Case Number: 1802032/2020
1805605/2020
1801091/2021
1803850/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Gaskell**

Respondent: **Ministry of Justice**

Heard at: Leeds on the, 7,8,9,10,14,15,16,17,18,22,24 and 25 February 2022.

Deliberations in Chambers: 20 and 21 April 2022

This was a hybrid hearing. The claimant and the respondent's counsel attended the hearing at the Tribunal. The respondent's witnesses attended by CVP video link. The Employment Judge and one of the panel members attended in person and one member appeared by CVP video link.

Before: **Employment Judge Shepherd**
Members: **Mr. Shah**
Mr. Pugh

Appearances:
For the claimant: **In person**
For the respondent: **Mr. Weiss, counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of indirect age discrimination are not well-founded and are dismissed.

2. The claims of detriment for making a protected disclosure are not well-founded and are dismissed.

3. The claims that the claimant was victimised because he had done a protected act are not well-founded and are dismissed.

4. The claims of failure to make reasonable adjustments are not well-founded and are dismissed.

5. The claims of discrimination arising from disability are not well-founded and are dismissed.

REASONS

1. The claimant represented himself and the respondent was represented by Mr Weiss. The Tribunal heard evidence from:

   Mark Gaskell, the claimant;
   Nicole Mason, National Contact Manager;
   Robert Heard, Head of Criminal Cases Unit;
   Nicola Johanson, Area Contract Manager;
   Antony Evans, Head of Civil Change;
   David Thomas, Head of Contract Management and Assurance;
   Janet Land, National Contact Manager;
   Joanne Bainbridge, Head of People and Capability;
   Francesca Weisman, Senior Legal Adviser;
   Brian Ruggles, HR Case Manager;
   Maria Brown, Line Manager in the Exceptional and Complex Cases Team;
   Hannah Payne, Head of Transformation;
   Janet Peel, Head of Operations and Private Office.

2. At the commencement of the hearing the claimant indicated that he accepted the respondent's application to include the witness statement of Hannah Payne and the admittance of additional documents. He also withdrew his application for the hearing to proceed as an attended in person hearing as he had accepted that the case had been listed for a hybrid hearing and should move on to be heard.

3. The Tribunal had sight of a bundle of documents which consisted of 17 lever arch files and numbered up to page 6046. The Tribunal considered those documents to which it was referred by parties.

The issues

4. The respondent provided a composite list of issues which was agreed although the claimant had produced further issues. It was submitted by Mr Weiss, on behalf of the respondent that the composite list of issues was faithful to the pleadings and the extra issues raised by the claimant were factual matters not relevant to the pleaded issues.

5. The issues were discussed at the commencement of this hearing. The composite list of issues the respondent had prepared was agreed. The claimant had provided some further issues. Upon discussion, the claimant agreed that the extra matters he had raised were, in fact, matters of evidence relating to factual matters and the claimant was happy to proceed on the basis of the composite list of issues.

6. Mr Weiss said that the respondent believed the composite list of issues adequately reflected the issues raised by the claimant and insofar as some are incoherent, that was because the pleaded claim was incoherent.

7. The composite list of issues provided by the respondent was as follows: (for the sake of clarity, the original numbering has been retained)

Claim number 1802032/2020 (the first claim)

Indirect age discrimination (section 19, Equality Act 2010)

1 What is the provision criterion or practice (PCP) relied upon which the Claimant asserts is discriminatory?

1.1 A PCP of managed moves that might in certain circumstances be used to appoint employees on secondment or loan to permanent senior positions;

The Respondent accepts this amounts to a PCP that it applied.

1.2 A PCP of reliance on the managed move policy in order to appoint individuals to specific roles without a recruitment process;

The Respondent does not accept this amounts to a PCP that it applied.

1.3 A PCP that provides for the appointment of a member of staff to posts within a Department without fair and open competition, in certain circumstances where that staff member's primary role was no longer extant;

The Respondent accepts this amounts to a PCP that it applied.

2 Did any or all of the above PCPs place the Claimant and persons with whom the Claimant shares the protected characteristic of age (being over 60) at any of the following particular disadvantages, when compared with persons with whom the Claimant does not share it:

2.1 The ACM role vacancy was not advertised or made known to them;

2.2 They were not invited to apply or were otherwise unable to apply;

2.3 They had let pass (or might have let pass) other job opportunities in the hope they could put themselves forward for this one;

2.4 PE was appointed directly into the role thus denying them the role or the opportunity to declare an interest in it;

2.5 In relation to any or all of the above, they were not granted an opportunity to apply for the ACM role in fair and open competition in circumstances where they had fewer years of employment remaining and so had (or were likely to have) fewer opportunities for promotion.

3 Is the PCP a proportionate means of achieving a legitimate aim? The legitimate aim asserted by the Respondent is:

3.1 The furtherance of good management and continuity of management.

3.2 The need to avoid making employees redundant in circumstances where there are vacant posts.

Whistleblowing detriment – Public Interest Disclosure Act 1998/Employment Rights Act 1996

4 It is accepted that the Claimant made a protected disclosure in or around October 2018 in respect of an alleged failure of the Legal Services Commission ("LSC") and the Respondent to highlight to LSC staff who were transferring to the Respondent's employment in 2013 the rules of the Principle Civil Service Pension Scheme as to the abatement of pension.

5 Was the Claimant put to any of the following detriments on the ground that he had made one or more protected disclosures in relation to himself and his colleagues being misled in relation to the transfer of their LSC Pensions into the Civil Service Scheme which had an adverse abatement rule not applicable in LSC Scheme:

5.1 Deliberately excluding the Claimant from emails concerning the extension of PE's appointment in October 2018 and his permanent appointment (announced 11th November 2019 by email);

5.2 Not advertising the ACM role vacancy and/or not making it known to the Claimant;

5.3 Not inviting the Claimant to apply for that vacancy, else making it so that the Claimant was unable to apply;

5.4 Appointing PE directly into the role thus denying the Claimant the role or the opportunity to declare an interest in it and to apply for it;

5.5 Not granting the Claimant an opportunity to go through an application process for the ACM role in fair and open competition.

6 Have the allegations of detriment been brought in time?
If not and it was not reasonably practicable for the allegations to be brought in time, were they brought within a further reasonable period?

Claim number 1805605/2020 (the second claim)

Victimisation (section 27(1) Equality Act 2010)

7 The Respondent accepts that the Claimant did a protected act within the meaning of section 27(1) by bringing the First Claim.

8 What are the detriments upon which the Claimant seeks to rely?

8.1 Raising allegations of misconduct on 11 May (2020) in relation to an enquiry the Claimant made with the Law Society;

8.2 Refusing to give the Claimant sight of complaints against him for 4 months;

8.3 Suspending the Claimant from work on 11 May 2020;

8.4 Denying the Claimant access to the Respondent's systems from 11 May 2020;

8.5 Not reviewing the decisions to suspend the Claimant and to deny the Claimant systems access;

8.6 Reaching an investigation outcome that was to the Claimant's detriment;

8.7 Precluding the Claimant from applying for roles within the Civil Service;

8.8 Commencing disciplinary procedures against the Claimant.

9 Have the allegations of detriment above been brought in time? If not, would it be just and equitable to extend time in the circumstances?

10. Does the Tribunal accept that the Claimant suffered the conduct set out above? if so, does the Tribunal accept that any of the acts/omissions amount to a detriment suffered by the Claimant?

11 If any of the above acts/omissions occurred, were they because of the Claimant bringing the First Claim (the protected act) or was there a reason for the conduct which was unconnected to the protected act?

Whistleblowing detriment - Public Interest Disclosure Act 1998/Employment Rights Act 1996

12. It is accepted that the Claimant made a protected disclosure in or around October 2018 in respect of an alleged failure of the Legal Services Commission ("LSC") and the Respondent to highlight to LSC staff who were transferring to the respondent's employment in 2013 the rules of the Principal Civil Service Pension Scheme as to the abatement of pension.

13 What are the detriments upon which the Claimant seeks to rely and which disclosure is it alleged the detriment is a result of?

13.1 Raising allegations of misconduct on 11 May (2020) in relation to an enquiry the Claimant made with the Law Society;

13.2 Refusing to give the Claimant sight of complaints against him for 4 months;

13.3 Suspending the Claimant from work on 11 May 2020;

13.4 Denying the Claimant access to the Respondent's systems from 11 May 2020;

13.5 Not reviewing the decisions to suspend the Claimant and to deny the Claimant systems access;

13.6 Reaching an investigation outcome that was to the Claimant's detriment;

13.7 Precluding the Claimant from applying for roles within the Civil Service;

13.8 Commencing disciplinary procedures against the Claimant.

14 Have the allegations of detriment been brought in time? If not and it was not reasonably practicable for the allegations to be brought in time, were they brought within a further reasonable period?

