claimant, it would not have been reasonable for them to do so. Mr Bishop's emails were attempts to ensure that the claimant was properly trained and could carry out his work effectively, and it was not reasonable for those emails to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

194. The emails did not amount to bullying or harassment. They were not unwanted conduct, they did not relate to disability, they did not have the required purpose or effect on the claimant and if they had had that effect, it would not be reasonable for them to have done so.

d. On 29 September 2015, Wendy Cottee removed his effects (including work papers) and put them in a mobile drawer [unit] and told the Claimant to sit outside (referring to a communal working area);

195. We have not found that Ms Cottee moved the claimant's things and put them in a drawer. We found that Ms Cottee told the claimant that all the desks were hot desks and that someone else had moved the claimant's things from a desk so that they could use it. We have not found that Ms Cottee told the claimant to sit outside. We have found that (on another occasion) when the claimant was looking for a desk to use, she told him that there were plenty of other empty desks. We have found that on this occasion Ms Cottee raised her voice in response to the claimant raising his.

196. The conduct which we have found to have taken place on both occasions was unwanted. The claimant was unhappy about his things being moved and was unhappy about being unable to find a desk, and this prompted unwanted exchanges on both days.

197. Ms Cottee's conduct was not related to disability at all. Ms Cottee was not aware of any of the details of the claimant's heart condition (although in any event knowledge is not a factor). This was a further example of friction between colleagues being caused by the hot-desking system.

198. For completeness, we have gone on to consider the remaining elements of the legal test. The respondent accepted that the claimant's subjective view was that the incident created a hostile environment for him. However, we agree with the respondent that it was not reasonable for the incident to have that effect. We take into account in reaching that conclusion the hot-desking arrangements applied to the claimant and to all staff (there had been no discussion about a permanent desk for the claimant at this stage) and the fact that the claimant raised his voice first, causing Ms Cottee to respond in a similar way. It was the claimant's conduct which led him to perceive that there was a hostile environment.

199. This conduct did not amount to disability-related harassment because it was not related to disability and, further, it was not reasonable for it to have had the required effect on the claimant.

200. We have also stepped back and considered 'the bigger picture' regarding the conduct the claimant complains of which relates to the hot-desking arrangements (issues 19a, 19b and 19d). We have considered whether, looked at together, there were facts from which we could conclude that the claimant was subject to disability-related harassment in relation to the hot-desking set up. We have found that there was friction between the claimant and some of his colleagues on a few occasions. We have not, however,

found facts from which we could conclude that the claimant was subject to disability-related conduct with the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We accept that these events were part of the everyday tensions which can arise in circumstances where colleagues have to share resources, and that in relation to issues 19a and 19d it was the claimant's conduct in overreacting and raising his voice that contributed to his perception that there was a hostile environment.

e. On or around 8 October 2015, Mark Bishop knowingly misled to the Court that the Claimant was the prosecutor when one failed to attend;

201. We have not found that Mr Bishop knowingly misled the court about the rota for 8 October 2015. We have found that the claimant was on the rota to attend Guildford Magistrates' Court on that day but he was unaware of this as he had not checked the up to date rota. Mr Bishop's actions on 8 October 2015 were entirely reasonable in the circumstances. He did not release the claimant's home address to the court or to the police.

202. The incident was not related to disability in any way. It was the claimant's confusion over the rota and failure to attend court which meant that Mr Bishop had to deal with the court, because he was contacted by the clerk.

203. This allegation fails on the facts. Mr Bishop did not mislead the court knowingly or otherwise. His conduct as we have found it on 8 October 2015 did not amount to harassment.

f. On numerous occasions, Spencer Golding (in charge of the rota), has failed to update the rota or changed it at the last moment without informing the Claimant;

204. We have found that there were delays or errors with the rota on the following days:

    204.1. the rota did not show the claimant as in the office on 4 November 2015;
    204.2. there was a delay in recording hospital appointments on 15 and 18 December 2015 appointments on the rota;
    204.3. there was an error with the rota for 28 January 2016 which Mr Golding corrected on the afternoon of 27 January 2016;
    204.4. the rota wrongly showed the claimant as attending a medical appointment on 10 February 2016 when he was not.

205. On the other dates where the claimant complained that the rota was not correct, we have not found that there were any delays or errors, or we have found that the error was on the claimant's part.

206. In relation to the five occasions listed above when there was an error or delay with the rota, these were either the result of errors or delays by Ms Phillips in passing on information to Mr Golding, or errors or delays by Mr Golding when entering the information (or a combination of the two).

207. This conduct was unwanted, in the sense that any rota errors caused the claimant frustration and upset.

208. Some of the rota errors related to medical appointments. However, we do not consider that this is sufficient to mean that the conduct was related to disability. We have not found that Ms Phillips or Mr Golding deliberately made errors in the claimant's rota or that Mr Golding took a less rigorous approach to the rota for the claimant, because of his disability or for any other disability related reason.

209. Even if the conduct was related to disability, it did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The delays and errors with the rota identified above were not made with the purpose of violating the claimant's dignity or creating such an environment. They were administrative errors.

210. We have found that the claimant found the errors frustrating, and stressful. However, we have not found that this had the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

211. If they had had that effect, it would not have been reasonable for them to do so. In a period of around four months, there were five errors, none of which had a significant impact on the claimant. Occasional errors with the rota and a need to check and chase up dates from time to time are inevitable parts of the respondent's complex working arrangements.

212. This conduct did not amount to disability-related harassment because it was not related to disability and, further, it did not have and it was not reasonable for it to have had the required effect on the claimant.

g. On or about 8 October (one occasion), Spencer Golding made a false claim to Anne Phillips that he was AWOL;

213. We have found that in an email of 8 October 2015, Mr Golding said to Mr Bishop and Ms Phillips:

> *"I am guessing he did not attend court yesterday and if so, why did he not make contact when he discovered there was no court sitting??!!"*

214. This was a reference to the fact that the claimant's copy of the rota for the week which included 8 October 2015 showed him as attending court on 7 October 2015, when that hearing had been cancelled.