15 Does the Tribunal accept that the Claimant suffered the

conduct set out above? If yes, was the Claimant subjected to that conduct because he had made qualifying disclosures, or was there a reason for the conduct which was unconnected to the qualifying disclosures?

Claim Number 180 1091/2021 (the Third Claim)

Victimisation (section 27(1) Equality Act 2010)

16 The Respondent accepts that the Claimant did a protected act within the meaning of section 27(1) by bringing the First Claim and the Second Claim.

17 What are the detriments upon which the Claimant seeks to rely?

17.1 Continuing the Claimant's suspension without carrying out bona fide reviews;

17.2 Refusing to accept the Claimant's grievance about a member of staff on the false basis that it was to be dealt with elsewhere;

17.3 Disregard of GP fit notes from 15th April to 14th September 2020. Coercion of the Claimant into taking part in a disciplinary investigation when certified medically unfit to do so by a GP and claiming in the Grounds of Resistance to the Third Claim that it is good HR practice to ask an unqualified individual to substitute their medical assessment of their own fitness for that of a qualified healthcare professional;

17.4 Requiring the Claimant to attend OH reviews after ignoring the recommendations from previous referrals. It is the Claimant's case that none of the OH reports in the case contain valid recommendations as an obvious condition precedent in each case (that the Claimant should fully understand the allegations faced – Dr Brown) was not met;

17.5 Subjecting the Claimant to oppressive, targeted and disproportionate disciplinary proceedings. includes the second disciplinary investigation which represents double jeopardy;

17.6 Subjecting the Claimant to a flawed and unfair disciplinary hearing and decision, as set out in the ET1 for the Third Claim:

17.6.1 Charge to be met was specific and Francesca Weisman confirmed the nature of what she was considering.

17.6.2 Reason for issuing a Final Written Warning had nothing to do with the charge (where the findings were largely in the Claimant's favour) and were not even discussed or put to the Claimant at the hearing;

17.6.3 Using legitimate matters of concern raised by the Claimant as reasons for issuing a Final Written Warning, e.g. The Claimant stating that he felt that the actions of the Respondent had ruined his life;

17.6.4 Involvement of a conflicted senior HR Official who advised both in relation whether a charge should be put and then on at the

hearing. Disciplining the Claimant for legitimately raising the possibility of conflict;

17.6.5 Producing a destructive and biased note of the disciplinary hearing;

17.6.6 Victimising reference to HR having advised the investigating manager (Antony Evans) that it was ok for him to assess my medical fitness to take part in an investigation and ignore medical opinion. Adviser was a conflicted HR official; ***??***

17.6.7 Notice of appeal

17.7 Flawed appeal outcome resulting in a written warning appearing on the Claimant's record, amounting to a "Do not Employ" edict. Perverse findings including, inter alia that the Claimant was in breach of 3.5 of the Civil Service Code. Refusal by HR to clarify the effect of a written warning despite being invited to do so.

18 Have the allegations of detriment above been brought in time? If not, would it be just and equitable to extend time in the circumstances?

19 Does the Tribunal accept that the Claimant suffered the conduct set out above? If so, does the Tribunal accept that any of the acts/omissions amount to a detriment suffered by the Claimant?

20 If any of the above acts/omissions occurred were they because of the Claimant bringing the First Claim and/or the Second Claim (the protected act) or was there a reason for the conduct which was unconnected to the protected act?

Claim Number 1803850/2021 (the fourth Claim) Jurisdiction – out of time

21 Was the claim submitted within three months starting with the date of the act to which the claim relates and as extended by the application of the ACAS early conciliation process? The respondent asserts that any act prior to 22 April 2021 is out of time.

22 If the claim in relation to any act of discrimination was not submitted within three months, did such act amount to conduct extending over a period, and was the claim brought within three months of the end of that period?

23 If not, would it be just and equitable to allow such claims to proceed?

Disability status

24 Was the Claimant a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time? The Claimant relies upon the conditions of workplace stress and episodes of depression. The material time is April 2020 – August 2021.

25 Did the Respondent have knowledge of that disability, and if so, from when?

Failure to make reasonable adjustments (section 20 – 21 Equality Act 2010)

26. Was the Respondent under a duty to make reasonable adjustments?

27. If so, what was the relevant provision, criterion or practice (PCP) which put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant relies on the following as PCPs:

27.1 Conducting separate disciplinary proceedings;

27.2 Placing the Claimant on suspension and continuing with suspension;

27.3 Withholding complaints and/or allegations from the person against whom disciplinary charges are brought;

27.4 Running "non-compliant" disciplinary processes.

28 Do any of the above amount to PCPs? If so, did the respondent apply them to the Claimant? The Respondent accepts that placing the Claimant on suspension/continuing with suspension amounts to a PCP that applied to the Claimant. It is denied that the remaining alleged PCPs amount to PCPs applied by the Respondent.

29 If the above are PCPs that were applied to the Claimant, was the Claimant placed at a substantial disadvantage in comparison with those not suffering with the Claimant's disability?

30 Did the Respondent have knowledge of the substantial disadvantage?

31 Did the Respondent fail to implement reasonable adjustments?

32 The Claimant's position is that the following adjustments were reasonable and were not applied:

32.1 Running the two disciplinary procedures against the Claimant at the same time and/or not running the second/misconduct disciplinary at all;

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32.2 Shortening the suspension or not suspending the Claimant;

32.3 Segregating the Claimant from the individuals who had complained about his conduct (instead of suspending the Claimant);

32.4 Finding him temporary redeployment (instead of keeping the Claimant on suspension);

32.5 Sharing the specific complaints raised against the Claimant at an earlier stage.

Discrimination arising from disability
(section 15 Equality Act 2010)

33 Did the Respondent treat the claimant unfavourably by:

33.1 Holding two separate disciplinary procedures through both of which he was suspended;

33.2 Failing to review or end the Claimant's suspension (sooner than the Respondent did)?

34 What was the something arising in consequence of the Claimant's disability?

35 Did the Respondent treat the Claimant unfavourably because of the something arising in consequence of his disability? The Claimant has identified 'because he was ill' as the something arising in consequence relevant to the first allegation above of unfavourable treatment; and 'the ongoing
suspension exacerbated his mental health difficulties' as the something arising in consequence relevant to the second allegation of unfavourable treatment.

36 If the Tribunal accepts that the Claimant was treated unfavourably because of something arising in consequence of his disability, was the treatment a proportionate means of achieving a legitimate aim?

36.1 The Respondent says that it aims were:

36.1.1 Ensuring potential breaches of its Code of Conduct are properly investigated and that all employees maintain the correct standard of behaviour;

36.1.2 Ensuring disciplinary processes are conducted in an orderly manner in a way which is manageable;

36.1.3 Avoiding the Claimant's conduct having a significant negative impact on others and/or the reputation of the Respondent and/or the effective delivery of public services.

Findings of fact

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

9. Where the Tribunal heard evidence on matters for which it makes no finding or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact. The Tribunal has anonymised the identity of those mentioned who were not parties, did not appear before the Tribunal or provide a witness statement.

10. The claimant is a solicitor and commenced employment with the respondent on 5 August 1985. He worked in the Legal Aid Board (which became the Legal Aid Agency in 2013).

11. In October 2012 the claimant was admitted to a psychiatric ward diagnosed with severe depression with psychotic symptoms. He was absent from work until September 2013.

12. On 18 March 2015 the claimant was appointed as Contract Adviser–band B.

13. On 28 November 2016 the claimant was discharged from the Community Mental Health Team. In the discharge letter it was stated that the claimant had indicated that he had not suffered significant symptoms of anxiety or depression for over 4 years. His medication was reduced for 2 weeks and then discontinued.

14. PE was appointed as Area Contract Manager on a temporary basis to cover maternity leave of JW from 28 August 2017 to 28 November 2018. He was the claimant's line manager.

15. Upon her return after maternity leave JW was seconded to another team within the Contract Management Unit in order to oversee a new IT project for a 12 month period.

16. The appointment of PE as Area Contract Manager was extended for a fixed period until JW was to return from the secondment.

17. On 12 October 2018 Nicole Mason wrote to PE and stated:

    "… The effect of this is that the end of the secondment, you would in effect transfer permanently into LAA (Legal Aid Agency). As all parties are in

agreement, and your role in your previous Department will not be held open for you, we propose to transfer you permanently to the LAA a at this stage.

You will continue to be seconded into the ACM Leeds role until 11 October 2019. Your permanent transfer to the LAA does not guarantee a permanent role as ACM Leeds as any permanent recruitment for that position will need to be fair and open via the usual recruitment processes.

Therefore, if you have not been successful in applying for a permanent post within the LAA by the end of your secondment, you could potentially be made surplus and the LAA would need to try and find an alternative role. We would also expect you to start looking at roles across the MoJ and wider Civil Service in the three months prior to the end of your secondment if you have not secured an alternative permanent position at that stage."

18. On 29 October 2018 the claimant sent an email in respect of his Legal Services Commission (LSC) pension having been transferred to the Civil Service Scheme (CSS) without his consent. The consequences of which were to the detriment of the claimant and everyone who transferred from the LSC pension scheme.

19. In around July 2019 JW was appointed to another substantive role and discussions took place with regard to PE. It was decided that the managed move policy would be followed and PE was permanently appointed to the role of Leeds ACM.

20. On 11 November 2019 Nicole Mason sent an email to the Contract Managers in Leeds informing them that PE was being retained as their ACM. It was indicated that PE would otherwise be a surplus band A within LAA and would have automatically had priority for the role had it been advertised and the process would not have changed the result.

21. On 28 November 2019 the claimant submitted a grievance notification form in which he provided details of grievance as follows:

"A promotion opportunity – ACM Leeds has been filled in breach of the Equality Act 2000 and my contract of employment which includes policies on open competition roles within the Legal Aid Agency.

The relevant policies have been breached and/or manipulated to secure the transfer of a loaned individual into the Leeds ACM role who did not wish to return to his "home" employment and in fact had made a decision not to return – in breach of my contract of employment and the Equality Act 2000. Full details (to date) are contained in emails between myself, David Thomas, Nicole Mason, Nicola Johanson, JW and Janet Land from 19 November 2019 to date.

My line manager is being refused permission to speak to me about this very serious matter. I believe that MOJ's policies which apply in the sponsored

body which is the Legal Aid Agency – in relation to loans and secondments are being widely ignored. I wish the wider position investigated as part of this grievance."

22. On 3 February 2020 Robert Heard, Head of Criminal Cases Unit provided an investigation report in response to the claimant's grievance. It was concluded that the appointment of PE was a managed move as opposed to a loan or secondment. It was also stated with regard to whether there was any evidence of age discrimination:

"There is no evidence in any of the material that I have considered which even remotely touches on the age of PE (or Mark for that matter) throughout this period."

23. On 3 February 2020 the claimant sent an email to David Thomas stating that he did not accept the findings of the investigation report which he said was clearly wrong. The claimant also stated that his grievance was withdrawn and asked that the respondent should not write to him about it further and that he was pursuing the matter in the Tribunal/County Court.

24. On 27 February 2020 KF (Contract Manager) raised a complaint about inappropriate behaviour by the claimant in a WhatsApp group discussion in which she said that the claimant made offensive remarks to team members because he didn't agree with their opinion.

25. In a WhatsApp conversation which took place on 27 February 2020 between team members, a housing query was raised with regard to a threat of homelessness that had been made by a landlord to a tenant. GC indicated that there should be something evidencing the threat. The claimant joined the conversation and said:

> "When I did housing law for a brief period my experience was that the worst threatening landlords didn't usually oblige by putting things in writing – even the tenancy agreement. D – ask him to go and get himself a black eye…
>
> Anyone can end up homeless. Our role is to help people in this predicament starting with affording them the dignity of being believed….."
>
> The conversation moved on with regard to the issue. The claimant sent a message:
>
> "Get on with. I've lost interest."
>
> GC stated:
> "So actually they haven't been made homeless they've made themselves homeless by handing the keys back voluntarily."

Claimant:
“This is utterly ridiculous. I hope your daughters are never threatened by a nasty landlord. Have either of you ever run a housing case?…

GC:
“No need to get arsey Mark!!!!! The question is simple is the claim compliant and does the file contain the required evidence the answer here is no

Claimant:
“No let’s not. This is concerning so we can pick up when we three are next in – 2023?

DF
“Wow. What have I started?!
That was rhetorical, for the record”

Claimant:
“Do one.”

GC:
“Seriously no need for that Mark your bang out of order!!!!!
Grow up.

DF:
“Ok let’s take a step back please”

KF:
“Agree. This is utterly inappropriate.”…

Claimant:
“The requirement for a documented threat seems absurd to me. The minute landlords cotton on they’ll simply make oral threats.

Client to Provider “the landlord has threatened to throw me out and to assault me”

Provider “can you ask him to put in writing to the file?”
Give me strength.

DF:
“Can we all please just step back and take a deep breath? I don’t want this to get so out of hand”

Claimant:
“Don’t you make my point. A few sharp exchanges and you think things are out of hand but tenant threatened by landlord – they’re different. I give up…

There is no requirement in English Law for threats to be put in writing for evidence about them to be admissible in Court. The same is the case in other Western democracies e.g. the Weinstein conviction.

Client – "I was threatened by Weinstein"

Attorney – "can you ask him to put in writing coz frankly you're not entitled to be believed…

26. On 27 February 2020 KF, Contract Manager sent an email to Nicola Johanson, copied to PE about the claimant's inappropriate behaviour. Within the complaint it was stated:

"I found this wholly inappropriate and offensive and did say so at the time. Unfortunately as I'm sure you are aware this is not the first instance of this individual creating a toxic environment in our team and people are reluctant to report it as they are afraid of the personal comeback."

27. On 28 February 2020 CG (Contract Manager) made a formal complaint in respect of the same WhatsApp group discussion and referred to aggressive, bullying and unacceptable behaviour by the claimant. She indicated that she hoped that this would be dealt with in the strictest confidence.

28. On 2 March 2020 DF (Contract Manager) raised a complaint against the claimant in respect of his negative and confrontational attitude and demeanour indicating that it had come to a head in the WhatsApp discussion.

29. Nicola Johanson, Area Contract Manager, met with the claimant on 2 March 2020 and carried out an informal discussion with regard to the complaints raised against him.

30. On 2 March 2020 the claimant sent an email to PE and copied to the individuals who had made the complaints. He stated that:

"I did get animated and I'd like to apologise for any offence. It wasn't intended and I clearly misjudged my audience.…I've agreed with Nic to work from home more often and away from the team when I'm in the office. Apparently I'm putting people off coming in and this will hopefully solve that as an issue enabling people to be in much more frequently going forward. I've also removed myself from the WhatsApp group."

31. On 10 March 2020 a report was provided by an Occupational Health Doctor in which it was stated:

"Mr Gaskell has had a major mental health problem, which required acute treatment, and which he is now thankfully fully recovered. It is clear that his symptoms were caused or substantially contributed to from his work. More

recently he has developed diabetes, but this is a mild form of the disease, and there are no current concerns about his health with regard to that. Neither of these health concerns are currently affecting his capability in any way for work. In summary therefore he is fit for his normal work.

He is likely no longer a disabled person with reference to the Equality Act. You will be aware that the employer needs to satisfy themselves of that decision, and you may wish to look at Appendix 1 of the Equality Commissioners Statutory Code of Practice for Employment.

He is not taking any medication which may lessen the symptoms, and does not have any effects from his health which would likely cause substantial effects on day today activities….

You ask if his ill-health has been work related – yes it has.

You ask whether any amended duties required – no longer at this stage. He is capable of all aspects of his work.

You ask whether any amended duties required – no longer at this stage. He is capable of all aspects of his work.…"

32. The three employees who had raised the complaints against the claimant indicated that they were not content with the apology that the claimant had provided.

33. Janet Land, National Contract Manager conducted meetings with each of them and it was considered appropriate to instruct an Investigating Officer.

34. On 10 April 2020 the claimant presented his first claim to the Employment Tribunal. He brought claims of indirect age discrimination and protected disclosure detriment.

35. On 14 April 2020 Janet Land wrote to the claimant and informed him that a formal investigation would take place. The claimant requested copies of the complaints made against him and asked how his complaints against the three individuals were to be progressed.

36. Janet Land indicated to the claimant that the details of the allegations would be shared with him once the investigating officer had had the opportunity to speak with three individuals concerned. It was also indicated that the complaints the claimant had raised against them would be dealt with together.