215. We have not found that this was a false claim by Mr Golding that the claimant was absent without leave. We have found that it was a comment made by

Mr Golding in the context of trying to understand what had happened when the claimant did not attend court on 8 October 2015.

216. The comment by Mr Golding was unwanted, but it was not related to the claimant's disability. It arose from the claimant's confusion over the rota on 8 October 2015.

217. Even if the comment had been related to disability, it did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The comment was not made with the purpose of violating the claimant's dignity or creating such an environment. It was made with the purpose of understanding why the issue with the 8 October 2015 had arisen.

218. The claimant did not agree with Mr Golding's interpretation of events on 7 October 2015, and we have found that he described it as a matter of 'concern and regret'. However, we have not found that the conduct had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. If it had done, it would not have been reasonable for it to do so, because it was a reasonable question to ask given that the claimant's copy of the rota showed him attending court on 7 October 2015 when his hearing that day had been cancelled.

219. This conduct did not amount to disability-related harassment because it was not related to disability and, further, it did not have and was not reasonable for it to have had the required effect on the claimant.

220. We stepped back and considered 'the bigger picture' regarding the conduct the claimant complains of which relates to meetings and rotas (issues 19c, 19e, 19f and 19g). We have considered whether, looked at together, there were facts from which we could conclude that the claimant was subject to disability-related harassment in relation to the rota issues in general. We have not found facts from which we could conclude that the claimant was subject to disability-related conduct with the purpose or effect of violating his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We accept that these events were part of the everyday issues and discussions that are likely to come up in a working environment whose functioning depends in large part on a complex and changing duties rota.

h. Between 3 July 2015 and February 2016, Anne Phillips repeatedly delaying to provide reasonable adjustments as alleged at paragraph 24.1 of the Grounds of Claim;

221. The respondent has admitted that it failed to make reasonable adjustments from September 2015.

222. The claimant makes a separate complaint that delays in providing reasonable adjustments during the period 3 July 2015 and February 2016 also amount to harassment.

223. We note in respect of the various forms of discrimination, that the definition of detriment in section 212(1) of the Equality Act 2010 prevents one act from amounting to both harassment and direct discrimination, or from amounting to both harassment and victimisation. There does not appear to be any provision ruling out, in principle, a finding of both harassment and failure to make reasonable adjustments in respect of the same conduct.

224. We have therefore gone on to remind ourselves of our findings of fact in relation to the claimant's requests for reasonable adjustments. We emphasise that we are not here considering whether the respondent failed to make reasonable adjustments. It has admitted that it did and that is no longer an issue in dispute between the parties. Here, we have to consider whether any delays in providing reasonable adjustments during this period also amounted to harassment of the claimant.

225. We have found that the chronology regarding reasonable adjustments during this period is as follows:

    225.1. 15 July 2015 - Ms Phillips became the claimant's line manager;
    225.2. Early August 2015 - Ms Phillips referred the claimant to OH for an up to date report including advice on reasonable adjustments;
    225.3. 7 September 2015 - the report was received but HR sought some clarification from the doctor;
    225.4. 21 September 2015 - the updated report and clarification was received by HR;
    225.5. 30 September 2015 - the updated report and clarification was sent to Ms Phillips
    225.6. 6 and 22 October 2015 - Ms Phillips contacted the claimant to arrange a meeting to discuss the OH report;
    225.7. 4 November 2015 - the meeting took place;
    225.8. 13 November 2015 - Ms Phillips replied to the claimant in relation to some points;
    225.9. 24 November 2015 - there was a further meeting between Ms Phillips and the claimant;
    225.10. 27 November 2015 - Ms Phillips wrote to the claimant responding to his reasonable adjustments request;
    225.11. 21 December 2015 - the claimant replied to Ms Phillips;
    225.12. 15 January 2016 - Ms Phillips replied to the claimant;
    225.13. 4 February 2016 - Ms Phillips met with the claimant again;
    225.14. 10 February 2016 - Ms Phillips confirmed the claimant's new working arrangements which were to apply from 23 February 2016.

226. Overall the period during which reasonable adjustments for the claimant were being considered was a lengthy one. However, there were no very long periods during which no steps were being taken by Ms Phillips.

227. There was a delay receiving the OH report and a further delay of around 3 weeks in September 2015 when clarification of the OH report was

requested. However, the clarification was requested by the respondent's HR advisor, not by Ms Phillips. It was reasonable for HR to request clarification if the OH advice was unclear.

228. There was a delay of around 5 weeks between Ms Phillips receiving the updated OH report in September 2015 and her meeting with the claimant on 4 November 2015, however, she was in contact with the claimant about the report at least twice during this period, and their lack of availability prevented an earlier meeting.

229. Nothing happened between 27 November 2015 to 21 December 2015, but that was a delay by the claimant. Ms Phillips did not reply to the claimant's email of 21 December 2015 for around 3 and a half weeks, although this was over the Christmas period.

230. At various points in the course of these discussions, Ms Phillips explained her decisions in respect of some of the claimant's requests for reasonable adjustments, for example on 13 November 2015, 27 November 2015 and 10 February 2015. In the end, some adjustments were made, but Ms Phillips did not agree to all of the claimant's requests.

231. The allegation is of delay by Ms Phillips. We have identified two periods of delay by Ms Phillips, that is 5 weeks in September 2015 and 3 and a half weeks in December/January 2016. These delays were unwanted conduct; the claimant would have preferred his requests for reasonable adjustments to have been responded to more quickly and he saw it as a disadvantage that they were not.