37. On 15 April 2020 the claimant commenced a period of sickness absence by reason of work-related stress.

38. On 30 April 2020 the claimant informed the respondent that he was intending to send a hard copy of the WhatsApp transcript to the Law Society. He said that he did not accept that he needed anyone's permission to do that. The conversation was not MoJ business. It was an illegal use of WhatsApp.

39. On 1 May 2020 the claimant sent an email to David Thomas stating that he had made contact with the Law Society as his 'union of choice.'

40. Antony Evans, Head of Civil Change, was asked to act as the Investigating Officer and on 10 May 2020 he wrote to the claimant setting out the details of what the three individuals had said which had led to the investigation being commenced.

41. On 11 May 2020 Janet Land wrote to the claimant referring to the investigation into allegations of inappropriate behaviour:

> "The incident which prompted the complaints was a discussion which took place on WhatsApp. You had indicated on numerous occasions, your intention to change your concerns regarding the content of those discussions and the use of WhatsApp, with the Law Society.
>
> You were informed that the Law Society was not an appropriate escalation route this issue. Despite multiple requests not to do so, you confirmed, via email on 1 May 2020 and subsequently by email on 6 May 2020, that you had shared the transcript of the internal conversation with the Law Society and raised concerns regarding the use of WhatsApp within the MoJ. As a consequence I am writing to confirm your suspension to facilitate the investigation of the misconduct allegations against you.
> The reasons for suspension was as follows:
>
> The initial fact-finding regarding your sharing of information with the Law Society shows that your behaviour might be gross misconduct.
>
> The working relationship with you has broken down.
>
> There is reasonable suspicion that there are risks to the MoJ's property and/or reputation…"

42. The claimant was absent from work. The statement from his GP provided that he was absent by reason of work related stress.

43. Antony Evans sent the claimant the original complaints to the claimant at his work email address on 20 May 2020. The claimant was unable to gain access to these at the time. The claimant was provided with copies by post on 11 June 2020.

44. An investigation report was prepared by Antony Evans and sent to the claimant together with an invitation to a disciplinary hearing on 14 July

2020. The findings of the investigation report were that the claimant's behaviour in respect of the WhatsApp conversation was misconduct but at the lower end in terms of seriousness. The additional complaints raised against the claimant should (or had) been dealt with by line management. The complaints raised by the claimant against the three individuals, it was found that no formal action was required.

45. It was found that the decision to suspend the claimant was appropriate in the circumstances. It was not believed that the claimant had shared any information with the Law Society but he had threatened to do so and the actions were potentially serious enough to amount to gross misconduct and there was a case to answer on this point which would be considered further at a formal disciplinary hearing.

46. In the letter to the claimant inviting him to the disciplinary hearing Janet Land, National Contract Manager, stated:

"You will be aware that formal enquiries have been undertaken following allegations that have been made in respect of your conduct. Specifically, the allegations regarding your interactions with KF, GC and DF. The incident which prompted the complaints was a discussion which took place on WhatsApp on or about 27th February 2020.

You had subsequently indicated on numerous occasions, your intention to share your concerns regarding the content of those discussions and the use of WhatsApp, with the Law Society. You were informed that the Law Society was not an appropriate escalation route for this issue. Despite multiple requests not to do so, you sent emails suggesting that you had shared the transcript of the internal conversation with the Law Society and raised concerns regarding the use of WhatsApp within the MoJ.

The investigation has now concluded and I am satisfied that in relation to the behaviours demonstrated towards KF, GC and DF in the context of the WhatsApp exchanges; this has already been dealt with adequately via line management actions.

However, I consider that there is sufficient evidence to justify holding a disciplinary hearing to consider a charge of gross misconduct regarding the threats to share the details of the WhatsApp incident with the Law Society on the basis that this undermines the trust between employee and employer."

47. On 28 July 2020 solicitors instructed by the claimant sent a letter requesting that the disciplinary proceedings were paused pending the procurement of the Occupational Health Report and an assessment by the claimant's GP to establish the condition of his mental health and well-being. They stated that they considered that the claimant was disabled for the purposes of section 6 of the Equality Act 2010.

48. On 4 September 2020 the claimant's GP sent a letter to his solicitors setting out his medical condition. It was stated that the claimant had symptoms of restless sleep, fatigue and emotional lability. These symptoms were said to be due to the claimant's ongoing stress related to the problems that he faced at his workplace. It was indicated that the non-provision of the complaints against him until June 2020 had affected his mental health. It was also stated "I do not feel that Mr Gaskell is disabled for the purposes of the Equality Act 2020."

49. On 10 September 2020 an Occupational Health report was provided to the respondent. It was stated that the claimant's treating doctor had advised him that his mental health may be at risk if work-related stress persisted without being addressed. In the opinion of the Consultant Occupational Physician there was no medical reason why the claimant could not be considered fit to return to work or fit to attend procedural meetings. "Whilst there is no evidence that the medical condition would appear to cause substantial impairment of day-to-day activities likely to persist beyond 12 months today at consultation, you may wish to consider it prudent, if there is any doubt, as the situation has no timeline for resolution that the provisions of the Act may apply in future. But at this stage I am unable to determine whether or not he is likely to need any long-term specific adjustments, apart from facilitated attendance at medical appointments advised by his treating doctor. However, as you appreciate it, I cannot give any more definitive view than that as ultimately this is a legal and not a medical decision."

50. On 25 September 2020 the claimant presented a second claim to the Employment Tribunal (claim 2). He brought a claim of Public Interest Disclosure detriment and victimisation.

51. On 6 October 2020 Francesca Weinstein wrote to the claimant inviting him to a disciplinary hearing. It was stated:

    "At the conclusion of the hearing it is open to me to find that the charge against you is made out, that an alternative lesser charge may be more appropriate, or that there has been no misconduct. If I find that the charge of gross misconduct is made out the range of penalties available includes, but is not limited to dismissal."

52. On 19 November 2020 a disciplinary hearing took place chaired by Francesca Weisman accompanied by Brian Ruggles, HR Case Manager.

53. On 1 December 2020 the outcome of the disciplinary hearing was provided. It was stated that:

    "I have been asked to make a decision based on the specific allegation set out in paragraph 1, but it would be incomplete if I were not to take some account of the language and manner of your broader conduct and communication towards your colleagues at and leading to the hearing I highlight the following:

- In correspondence and at the hearing itself you repeatedly referred to Janet Land as “thuggish”;

- You made reference to procedural steps taken by Nicola Johanson and Janet Land as “a dog’s breakfast”

- You refer to colleagues involved in current proceedings as “these idiots” and more than once as “nasty pieces of work”;

- You made a number of sarcastic references to Anthony and his report, describing him as “Mr Fairness”; asking him what medical qualifications he had when he had never indicated he held such qualifications, and referring repeatedly to his report as a “character assassination”;

- You suggested Brian Ruggles was not an “honest broker”, and during one interchange made it difficult for him to speak;
- There were moments of hostilities during the hearing when you pointed at the screen and shouted at the screen that “you have ruined my life”.

These represent only a fraction of the disparaging and sometimes vitriolic comments I have been in a position to observe.”

54. It was also stated within the outcome:

“Threats to disclose sensitive information to an outside body such as the Law Society are capable of amounting to gross misconduct. However, in the particular circumstances here I take the view that there were contributory factors not of your making which escalated the situation, most importantly the nondisclosure of the complaints against you, and the disproportionately negative response to your WhatsApp conversation of 27th February. Taken together with your personal circumstances, including mental health issues, I find the charge of gross misconduct is not made out…

This is at the upper end of the spectrum of serious misconduct and I consider that a Final Written Warning is an appropriate sanction to remain live on your file for 12 months.”

55. On 17 December 2020 the claimant appealed against the decision to issue him with a final written warning.

56. On 24 February 2021 the claimant presented a third claim to the Employment Tribunal. The claimant brought a claim of victimisation.

57. On 25 February 2021 an Occupational Health report was provided to the respondent. It was stated that the claimant had experienced a significant

episode of mental ill-health in 2012 and was prescribed regular medication to treat this until 2017. The Consultant Occupational Physician stated that he was satisfied that there was no evidence of thought disorder or other symptoms that might suggest recurrence of this condition. In the report it was stated that:

"… The major barrier to resuming employment would seem to be his dissatisfaction with how he feels he has been treated and a breakdown of trust between him and his team. These issues are essentially non-medical and likely to remain a barrier to progress until mutually satisfactory resolution is achieved through usual management processes.

To summarise, my overall impression is that although Mark is suffering from symptoms of anxiety and depression which may be causing some degree of impairment I think he remains fit for work in the generic sense of his role but that non-medical factors as described above make the chances of a successful return to his current team unlikely."