232. The unwanted conduct was related to the claimant's disability, in that it was about his requests for reasonable adjustments to prevent him from being disadvantaged because of his disability.

233. Our conclusions so far mean that we now go on to consider whether Ms Phillips' delays in responding to requests for reasonable adjustments had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

234. We have considered this carefully. We do not rule out the possibility that delays in responding to a request for reasonable adjustments might in some circumstances amount to unlawful disability-related harassment as well as a failure to make reasonable adjustments. For example, an employer might respond to a request for reasonable adjustments using degrading language about disability or hostile language about the need for adjustments. Another example might be where an employer decides to refuse to consider adjustments, deliberately intending to make the employee's working life humiliating or offensive as a result.

235. We have carefully considered the correspondence between the claimant and Ms Phillips between July 2015 and February 2016, the notes of the

meetings they attended and the language and tone adopted by Ms Phillips in both. We have concluded that Ms Phillips' conduct did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Ms Phillips was a new manager and she found the claimant's reasonable adjustments request difficult. However, she engaged with him regularly, corresponded with him in a firm but professional way, had regular meetings with him, took advice from OH and HR, explained her decisions and tried to find a way forward. We have decided that Ms Phillips' conduct, while an admitted failure to make reasonable adjustments, did not cross the line such that it also amounted to harassment of the claimant.

236. This conduct did not amount to disability-related harassment because it did not have the purpose or effect required by section 27, and if it did, it was not reasonable for it to have had the required effect on the claimant.

i. Failure to deal with the Claimant's grievance (presented on or about 8 March 2016) as alleged at paragraph 25 of the Grounds of Claim.

237. The claimant's grievance of 8 March 2016 was his second formal grievance, and was against his line manager Ms Phillips. We have found that the chronology in respect of this grievance was as follows.

    237.1. Ms Ragnauth appointed Mr Crook as Investigating Officer and wrote to the claimant on 15 March 2016 to tell him this;
    237.2. Mr Crook emailed the claimant on 29 March 2016 (after the claimant's return from leave) to arrange a meeting at Guildford on 14 April 2016;
    237.3. On 1 April 2016, Mr Crook told the claimant he would have to move the meeting to a date towards the end of May because of a family bereavement and a work commitment;
    237.4. On 13 April 2016 the claimant was signed off sick. On 15 April 2016 the claimant told Mr Crook he hoped to meet when he was well and back to work. The claimant did not return to work until 24 September 2018;
    237.5. From time to time during the claimant's sick leave, Mr Badenhorst checked with the claimant whether he wanted to continue with his grievance and the claimant did not say that he wanted to do so;
    237.6. Mr Badenhorst began to make arrangements for the grievance investigation to be resumed after 31 March 2017 when the respondent's OH advisor said that resolution of the claimant's grievance would be likely to benefit his health. A new investigating officer had to be identified; Ms Trust was appointed on 29 June 2017. She had meetings between July and November 2017, and produced a final report dated 23 January 2018.

238. Paragraph 25 of the Grounds of Claim says that the respondent failed to deal with the claimant's grievance adequately or at all. That claim was presented on 15 July 2016. The grievance had not been dealt with by that stage, but it was dealt with later. Therefore, we have not found that there

was a wholesale failure to deal with the claimant's grievance. We have not found that the respondent failed to deal adequately with the claimant's grievance of 8 March 2016. A detailed report was produced by Ms Trust which made findings and reached conclusions on each of the complaints.

239. We have however found that there were two delays in dealing with the grievance. First there was a delay in arranging the initial meeting with the claimant. Although it was originally arranged promptly, Mr Crook's bereavement and other commitments meant that it was not possible for the meeting to take place until the end of May, well over two months after the grievance complaint was submitted.

240. There was a second period of delay in progressing the grievance from mid-April 2016 to 31 March 2017, during which time the claimant was on sick leave. For the purposes of this complaint, we consider the delay from mid-April 2016 to 15 July 2016, when the claim was presented (there having been no application to amend the claim to include any delay or other issues post-dating the claim).

241. We start by considering whether the conduct as we have found it to have happened (the two periods of delay in progressing the grievance) was unwanted conduct.

242. The delay in holding the first meeting in April 2016 was unwanted. The claimant said that he wanted his grievance to be progressed more quickly.

243. The position is not the same in respect of the delay while the claimant was on sick leave. The claimant said that he wanted the grievance to continue once he was well and back to work. During the relevant period from mid-April 2016 to 15 July 2016 he did not ask for it to be restarted. This delay was not unwanted conduct.

244. We need to consider whether the unwanted conduct that we have found to have occurred (that is, the delay in arranging the first meeting) was related to disability. It was not. It was caused by Mr Crook's bereavement, and his later diary commitments. The grievance itself was related to disability (it was about the failure to make reasonable adjustments and other disability related matters). However, it is the unwanted conduct (the delay) that we have to consider here, not the grievance itself. There was no evidence before us to suggest that the delay was related in any way to the fact that claimant's grievance concerned disability, or to suggest that it would have been dealt with any more quickly or treated any differently if it had been about something other than disability. We have concluded that the conduct complained of, that is the delay in holding the first grievance meeting with the claimant, was not related to disability.

245. If we had found the initial delay to have amounted to unwanted conduct related to disability, we would have concluded that, taking into account the length of the delay and the understandable reasons for it, it did not have the purpose or effect of violating the claimant's dignity or creating an

intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

246. This complaint of harassment therefore fails, because any unwanted conduct was not related to disability and did not have the purpose or effect required by section 26.

247. Stepping back to consider the harassment complaints as a whole, we have not found facts from which we could conclude that the claimant was subject to disability-related conduct with the purpose or effect of violating his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Our conclusions mean that none of the claimant's complaints of harassment succeed.