58. On 19 March 2021 the claimant was invited to a Disciplinary Investigation Meeting by Maria Brown, Line Manager in the Exceptional and Complex Cases Team. The meeting was to discuss misconduct allegations against the claimant in respect of numerous emails the claimant had sent to colleagues and managers.

59. On 21 May 2021 the claimant attended an appeal hearing chaired by Joanne Bainbridge, Head of People and Capability.

60. On 9 June 2021 Joanne Bainbridge wrote to the claimant setting out the outcome of his appeal. The final written warning was overturned and the claimant was issued with first written warning instead. The reasons were provided as follows:
    - "I have disregarded any behaviour evident through emails or meetings (other than as specifically outlined above) as irrelevant to this process – I am aware this is part of a separate investigation so have not considered it
    - I note that significant delay in the process in terms of notifying you of the complaints made played a part in you threatening to contact the Law Society. Had you been provided with the information quickly and as directed in the policy it is highly likely you wouldn't have made the threats regarding Law Society disclosure that you did.
    - You didn't disclose any information to the Law Society.
    - It is evident that the delay in notifying you of the complaints against you impacted on your mental health and I have taken this into account when reducing the sanction.

- Evidence is clear that you suggested both that you would notify the Law Society of the WhatsApp conversation and that you indicated you had contacted them. It subsequently became clear that you hadn't done so, other than to submit a general enquiry, however the threat to do so is something that you have replicated subsequently. I point to specific examples above. On a number of occasions, you have made threats in the attempt to expedite the provision of information. It is for the Law Society threat and associated threats that I have imposed a warning. You expressed regret at the Law Society threat and indicated it was as a result of your poor mental health.

- This behaviour is in contravention of the Civil Service code, which requires civil servants to always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings. It also requires you not to disclose official information without authority. The threat to contact the Law Society contravened the Civil Service Code and the MoJ Code of Conduct, specifically section 3.5 which states that you will not release official information unless you are authorised to do so. I have considered this specific behaviour against the backdrop of your experiences with a MoJ over the last few years and the failure to provide you with the details of complaints against you hence the first written warning rather the final written warning."

61. On 25 June 2021 David Thomas sent an email to the claimant lifting his suspension. It was stated that Joanne Bainbridge had found that the relationship with CMA had broken down and, the claimant had requested to be redeployed outside of the team. The claimant was placed on special leave with pay and it was aimed to find suitable alternative employment within the LAA or wider MoJ. It was indicated that the claimant was asked to abide by the Civil Service code of conduct.

62. On 12 July 2021 the claimant was invited to a disciplinary hearing in respect of the allegations that his conduct fell below acceptable standards in respect of the content of a number of emails and one phone call.

63. On 22 July 2021 the claimant presented a fourth claim to the Employment Tribunal. He brought a claim of disability discrimination.

64. On 2 August 2021 claimant attended a disciplinary hearing. The chair was Janet Peel, Deputy Public Trustee.

65. Janet Peel considered that, although the initial scope of the disciplinary case was in relation to 20 instances of alleged misconduct in respect of emails. This was reduced as she felt there was a likelihood that some of the emails may have been considered previously at the stage when the claimant had been issued with a final written warning. Janet Peel said that

she was aware that Joanne Bainbridge had disregarded these emails when she heard the appeal but she was concerned as to whether they had the potential to have been considered at first instance.

66. The decision was based on six emails that post-dated the disciplinary hearing before Francesca Weisman.

67. On 12 August 2021 Janet Peel wrote to the claimant providing the outcome of the disciplinary process. It was indicated that it had been decided that the claimant's actions constituted minor misconduct and no further action was taken.

68. At the time of the Tribunal hearing the claimant remains in the respondent's employment. He has successfully moved to a different department with a different line management chain and he indicated that he was performing well in the new role.

The law

Time limits

69. Section 123 of the Equality Act 2010 states:

> (1)...Proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> ...
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) a failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

70. The Court of Appeal made it clear in **Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686,** that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish 'an

act extending over a period', is that (*a*) the incidents are linked to each other, and *(*b*)* that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an "ongoing situation or continuing state of affairs" as opposed to "a succession of unconnected or isolated specific acts". It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

71. In the case of **Humphries v Chevler Packaging Ltd EAT 0224/06** the EAT confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make reasonable adjustment. In the case of **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170. T**he Court of Appeal held that where an employer was not deliberately failing to comply with the duty and the omission was due to lack of diligence or competence, or any reason other than conscious refusal, it is to be treated as having decided upon the omission when the person does an act inconsistent with doing the omitted act or when, if the employer had been acting reasonably, it would have made the adjustments. In the Court of Appeal case of **Abertawe Bro Morgannwg University v Morgan [2018] WLR197** it was stated:

> "In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20 (3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to redress the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became a should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

72. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the Tribunal that it should do so, and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre [2003] EWCA Civ 576** per Auld LJ *at para 25)*.

.73. Discretion to grant an extension of time under the just and equitable formula has been held to be as wide as that given to the Civil Courts by Section 33

of the Limitation Act 1980 **British Coal Corporation v Keeble** [1997] IRLR 336. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension having regard to all of the circumstances, in particular:-

(a) The length of and the reason for the delay;

(b) The extent to which the cogency of the evidence is likely to be affected by the delay;

(c) The extent to which the parties sued had cooperated with any request for information;

(d) The promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action; and

(e) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

74. These are checklists useful for a Tribunal to determine whether to extend time or not. Using internal proceedings is not in itself an excuse for not issuing within time see **Robinson v The Post Office** but is a relevant factor.

75.

Time limits are short for a good purpose- to get claims before the Tribunal when the best resolution is possible. If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if it agrees with the claimant, the Tribunal can make a constructive recommendation. Left unresolved, omissions by employers often have devastating consequences which it is too late to remedy in that way.

Disability Discrimination

76. Section 6 of the Equality Act 2010 states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Under paragraph 2(1) schedule 1 to the Equality Act it is provided:

Long-term effects

(1) The effect of an impairment is long-term if—

(a) It has lasted for at least 12 months,

(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

Section 212 provides that "substantial" means more than minor or trivial.

77. The time at which to assess the disability (that is to say whether the is an impairment which has a substantial adverse effect on normal day-to-day activities) as the date of the alleged discriminatory act. Authority for this proposition may be found in **Cruickshank v VAW Motorcast Limited [2002] ICR 729 EAT.**

78. For impairments that have not lasted 12 months, the Tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The word "likely" is to be interpreted as meaning that it "could well happen" upon the authority of the decision of the House of Lords in **Boyle v SCA Packaging Ltd [2009] ICR 1056.**

79. The issue of how long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal hearing. Authority for this proposition may be found in the case of **McDougall v Richmond Adult Community College [2008] ICR 431.**

80. In the case of **All Answers Limited v W and another [2021] EWCA Civ 606** it was held that in determining whether an impairment is long-term, events after the date of the discriminatory act should be disregarded. The question must be answered by reference to the facts and circumstances at the date of the act.

81. In the case of **Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540** (with reference to the Disability Discrimination Act 1995) it was made clear that a substantial adverse effect resulting from a different impairment would not properly be described as a recurrence.

82. In the case of **J v DLA Piper UK LLP 2010 ICR 1052** the EAT said that, when considering the question of impairment in cases of alleged depression, tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. While both can produce broadly similar symptoms of low mood and anxiety:

"The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events"

Indirect Discrimination

83. Section 19 of the Equality Act 2010 states:

(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.

Section 23 states: Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Discrimination arising from Disability

84. Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

85. Under section 15 there is no requirement for a Claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

86. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the

Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?

87. With regard to justification, The EAT in **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EQLR 670** applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565**, CA to a claim of discrimination under section 15 Equality Act 2010. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. In effect the Tribunal needs to balance the discriminatory effect of the stated treatment against the legitimate aims of the employer on an objective basis in considering whether any unfavourable treatment was justified.

88. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

89. In the case of **Pnaiser v NHS England [2016] IRLR 170** it was provided as follows:

"In the course of submissions I was referred by counsel to a number of authorities including **IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN** and **Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893**, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as

he or she did is simply irrelevant: **see Nagarajan v London Regional Transport [1999] IRLR 572**. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in **Land Registry v Houghton UKEAT/0149/14** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of **Weerasinghe** as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in **Weerasinghe**, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to something' that caused the unfavourable treatment."