Victimisation – protected acts

248. The respondent accepts that the claimant did protected acts on three occasions:

    248.1. On 3 November 2015 in his email to Ms Phillips entitled 'reasonable adjustments';
    248.2. On 24 November 2015 in his meeting with Ms Phillips when reasonable adjustments were discussed;
    248.3. On 8 March 2016 in his grievance complaint, when he complained that Ms Phillips had failed to make reasonable adjustments.

249. These acts were clearly protected acts by the claimant within the meaning of section 27 of the Equality Act 2010. The acts in November 2015 were requests for reasonable adjustments, and were therefore occasions on which the claimant was doing something 'in connection with' the Equality Act 2010 within subsection 27(2)(c). The grievance complaint was an allegation of a contravention of the Equality Act 2010, and was therefore a protected act within subsection 27(2)(d).

250. In the consolidated list of issues, the claimant said that he also did protected acts on 1 September 2015 and 13 November 2015. We have not found that he did protected acts on these dates. We cannot identify any possible protected act being done by the claimant on 13 November 2015, and it seems likely that meant to refer to 3 November 2015. We did not hear any evidence about and cannot identify any possible protected act being done by the claimant on 1 September 2015.

Victimisation – detriments

251. As the claimant did three protected acts, we need to go on to consider, in respect of each act of detriment, whether the treatment occurred as alleged, whether it was a detriment, and whether the detriment was done because the claimant did a protected act (or because the respondent believed the claimant had done or may do a protected act).

252. The treatment which the claimant says amounted to detriments by the respondent is set out in the consolidated list of issues at paragraph 29, sub-paragraphs a to i. We have considered these in turn.

a. On or around 18th March 2016, Anne Phillips accused the Claimant of failing to review the cases to the standard expected as alleged at paragraph 24.2.4 of the Grounds of Claim

253. We understand this allegation to refer to a series of emails from Ms Phillips to the claimant on 17 and 18 *February* 2016 (not 18 *March* 2016).

254. We have found that on 17 and 18 February 2016 Ms Phillips considered a number of case reviews completed by the claimant during weekend overtime working as approval was required for his decisions to discontinue some cases. After considering the claimant's case reviews, Ms Phillips emailed the claimant to say that she was concerned that the claimant may not be clear as to the expectations for a file review, and she said that there may be a training need. In a later email of the same day, Ms Phillips raised some other concerns about the work the claimant had done over the weekend, and said she would organise some training so that the claimant was 'equipped to deal with cases fully'.

255. We have therefore found that the claimant was told by Ms Phillips that he had not completed case reviews to the standard expected. This amounted to a detriment to the claimant in that he did not consider his work to be below standard and he did not accept that the criticism was justified.

256. We have to consider whether Ms Phillips' criticism of the claimant's work was because of a protected act or acts done by the claimant. Only the first and second protected acts (the claimant's requests for adjustments in November 2015) are relevant to this alleged detriment, because the conduct pre-dates the grievance of 8 March 2016.

257. We therefore have to consider whether Ms Phillips' emails of 17 and 18 February 2016 criticising the file reviews carried out by the claimant over the weekend were because the claimant had requested reasonable adjustments in November 2015. We have to consider what, consciously or subconsciously, was the reason Ms Phillips subjected the claimant to the detriment.

258. We have considered this carefully. Ms Phillips clearly regarded some of the claimant's requests for adjustments as unreasonable (this is why she decided they should be refused). We can see how in a situation where an employee has made requests that a manager considers to be unreasonable, the manager might (consciously or subconsciously) scrutinise the employee's work more closely as a result, or have less patience with performance issues than they might otherwise.

259. However, we are satisfied that this was not the case here and that the claimant's requests for reasonable adjustments were not the reason why Ms

Phillips criticised the claimant's work. Her criticism of the claimant was not because of his protected acts. Rather, Ms Phillips had genuine concerns about the claimant's performance, unrelated to his disability or his request for adjustments. She was concerned that one of the claimant's files reviews included a sentence which did not make sense. Once the claimant had clarified the meaning of the sentence, Ms Phillips felt that it demonstrated that the claimant had not completed work he should have done on a case which had been allocated to him. When Ms Phillips looked at the other cases the claimant recommended should be discontinued, she found further specific concerns which she explained in detail to the claimant. Ms Phillips was aware that similar concerns had been raised in the complaint by Guildford Magistrates' Court in November 2015.

260. We have concluded that the reason why Ms Phillips said that the claimant had failed to review the cases to the standard expected was because she had genuine and justified concerns about his performance in relation to those reviews. It was not (either consciously or subconsciously) because he had requested reasonable adjustments in November 2015. This complaint of victimisation fails.

b. From on or about February 2016 refused overtime as alleged at paragraph 24.2.3.4 of the Grounds of Claim

261. We have found that in February 2016 Ms Phillips told the claimant that she could not allow him to do overtime at that time because the work he had produced was not of a satisfactory standard. She said that once these issues had been addressed, she would agree to the claimant working at the weekend again. She organised training for him. The claimant was not permitted to do overtime after the weekend of 13 and 14 February 2016.

262. Refusing to allow an employee to work overtime amounts to a detriment.

263. For reasons similar to those set out above in relation to issue 29a, the reason why the claimant was not permitted to do overtime was because Ms Phillips had genuine and justified concerns about the quality of the claimant's work and she asked him to undertake training before being allowed to work overtime again. The claimant's requests for reasonable adjustments were not the reason for the refusal to allow him to perform overtime. Ms Phillips had authorised the claimant's overtime for the weekend of 13 and 14 February 2016, after his protected acts. It was only after she had reviewed the work he did that weekend that she told him he could not do anymore overtime until he had had some training. The claimant was not told he could not do overtime because of doing a protected act, and so this complaint of victimisation fails.

c. On or around 4th March 2016 Anne Phillips accused the Claimant of being rude and stormed out of a meeting with the Claimant in the Guildford office

264. We have found that the meeting between the claimant and Ms Phillips on 4 March 2016 was brought to an end by Ms Phillips. She told the claimant that

she considered his attitude towards her to be rude, and that she was going to wind up the conversation because of that. We have found that the claimant was likely to have raised his voice and taken a confrontational approach.

265. Ms Phillips' behaviour was a detriment to the claimant. He did not consider his attitude to be rude and he wanted the meeting to continue.

266. We have to consider whether Ms Phillips' conduct was because of the claimant's protected acts in November 2015. We have concluded that it was not. Although the claimant's disability and reasonable adjustments were discussed in the meeting, the conduct complained of by the claimant was the accusation that he had been rude, and the meeting being brought to a close by Ms Phillips. That conduct was not (consciously or sub-consciously) because of the claimant's November 2015 protected acts. It was because of the claimant's conduct at the meeting when discussing the change of role proposed by Ms Phillips. As we have concluded that Ms Phillips' treatment of the claimant at the meeting was not because he had done a protected act, this complaint of victimisation fails.

d. Failing to investigate complaints he made against other prosecutors, Nick Wilson, and Manjit Bath made on 28 July 2015, against Mark Bishop and Spencer Golding made on 26 October 2015, and against Staines Security staff and a police officer made on 19 November 2013, which still remained outstanding on 20 November 2015

267. We have not found that the respondent failed to investigate the claimant's complaints against Mr Wilson and Ms Bath which he made on 28 July 2015, although there was a delay in Ms Phillips dealing with this complaint. We have found that she spoke to the claimant and Mr Wilson, and then responded to the claimant on 7 September 2015. Delay dealing with a complaint would amount to a detriment.

268. The delay in dealing with this complaint cannot have been caused by any of the claimant's protected acts, as the complaint and the response to the complaint both pre-date the protected acts. There was no evidence to suggest that Ms Phillips delayed dealing with the complaint because she believed the claimant had done or may do a protected act. The complaint of victimisation in respect of this delay cannot succeed.

269. In respect of the complaint against Mr Bishop and Mr Golding, we have found that ultimately the complaint was investigated, so there was not a wholesale failure to investigate. There was however a delay and the complaint had not been investigated at the time the claimant presented his first claim. We have found that an informal grievance was made by the claimant on 4 November 2015. We have found that the claimant took some time to consider whether he wanted to pursue this as a formal grievance and confirmed on 21 December 2015 that he did wish to do so. He completed the formal grievance form on 15 February 2016 and this was to be investigated by Ms Phillips. When the claimant later made a complaint

against his manager Ms Phillips, a new manager had to be appointed to investigate the grievance against Mr Bishop and Mr Golding. That was done on 11 April 2016. It was then paused when the claimant was on sick leave. When the claimant presented his first complaint on 15 July 2016, this grievance had not been investigated.

270. The delay between 26 October 2015 and 15 February 2016 in respect of the claimant's complaint against Mr Bishop and Mr Golding was because the claimant was considering his position and completing the grievance form.

271. There was a delay in dealing with this complaint between 15 February 2016 when the claimant completed the grievance form and 15 July 2016 when he presented his tribunal complaint. This delay was not because the claimant did protected acts in November 2015 and March 2016. It was because a new manager had to be appointed to consider the grievance, and because the claimant was then not well enough while on sick leave to progress a grievance, and so the process was paused. As the delay was not because of a protected act, this complaint of victimisation fails.

272. We heard very little evidence about the claimant's complaints about Staines security staff and a police officer made on 19 November 2013, which still remained outstanding on 20 November 2015. We conclude, based on the chronology, that any further delay in investigating this complaint after the claimant did protected acts in November 2015 and March 2016 was very unlikely to have been because of those protected acts, given that the complaints had apparently been uninvestigated for some two years before any protected act. This complaint of victimisation therefore also fails.

e. From 1- 10 September 2015, demanding the Claimant travel to Brighton as alleged at paragraph 24.2.3.5 of the Grounds of Claim

273. We have found that Mr Bishop asked the claimant to attend a meeting with him in Brighton to provide him with training on new procedures. The meeting was originally due to take place on 3 September 2015, and was rescheduled to 9 September 2015 and then cancelled when the claimant was unable to make travel arrangements in time. Mr Bishop was not aware of any medical issues the claimant had with travelling at the time the discussions about the meeting were taking place.

274. Mr Bishop's requests that the claimant travel to Brighton for a training meeting cannot have been caused by any of the claimant's protected acts, as the requests pre-date the protected acts (which took place in November 2015 and March 2016).

275. There was no evidence to suggest that Mr Bishop's conduct was because he believed the claimant had done or may do a protected act.

276. The complaint of victimisation in respect of these requests therefore cannot succeed.

f. From 18 February 2016 to 4 March 2016, micro-managing and scrutinizing the Claimant's work, referring every case the Claimant decided to discontinue as alleged at paragraph 24.2.4 of the Grounds of Claim

277. We have found that after she became the claimant's line manager and took over supervision of his work, Ms Phillips had some concerns that the claimant seemed too ready to discontinue cases. This was one of the concerns raised in the complaint from Guildford Magistrates' Court in November 2015. Ms Phillips raised this with Ms Ragnauth and in February 2016 Ms Ragnauth told Ms Phillips that any decision by the claimant to discontinue a case should be authorised by someone at Ms Phillips' level. Ms Phillips told the claimant about this requirement on 10 February 2016. Ms Phillips reviewed some of the cases the claimant had worked on over the weekend of 13 and 14 February 2016, because he recommended discontinuing them. Ms Phillips and the claimant had email correspondence about this work during the period. We have summarised our findings on that correspondence in our conclusions about complaint 29a above.