90. In the case of **A Ltd v Z [2019] IRLR 952** it was stated by Eady J*:*

"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see **City of York Council v Grosset *[*2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA** at para 39**.**

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see **Donelien v Liberata UK Ltd *(2014)* UKEAT/0297/14, [2014] All ER (D) 253** at para 5, per Langstaff P, and also see **Pnaiser v NHS England *(2016)* UKEAT/0137/15/LA, [2016] IRLR 170** EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see **[2018] EWCA Civ 129, [2018] IRLR 535 CA** at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes *(see* **Herry v Dudley Metropolitan Council *(2016)* UKEAT/0100/16, [2017] ICR 610**, per His Honour Judge Richardson, citing **J v DLA Piper UK LLP *(*2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052)*,*** and (ii) because, without knowing the likely cause of a given

impairment, 'it becomes much more difficult to know whether it may well last for more than 12 months, if it is not *[*already done so*]'*, per Langstaff P in **Donelien** EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

'5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.'

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (**Ridout v T C Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).**

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

91. In the case of **City of York Council v Grosset [2018] IRLR 746** the Court of Appeal held that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? (ii) and did that 'something 'arise in consequence of B's disability?

Failure to make reasonable adjustments

92. Section 20(3) of the Equality act 2010 provides:

"…where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with

persons who are not disabled, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."

93. Section 212(1) provides that "Substantial" is defined at to mean "more than minor or trivial".

94. Whilst there is no definition of 'provision, criterion or practice' found in the legislation, and it is left to the judgment of individual Tribunals to see whether conduct fits this description, not every act complained of is capable of amounting to a PCP. In **Ishola v Transport for London [2020] IRLR 368** Simler LJ stated:

> "In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
>
> In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

95. In **Environment Agency v Rowan [2008] IRLR 20**, the EAT provided guidance on how an Employment Tribunal should approach a reasonable adjustments claim The Tribunal must identify:

> "(a) the provision, criterion or practice applied by or on behalf of an employer, or;
> (b) the physical feature of premises occupied by the employer;
> (c) the identity of non-disabled comparators (where appropriate); and
> (d) the nature and extent of the substantial disadvantage suffered by the claimant."

96. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J held:

> "The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through."

97. In **Chief Constable of Lincolnshire Police v Weaver UKEAT/0622/07/DM**, the EAT held that a Tribunal must also take into account wider implication of any proposed adjustment, not just focus on the claimant's position. This may include operational objectives of the employer, which may include the effect on other workers.

98. Schedule 8 of the Equality Act 2010 provides that an employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question.

99. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1). Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. The employer does not need to also know that, as a matter of law, the consequence of such facts is that the employee is a disabled person as defined in section 1(2) **Gallop v Newport City Council [2014] IRLR 211**.

100. As to the relevance of the content of Occupational Health reports to the question of the employer's knowledge of disability. In the case of **Donelien v Liberata UK Ltd [2018] IRLR 535** Underhill LJ stated, "while an ET will 'look for evidence that the employer has taken its own decision…the lay members sitting with me in this case would wish to emphasise that in general great respect must be shown to the views of an Occupational Health doctor', though such views should not be followed uncritically"

<u>Victimisation</u>

101. Section 27 of the Equality Act provides as follows:-

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act--
> (a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;
(c) Doing any other thing for the purposes of or in connection with this Act;
(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

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

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

102. In a victimisation claim there is no need for a comparator. The Act requires the Tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

"The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

103. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof. To benefit from protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says, "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable.

104. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi** EAT0269/09. Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of

the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572 and **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, and **St Helen's Metropolitan Borough Council v Derbyshire** [2007] IRLR 540. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others** [2010] IRLR 136. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

"…The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and, if not, not. In our view there will in principle be cases where an employer had dismissed an employee (or subjected him to some other detriment) in response to a protected act (say, a complaint of discrimination) but he can, as a matter of common sense and common justice, say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable. The most straightforward example this were the reason relied on is the manner of the complaint.…

We accept that the present case is not quite like that. What the Tribunal found to be the reason for the Appellant's dismissal was not the unreasonable manner in which her complaints were presented (except [in one relevant respect]). Rather, it identified as the reason the combination of interrelated features – the falseness of the allegations, the fact that the appellant was unable to accept that they were false, the fact that both those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness. But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."

105. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan v Agnew [1994] IRLR 61**. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-

"Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful

discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

106. In **O' Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615** the Court of Appeal said that if there was more than one motive it is sufficient that there is a motive that there is a discriminatory reason, as long as this has sufficient weight.

Burden of Proof

107. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

108. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved again **in Madarassy v Normura International plc [2007] EWCA 33.**

109. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will

have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

110. In the case of **Strathclyde Regional Council v Zafar [1998] IRLR 36** the House of Lords held that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

111. In **Law Society and others v Bahl [2003] IRLR 640** the EAT agreed that mere unreasonableness is not enough. Elias J commented that

"all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour … Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way … The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable."

112. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

Protected Disclosure Claim

113. Section 43B(1) of the Employment Rights Act 1996

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged;

or

(f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

114. Section 47B (1)

"A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

115. It is accepted by the respondent that the claimant made a protected disclosure in around October 2018 in respect of the alleged failure by the Legal Services Commission and the respondent to highlight to LSC staff who were transferring to the respondent's employment in 2013 the rules of the Principle Civil Service Pension Scheme as to the abatement of pension.

116. Mummery LJ in in the well-known Court of Appeal case of **NHS Manchester v Fecitt & Others [2011] EWCA Civ1190** made it clear that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detriment.

"In my judgment, the better view is that Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so…

Where the whistle-blower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical eye – to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation

117. The Tribunal had the benefit of detailed written and oral submissions provided by the claimant and Mr Weiss on behalf of the respondent. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Jurisdiction – Time limits

The first claim

118. The Tribunal considers it appropriate to deal with jurisdictional issues first.

119. The first claim is of indirect discrimination and protected disclosure detriment.

120. The ACAS Early Conciliation notification was dated 10 February 2020 and the certificate was issued on 10 March 2020. The claim was presented to the Tribunal on 10 April 2020. Any allegations prior to 10 November 2019 would be out of time.

121. The claim in respect of indirect discrimination is in respect of the appointment of PE which took place on 11 November 2019. That claim is therefore in time.

122. The claims in respect of the protected disclosure detriments relates to the issues leading to the appointment of PE on 11 November 2019. The Tribunal is satisfied that the allegations are in respect of conduct extending over a period and these claims are in time.

The second claim

123. The second claim is one of victimisation and protected disclosure detriments.

124. The ACAS Early Conciliation notification was dated 10 August 2020 and the certificate was dated 25 September 2020. Any alleged detriment which took place prior to 10 May 2020 would be out of time.

125. The claim of victimisation relates to the suspension of the claimant on 11 May 2020 and this claim is in time.

126. The claim of protected disclosure detriment also relates to the suspension of the claimant on 11 May 2020 and is in time.

The third claim

127. The third claim is one of victimisation.

128. The ACAS Early Conciliation notification was dated 22 February 2021. The certificate was issued on 23 February 2021. The claim was presented to the Tribunal on 24 February 2021. Any allegations prior to 22 November 2020 would be out of time.

129. It was submitted by Mr Weiss that the disciplinary hearing that was chaired by Francesca Weisman was on 19 November 2020 and it is not just and equitable to extend the time limits. The claimant was professionally represented when he submitted his notice of appeal on 17 December 2020. That notice of appeal was drafted by counsel and there is no explanation as to why the claim could not have been brought sooner. Particularly considering that the claimant was a solicitor himself and capable of researching time limits.

130. The claimant submitted that he is not an employment lawyer, his expertise lies principally in common law, specifically personal injury claims and administrative law – judicial review et al. He also submitted that he was running out of money and had decided to proceed without legal representation.

131. The third claim was out of time. The Tribunal finds that it is not just and equitable to extend time. The claimant provided no reason to extend time on that basis. The claimant is a solicitor, he was able to find out about time limits. He had been professionally advised when he submitted his notice of appeal. The notice of appeal had been drafted by counsel. There were no grounds on which it would be just and equitable to extend time.

The fourth claim

132. The fourth claim is in respect of disability discrimination. The ACAS Early Conciliation notification was dated 17 June 2021. The certificate was issued on 18 June 2021. Any alleged failure to make reasonable adjustments or discrimination arising from disability prior to 17 March 2021 are out of time.