278. We have also found that during this period Ms Phillips asked the claimant to provide details of hospital appointments, and that she brought a meeting on 4 March 2016 to an end.

279. We have not found that Ms Phillips was micro-managing the claimant during this period. She was scrutinising his decisions to discontinue cases because there were genuine concerns about his performance, and she had been asked to approve his decisions to discontinue cases. Although this treatment does amount to a detriment (in that the claimant would have preferred it not to have happened), Ms Phillips' treatment of the claimant was not because he had made requests for reasonable adjustments in November 2015. For the reasons set out above in relation to issue 29a, we conclude that Ms Phillips' management of the claimant was not because of his requests for reasonable adjustments (his protected acts).

280. Further, the reason Ms Phillips asked the claimant to provide details of hospital appointments was because he had suggested that he could not attend work at all on a day on which he had a hospital appointment at 4.00pm. Also, we have found that Ms Phillips ended the meeting on 4 March 2016 because of the claimant's attitude during the meeting, not because of his protected acts.

281. This means that this complaint of victimisation fails.

g. Failure to update, change or inform the Claimant of changes to the rota in respect of:

i. Hospital Appointments - On 1 December 2015, 15 December 2015, 18 December 2015, 10 February 2016 and 2 March 2016;
ii. Meeting with Anne Phillips on 4.11.2015 and Caroline Mitchell on 24.11.2015, 1 December 2015 and 18 December 2015.
iii. Court Deployment – on 7 October 2015, 8 October 2015, 28 January 2016 and 13 February 2016, 28 January 2016, and 5 March 2016

282. We have set out or findings of fact in relation to changes to the rota in our conclusions on issue 19f above. In short, we found that there were delays or errors with the rota on the following days:

    282.1. the rota did not show the claimant as in the office on 4 November 2015;
    282.2. there was a delay in recording hospital appointments on 15 and 18 December 2015 appointments on the rota;
    282.3. there was an error with the rota for 28 January 2016 which Mr Golding corrected on the afternoon of 27 January 2016;
    282.4. the rota wrongly showed the claimant as attending a medical appointment on 10 February 2016 when he was not.

283. In relation to the five occasions when there was an error or a delay with the rota, these were either the result of Ms Phillips failing or delaying passing information to Mr Golding, or of Mr Golding failing or delaying entering information on the rota (or a combination of the two). These errors or delays were a detriment to the claimant. On the other dates where the claimant complained that the rota was not correct, we have not found that there were any errors, or we have found that the error was on the claimant's part.

284. We need to consider the reason why these errors or delays occurred, and whether they were because of the claimant's protected acts. We have considered the number of issues which arose, the period of time over which they occurred and the nature of them. We have concluded that they were administrative errors of a kind which occur regularly in the context of a busy working environment with complex and changing workplace rotas. The claimant's protected acts did not, either consciously or sub-consciously, play any part in these errors. This complaint of victimisation fails.

285. We stepped back again to consider 'the bigger picture' of the claimant's complaints of victimisation, particularly those against Ms Phillips. We have considered whether, looked at together, there were facts from which we could conclude that the claimant was subject to victimisation by Ms Phillips. We have considered this carefully in light of the respondent's admissions about failures to make reasonable adjustments, and the conclusion of the grievance investigator that Ms Phillips 'allowed her perception of the claimant as a poor performer to dictate her response' to the claimant's disability issues.

286. We have found that Ms Phillips was a new manager and that the claimant's approach was confrontational at times. It is clear that Ms Phillips found the claimant difficult to manage and that this sometimes led to delays in addressing the claimant's informal complaints. However, we have not found facts from which we could conclude that Ms Phillips victimised the claimant. Her conduct towards the claimant was because of her genuine and justified concerns about performance which were shared by others. Although she did not give appropriate weight to the claimant's disability issues, she did

not subject the claimant to any detriments because he was seeking reasonable adjustments or complaining that they had not been made.

287. Our conclusions mean that none of the claimant's complaints of victimisation succeed.

Discrimination arising from disability

288. The complaints of discrimination arising from disability, failure to make reasonable adjustments and indirect discrimination which remain for us to decide all relate to the respondent's decision in April 2017 not to pay the fee for the claimant's practising certificate fee for the 2017/2018 year.

289. The respondent's decision not to renew the claimant's practising certificate while he was on long term sick leave was because of his sickness absence which was related to his disability. It was because of something arising from the claimant's disability.

290. We have to consider whether the decision was unfavourable treatment. We remind ourselves that unfavourable treatment here is, according to the guidance, synonymous with 'disadvantage' and that there is a relatively low threshold to establish unfavourable treatment. We have concluded that the decision not to renew the claimant's practising certificate was not unfavourable treatment. The claimant was not disadvantaged by the respondent's failure to pay the fee because:

    290.1. The claimant was on sick leave and was not practising, and so he did not need a practising certificate;
    290.2. The respondent would pay for his renewed practising certificate on a pro-rata basis as soon as his return to work date was known, and this could be arranged very quickly, within a couple of days;
    290.3. The claimant could have paid for his practising certificate to be renewed while he was on sick leave if he wanted;
    290.4. There could be no impact on the claimant's status arising from not having a practising certificate. He was still a barrister, but was not a practising barrister because he was on sick leave. The non-renewal of the claimant's practising certificate accurately reflected his professional status during his sick leave;
    290.5. The queries raised with the claimant by the Bar Council about his authorisation to practise on 1 and 2 May 2017 were not because of the decision not to renew the practising certificate. They arose because, in circumstances where authority to practise is the responsibility of each individual barrister, the claimant failed to change his status with the Bar Council to unregistered barrister until 2 May 2017, when the certificate from the previous year expired on 30 April 2017, and when he had been told on 12 April 2017 that he would have to change his status if he chose not to pay the practising certificate fee himself.