133. It was submitted by Mr Weiss that the allegations of failure to make reasonable adjustments are substantially out of time. With regard to the decision to suspend the claimant. This was in May 2020 and the decision not to share details of the complaints was taken in April 2020 and time started to run from the date those decisions were taken. It was said that it seemed that a substantial cause of the delay in bringing the proceedings sooner was a lack of availability of the claimant's counsel to advise. On 12 July 2021. The claimant wrote to the respondent seeking to amend the third claim to include a claim for disability discrimination. He indicated that the application was made on the advice of counsel which had recently been received in conference. It was stated that counsel had had instructions since before Christmas 2020. It was submitted that the six months delay was of the claimant's own making in choosing to wait so long for advice rather than seek advice from sources that could provide it more timeously. There is no good reason why the claimant should, in those circumstances, benefit from an extension of time.

134. The claimant asserted that it was just and equitable time be extended. He said that the respondent seemed to rely on him having an endless supply of money such that he was able to just instruct someone else. He also referred to an attendance note of a conference with Counsel on 17 February 2022, during the hearing of this case. This referred to the claimant indicating that the law of disability is extremely complex for a non-employment lawyer and he couldn't be expected to be alive to those issues. Also, failing to review or end the claimant's suspension is a continuing act running all the way through.

135. The claimant also referred to a "change of label" with regard to the addition of a further legal claim based on the same facts and that he suffered from an intermittent mental health condition which meant that he became debilitated and unable to function normally when subject to grossly unfair treatment.

136. The Tribunal is satisfied that the claimant was aware of the potential claim for disability discrimination before Christmas 2020. The Tribunal finds that this was not a relabelling exercise. It is a completely new cause of action. The Tribunal must weigh the balance of prejudice and the effect on the cogency of evidence.

137. The claimant knew that he could bring a claim and took professional advice but this was not done in a timeous way. The allegations of disability discrimination were substantially out of time and it is not just and equitable to extend time.

138. Although the conclusion is that the Tribunal has no jurisdiction to hear the third and fourth claims which are out of time and it is not just and equitable to extend time, the Tribunal has gone on to consider the identified issues.

139. The Tribunal has given very careful consideration to all of the issues and has reached unanimous conclusions.

140. Using the composite list of issues the Tribunal's conclusions are as follows:

Claim number 1802032/2020 (the first claim)

Indirect age discrimination (section 19, Equality Act 2010)

141. It was accepted by the respondent that the Managed Moves Policy was applied with regard to the appointment of PE to the Leeds ACM role on a permanent basis. This applied to all levels of employee but it was accepted by the respondent's witnesses that it was applied more often in respect of senior posts.

142. It was submitted by Mr Weiss that the policy does not put the respondent's employees aged over 60 at a particular disadvantage when compared with other younger age groups. It was asserted by the claimant that the over 60s would be disadvantaged if roles were filled without fair and open competition as they had fewer years of employment remaining and so had, or were likely a to have, fewer opportunities for promotion.

143. The best and only statistical evidence before the Tribunal was that, as at September 2019, around the time the PCP was being applied in this case, employees aged 60 and over made up 8.6% of the Legal Aid Agency workforce. They made up 15.4% of the top grade and 10.5% in

the grade of G7, the grade of the band A role that was filled by PE. This shows that the age group 60 and over are overrepresented in the senior positions. In those circumstances, there was no group disadvantage for employees aged 60 if, from time to time certain roles were filled without open and fair competition, for the employees aged 60 and over as they had the opportunity to benefit from opportunities for promotion as is reflected in their overrepresentation at senior grades.

144. The claimant, in his submissions, contended that the overrepresentation (not accepted) at grade 7 was based on numbers that are so low that it was unsafe to draw any conclusions from them.

145. The fact that the figures presented by the respondent were the best and only ones available was not the claimant's fault as he was not offered access to the data. The claimant submitted that it had been open to the respondent to provide better evidence.

146. It is for the claimant to show that the PCP put or would put persons with whom the claimant shares the relevant protected characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the relevant protected characteristic pursuant to Section 19(2)(B).

147. The Tribunal finds that there was no group disadvantage established. The overrepresentation of employees aged 60 or over in senior positions in the circumstances indicates that there was no group disadvantage.

148. If such a group disadvantage had been established, then the Tribunal is satisfied that the application of the Managed Move Policy is a proportionate means of achieving the legitimate aim of operational need and avoiding redundancies. The policy was to provide for an internal appointment of an existing member of staff to a role within the department without fair and open competition to meet operational need and it was applied when the member of staff was in a temporary role on loan and he no longer had a substantive role to return to.

149. The claimant also made submissions that the managed move policy was not correctly applied. He stated: "it was manipulated to shoe a buffoon into a highly desirable role." This appears to be an allegation as to what occurred on this particular occasion rather than a PCP.

150. There was no evidence that there was a PCP of manipulation of the policy. There no evidence provided in respect of any use of the managed move policy generally or of a practice of using it to appoint individuals without a recruitment process.

151. The Claim of indirect discrimination does not succeed as the claimant has not established facts from which the Tribunal could

conclude that there was an act of discrimination. If he had, the respondent has shown a non-discriminatory reason.

Whistleblowing detriment – Public Interest Disclosure Act 1998/Employment Rights Act 1996

152. The identified issues were:

Was the Claimant put to any of the following detriments on the ground that he had made one or more protected disclosures in relation to himself and his colleagues being misled in relation to the transfer of their LSC Pensions into the Civil Service Scheme which had an adverse abatement rule not applicable in LSC Scheme:

Deliberately excluding the Claimant from emails concerning the extension of PE's appointment in October 2018 and his - permanent appointment (announced 11th November 2019 by email);

Not advertising the ACM role vacancy and/or not making it known to the Claimant;

Not inviting the Claimant to apply for that vacancy, else making it so that the Claimant was unable to apply;

Appointing PE directly into the role thus denying the Claimant the role or the opportunity to declare an interest in it and to apply for it;

Not granting the Claimant an opportunity to go through an application process for the ACM role in fair and open competition.

153. It was submitted by Mr Weiss that the claim for whistleblowing detriment and indirect discrimination claims must be mutually exclusive. If there was an application of the Managed Move Policy applied generally then the claimant's complaints of whistleblowing detriment must fail.

154. The protected disclosure was made in an email dated 28 October 2018. The first email from which the claimant was excluded was sent on 14 September 2018, before the disclosure.

155. Nicole Mason gave evidence that the claimant was not included in the email group in error and she provided him with a copy on 3 October 2018.

156. The Tribunal accepts Nicole Mason's evidence that excluding the claimant from the email group was purely accidental and not in any way influenced by his protected disclosure.

157. The appointment of PE to the ACM role permanently was carried out within the Managed Move Policy. JW had been appointed to another substantive role and the Leeds ACM role was then no longer hers. PE had been in the role for over a year. There was some confusion about the terminology but the appointment of PE was made because Nicole Mason said that he had demonstrated that he had the skill set to do the job and would have become surplus as his previous substantive job was no longer his.

158. The emails Nicole Mason exchanged with others around September to November 2019 provide evidence that the motivation was as a result of JW taking up another role and giving up the ACM the role as her substantive role.

159. The claimant was not included in the email group as he was then no longer part of the Leeds team having moved to the North West team in March 2019.

160. Nicole Mason gave clear and credible evidence that she was not aware that the claimant was interested in the Leeds ACM role. The claimant did not indicate to the respondent that he was interested in the role.

161. The Tribunal is satisfied that Nicole Mason was not motivated to exclude the claimant as a result of any influence of the fact that the claimant had made a protected disclosure. The rationale for appointing PE pursuant to the Managed Moves Policy was that he had been in the role for over a year and had the appropriate skills he would have become surplus. There was no evidence that the claimant having made a protected disclosure was a material influence on the appointment.

Claim number 1805605/2020 (the second claim)

Victimisation (section 27(1) Equality Act 2010)

162. The Respondent accepts that the Claimant did a protected act within the meaning of section 27(1) by bringing the First Claim.

What are the detriments upon which the Claimant seeks to rely?

Raising allegations of misconduct on 11 May (2020) in relation to an enquiry the Claimant made with the Law Society.

163. The Tribunal is satisfied that the respondent did raise an allegation of misconduct.

Refusing to give the Claimant sight of complaints against him for 4 months.

164. Antony Evans provided the claimant with the details of the complaints in an email dated 10 May 2020. These consisted of notes of the meetings with Janet Land. The copies of the original email complaints were posted to the claimant on 11 June 2020. Janet Land reasonably believed that sending the complaints to the claimant might escalate matters further. The Tribunal is satisfied that this was not in any way motivated by reason of the protected act.

Suspending the Claimant from work on 11 May 2020.