291. Even if we had found that the respondent's decision not to pay the fee for the claimant's practising certificate did amount to unfavourable treatment, we would have accepted that the treatment was a proportionate means of achieving a legitimate aim, namely saving public money by not paying fees for practising certificates for barristers who are not currently practising.

292. While the respondent cannot rely as a legitimate aim on a wish simply to save costs alone, we accept that the wider aim of avoiding unnecessary expenditure from public funds is a legitimate aim, and that the practice adopted by the respondent was a proportionate means of achieving that aim.

Reasonable Adjustments

293. The claimant relies on the respondent's practice of renewing practising certificates as a provision, criteria or practice (PCP).

294. We have found that the respondent had a practice of not renewing practising certificates for those on long term absence. This is clear from the email from the respondent's pay and benefits officer which was sent in advance of the certificate renewal block fee process, asking each area to provide details of those barristers who were or would be on 'maternity leave, career breaks etc'. This practice amounted to a PCP.

295. The claimant says that the PCP placed him at a substantial disadvantage in comparison with non-disabled people who were also on long term sick leave. However, we have not found that non-disabled barristers who were also on long term sick leave (or in fact other long term absence) were or would have been treated any differently to the claimant. The claimant was no more disadvantaged than barristers employed by the respondent who are not disabled but who are on long term absence. The respondent's practice was to treat all those on long term absence in the same way.

296. Further, for the reasons set out above in relation to unfavourable treatment in the context of the complaint of discrimination arising from disability, we do not consider the respondent's failure to pay the practising certificate fee to amount to a substantial disadvantage, as the claimant did not need a practising certificate because he was not practising.

297. Even if we had found there to have been a substantial disadvantage to the claimant from the PCP, we would have concluded that it would not have been a reasonable adjustment for the respondent to pay the claimant's practising certificate fee. This is because he did not need a practising certificate and it is not reasonable for the respondent to spend public funds when there is no need to do so.

Indirect discrimination

298. We have found that the respondent's practice of not renewing practising certificates for those on long term absence amounted to a PCP.

299. For reasons similar to those set out above, the PCP did not put people who share the claimant's disability at a particular disadvantage compared with people who do not share the claimant's disability. The relevant group for comparison here is a group of people who are not disabled but who are on long term absence. This is because there must be no material difference in the circumstances of the comparators' case (section 23). The comparator group (non-disabled employed barristers on long term absence) would have been treated in the same way as the claimant.

300. Even if there had been any difference in treatment, for the reasons set out above, we do not consider the failure to pay the practising certificate fee to amount to a particular disadvantage, as those on long term absence would not need a practising certificate when they were not practising.

301. Finally, even if we had found there to have been a particular disadvantage to the claimant and to those who share his disability, we would have concluded that the PCP was a proportionate means of achieving a legitimate aim, as explained above in connection with the complaint of discrimination arising from disability.

302. We have therefore concluded that the claimant's three complaints in respect of the respondent's decision not to pay the fee for his practising certificate while he was on sick leave do not succeed.

<u>The overall picture of the claimant's complaints</u>

303. Finally, we record that in reaching our decision, we have had in mind the dangers of an overly fragmented approach. The need to focus in detail on each of the various legal tests in respect of a large number of separate incidents complained of by the claimant could lead to a failure to see the bigger picture. Where, as here, allegations of discrimination cover a substantial period of time, we should not treat the individual incidents complained of in isolation from one another. The wider picture may shed light on individual complaints.

304. We have therefore stepped back at appropriate points, and considered some of the allegations together, to ensure that we have understood the fuller picture. We have done so in relation to the hot-desking complaints, the rota complaints and the complaints of harassment and victimisation in general. Having done so, we have not found any of the complaints within those groups of complaints to have been proven.

305. We have also stepped 'right back' and considered the full picture of all of the claimant's complaints. The claimant clearly has genuine reason to be aggrieved about his treatment. Significant elements of his grievance complaint were upheld. The respondent has admitted that it failed to make reasonable adjustments for him, in particular by failing to allow him to do some home working and by failing to liaise with the court to enable the claimant to finish at 4pm to take his medication. The respondent has also

admitted that in removing the claimant from court duties without making these adjustments, it discriminated against the claimant because of something arising from his disability. Having carefully considered the claimant's claim, with these important factors in mind, we have concluded that the claimant's other allegations are not made out. Many of the incidents about which the claimant complains were unrelated to his disability or his protected acts, or were caused or aggravated by the claimant over-reacting, being confrontational in approach or being defensive in response to errors by him (such as with the meetings in Brighton and the 8 October 2015 rota confusion) or to genuine concerns about his performance. The complaint about the respondent's failure to pay the claimant's practising certificate fee, whichever legal framework is adopted, fails, principally because the decision did not give rise to any disadvantage to the claimant.

306. Having considered the full picture of the complaints in this way, we have reached a final conclusion that all of the claimant's complaints which remain in dispute fail.

Jurisdiction

307. As we have not found that any of the complaints which were in dispute have succeeded, we do not need to go on to consider whether the complaints were brought in time.

Interim payment application – the claimant's application

308. The background to this application is as follows. The employment judge considered requests by the claimant made at preliminary hearings on 23 September 2019 and 23 April 2021 to list a remedy hearing in relation to the admitted complaints before this liability hearing on the disputed issues. The judge declined the application, explaining the reasons why at both hearings and, at the claimant's request, giving written reasons for her decision on 23 April 2021. In short, she said there was considerable factual overlap between the admitted complaints and the disputed issues, and that this overlap had the potential to impact on remedy issues, such as causation and the appropriate injury to feelings award. She also said that it would not be practical in the circumstances to prepare for a remedy hearing before the liability hearing, and that it would not be proportionate as it meant two remedy hearings might be needed.

309. A separate remedy hearing has been listed to decide what remedy the claimant should be awarded in respect of those complaints which the respondent has admitted. Case management orders have been made for that hearing.

310. At the end of the liability hearing the claimant made an application for an interim payment in respect of remedy. There was insufficient time to consider the application at that point, so, with the consent of the parties, case management orders were made for the application to be dealt with in writing. The claimant has made a detailed 30 page application for an interim

payment to be made by the respondent. The respondent provided a written response to the application.

311. The claimant's application refers to rule 25.7 of the Civil Procedure Rules (CPR) which sets out the conditions to be satisfied and matters to be taken into account by a court considering an order for an interim payment.

312. He says that the tribunal has the power to order an interim payment under rules 65 and 66. Although he again mentions the CPR, we understand from what the claimant says about rules 65 and 66 that he is referring to the Employment Tribunal Rules of Procedure 2013. These provide:

> *"65.* ***When a judgment or order takes effect***
>
> *A judgment or order takes effect from the day when it is given or made, or on such later date as specified by the Tribunal.*
>
> *66.* ***Time for compliance***
>
> *A party shall comply with a judgment or order for the payment of an amount of money within 14 days of the date of the judgment or order unless-*
> *a) The judgment, order, or any of these Rules, specifies a different date for compliance; or*
> *b) The Tribunal has stayed …the proceedings or judgment"*

313. The claimant says that the tribunal should have ordered judgment in the admitted claims on or about 2 July 2019 (when the respondent's admissions were made) and that 'payment of a sum of money would have been payable within 14 days thereafter'.

314. The claimant also seeks an injunction to prevent senior managers, lawyers, staff and legal clerks from spreading malicious rumours and gossip about him.

Interim payment application - conclusions

315. We have considered the claimant's application. We have concluded that we do not have the power to make an order for an interim payment.

316. The Civil Procedure Rules (CPR) are not incorporated into the Employment Tribunal Rules. The Employment Tribunal Rules refer expressly to the powers of the county court in some rules, for example in relation to disclosure in rule 31 of the Employment Tribunal Rules. This means that, where specific reference is made to the CPR, the same approach must be taken by the employment tribunal but otherwise, while the employment tribunal should apply the same general principles as the civil courts, the CPR do not apply.

317. There is no reference in the Employment Tribunal Rules to the power to order interim payments or the provisions of the CPR which relate to interim payments. We are not able to apply the interim payment provisions of the CPR as if they are part of the Employment Tribunal Rules, because they are not.

318. Rules 65 and 66 of the Employment Tribunal Rules of Procedure 2013 which are relied on by the claimant do not contain any power to make an order for interim payment. Rule 66 refers to judgments or orders for payment of an amount of money. No such judgment or order has been made in this case at this stage. The judgment made following the remedy hearing will make the appropriate remedy orders including any order for payment of an amount of money. It would not have been possible for the tribunal to make an order for compensation on or after 2 July 2019 (when the respondent's admissions were made) because, before having a remedy hearing and hearing the evidence and the parties' submissions on remedy, the tribunal does not have enough information to decide how much compensation should be awarded.

319. The employment tribunal does have the power to award interim relief in some cases. Interim relief is not the same as an interim payment. It is essentially an injunction to prevent or suspend dismissal. The employment tribunal does not have a general power to grant interim relief, it can only do so where there is a specific power contained in the legislation under which the claim is brought. This applies for example:

    319.1. in some cases under the Employment Rights Act 1996, including in cases of protected disclosure dismissal under section 103A;
    319.2. under the Employment Relations Act 1999, in cases of dismissal for exercising the right to be accompanied; and
    319.3. under the Trade Union and Labour Relations (Consolidation) Act 1992, in trade union dismissal cases.

320. The claimant has not brought any of these claims. His claims are brought under the Equality Act 2010. There is no power to grant interim relief in claims brought under the Equality Act 2010. This has been considered by the Court of Appeal in the case of Steer v Stormsure Ltd [2021] IRLR 762. The Court of Appeal held that a claimant bringing claims under the Equality Act was not entitled to interim relief, and that the absence of a power to grant interim relief in discrimination cases under the Equality Act was not incompatible with the European Convention on Human Rights.

321. In conclusion, we have decided that we are not able to make an order for an interim payment in this case. We are not able to make an order for an interim payment under rule 25 of the Civil Procedure Rules, because that rule does not apply in the employment tribunal. There is no provision in the Employment Tribunal Rules of Procedure which allows us to make an interim payment. The power to grant interim relief (which is not the same as ordering an interim payment) does not apply in this case either.

322. Similarly, we do not have any power to make an injunction as sought by the claimant. There is no power to do so in the Employment Tribunal Rules of Procedure 2013 or the Equality Act 2010, and we cannot apply parts of the CPR which are not incorporated as part of the tribunal rules.

323. In his application the claimant has raised a number of points regarding the reasonableness of the timing of the respondent's admissions following the outcome of his grievance. The claimant also refers to some of the case law on costs applications. We do not understand the claimant to be making an application for costs at this stage.

324. Finally, the liability issues in these three joined cases having now been admitted or decided by the tribunal, the tribunal (pursuant to regulation 3 of the Employment Tribunal Rules 2013) encourages the parties to explore, via the services of Acas or other means, whether it is possible to resolve the outstanding remedy issues by agreement.

Employment Judge Hawksworth

Date: 22 November 2021

Judgment and Reasons

Sent to the parties on:

13 December 2021

For the Tribunal Office