165. The Tribunal is satisfied that the reason for the claimant's suspension was that the claimant had indicated, on a number of occasions, that his intention was to contact the Law Society. The respondent informed the claimant that he did not have permission to go to the Law Society and that it was wholly inappropriate to contact them. The reasons for the suspension were that it was believed that the claimant might have committed gross misconduct, the working relationship with the claimant had broken down and there was a reasonable suspicion that there were risks to the respondent's reputation.

166. The Tribunal is satisfied that the reason for the suspension was the claimant's conduct and not in any way related to the disclosure.

Denying the Claimant access to the Respondent's systems from 11 May 2020.

167. The respondent's policy in relation to employees who are suspended is to provide supervised IT access. In view of the Covid 19 restrictions, the respondent introduced new software that would allow the claimant remote supervised access and there was some delay in arranging this and difficulties with regard to the appropriate device for such access. This was a reasonable adaptation of the respondent's procedure in view of Covid 19 restrictions and the Tribunal is satisfied that it was not materially influenced by the claimant disclosure.

Not reviewing the decisions to suspend the Claimant and to deny the Claimant systems access.

168. The suspension and systems access were reviewed by Janet Land and David Thomas. It was concluded that the grounds for concern remained

and that, if the suspension was lifted, it was considered that the claimant would continue to send emails which would be potentially damaging to the respondent's reputation. The Tribunal finds that this was a reasonable concern and not related to the protected disclosure.

Reaching an investigation outcome that was to the Claimant's detriment.

169. It was concluded that there was sufficient evidence to justify holding a disciplinary hearing. The issue that was referred to the disciplinary hearing related to the claimant's conduct and his threat involving the Law Society. It was not in any way by reason of the protected act.

Precluding the Claimant from applying for roles within the Civil Service

170. The Tribunal is satisfied that the claimant was not precluded from applying for roles within the Civil Service. He was informed of the roles and it was indicated by Janice Land that they would support the claimant in making applications. The disciplinary process did not preclude the claimant from applying for other roles. The claimant indicated to the respondent that he had decided against applying for anything while the disciplinary was outstanding.

Commencing disciplinary procedures against the Claimant.

171. The Tribunal is satisfied that disciplinary procedures were commenced against the claimant because he was threatening to disclose information to the Law Society when the respondent had instructed him not to do so and this was considered capable of amounting to misconduct.

Have the allegations of detriment above been brought in time? If not, would it be just and equitable to extend time in the circumstances?

172. The Tribunal is satisfied that the second claim was issued within time as set out above.

Does the Tribunal accept that the Claimant suffered the conduct set out above? if so, does the Tribunal accept that any of the acts/omissions amount to a detriment suffered by the Claimant?

If any of the above acts/omissions occurred, were they because of the Claimant bringing the First Claim (the protected act) or was there a reason for the conduct which was unconnected to the protected act?

173. The claimant said that the respondent had formed a view of him as a trouble causer because he had raised the protected disclosure and/or issued proceedings. The respondent was clearly concerned about the claimant's behaviour and may have seen him as a trouble causer. However, there was no credible evidence that this was in any way because he had made the protected act.

174. The Tribunal is satisfied that the actions taken against the claimant were taken against him because of the concerns of the respondent in respect of the claimant's conduct and were in no way influenced by the fact that the claimant had made a protected act by bringing the first claim.

175. The Tribunal has considerable sympathy with the claimant. He has been subject to a very lengthy suspension and warnings as a result of what were issues of really intemperate and inappropriate language and which were eventually found to constitute minor misconduct and no further action taken. The claimant sent numerous ill-tempered derisive and demanding emails often many on the same day. However, the Tribunal has considered the issue carefully and is satisfied that the respondent's treatment of the claimant was not influenced by the protected act.

Whistleblowing detriment - Public Interest Disclosure Act 1998/Employment Rights Act 1996

It is accepted that the Claimant made a protected disclosure in or around October 2018 in respect of an alleged failure of the Legal Services Commission ("LSC") and the respondent to highlight to LSC staff who were transferring to the Respondent's employment in 2013 the rules of the Principal civil Service Pension Scheme as to the abatement of pension.

W*hat are the detriments upon which the Claimant seeks to rely and which disclosure is it alleged the detriment is a result of?*

176. The detriments relied upon are the same as those identified in respect of the victimisation claim as set out above and the Tribunal is satisfied that the actions taken against the claimant were because of the concerns of the respondent in respect of the claimant's conduct and the protected disclosure was not a material influence on the respondent's treatment of the claimant.

Have the allegations of detriment been brought in time?

If not and it was not reasonably practicable for the allegations to be brought in time, were they brought within a further reasonable period?

177. The Tribunal is satisfied that the second claim was issued within time as set out above.

Does the Tribunal accept that the Claimant suffered the conduct set out above? If yes, was the Claimant subjected to that conduct because he had made qualifying disclosures, or was there a reason for the conduct which was unconnected to the qualifying disclosures?

178. The Tribunal has considered the position and is satisfied that it has not been established, on the balance of probabilities, facts from which it could conclude that the respondent had discriminated against the claimant. The burden of proof has not shifted to the respondent and, the respondent has shown that the actions against him were not because he had made protected disclosures.

Claim Number 1801091/2021 (the Third Claim)

Victimisation (section 27(1) Equality Act 2010)

The Respondent accepts that the Claimant did a protected act within the meaning of section 27(1) by bringing the First Claim and the Second Claim.

What are the detriments upon which the Claimant seeks to rely?

Continuing the Claimant's suspension without carrying out bona fide reviews

179. The reason for the claimant's suspension was the claimant's conduct and the claimant continued to send inappropriate emails. David Thomas was of the view that if the claimant's suspension was not continued, he would continue to send emails which were often copied to numerous individuals. The reason for the continuation of the claimant's suspension was for reasons of the claimant's conduct and ongoing risks. The Tribunal is satisfied that this was nothing to do with the fact that the claimant had brought the first and second claims.

Refusing to accept the Claimant's grievance about a member of staff on the false basis that it was to be dealt with elsewhere

180. Janet Land's opinion was that the complaints about PE should form part of a freestanding grievance. The Tribunal is satisfied that her opinion was in no way influenced by the fact that the claimant had brought the first and second claims.

Disregard of GP fit notes from 15th April to 14th September 2020. Coercion of the Claimant into taking part in a disciplinary investigation when certified medically unfit to do so by a GP and claiming in the Grounds of Resistance to the Third Claim that it is good HR practice to ask an unqualified individual to substitute their medical assessment of their own fitness for that of a qualified healthcare professional.

181. The respondent regularly sought updates from the claimant and considered the medical evidence. The claimant informed Anthony Evans that he wished to proceed with the investigation and that he was able to do so. The respondent's actions were in no way influenced by the fact the claimant had brought the first and/or the second claim.

Requiring the Claimant to attend OH reviews after ignoring the recommendations from previous referrals. It is the Claimant's case that none of the OH reports in the case contain valid recommendations as an obvious condition precedent in each case (that the Claimant should fully understand the allegations faced – Dr Brown) was not met.

182. It was submitted by Mr Weiss that this allegation is largely incomprehensible. The claimant had indicated in evidence that the Consultant Occupational Health Physician, in her 6 September 2020 report, said that the claimant should be provided with written information in advance of meetings. This had been done and the claimant solicitors were sent hard copies of the documentation Francis Weisman was considering a month before the hearing took place.

183. Also, the claimant asserted that there was some recommendation in the Occupational Health of 10 March 2020 that was ignored. However, in that report it was found that the claimant was adjudged fit to work and there had been no recommendation that was not followed.

184. The Tribunal is satisfied that the respondent followed the Occupational Health recommendations and the respondent's actions were not in any way motivated by the fact that the claimant had brought the first and/or the second claim.

Subjecting the Claimant to oppressive, targeted and disproportionate disciplinary proceedings. Includes the second disciplinary investigation which represents double jeopardy.

185. The Tribunal is satisfied that the respondent perceived the claimant's threat to share information with the Law Society was conduct capable of amounting to gross misconduct. The claimant's behaviour was a major concern to the respondent. The disciplinary proceedings were not disproportionate and the Tribunal is satisfied that they were not influenced by the fact that the claimant had brought the first and/or the second claim.

186. The second disciplinary investigation did not represent double jeopardy as the six emails post-dated the original investigation and could not have been considered by Francesca Weisman.

187. The Tribunal is satisfied that this was in no way influenced by the fact that the claimant had brought the first and/or the second claim. The Tribunal is satisfied that it was a result of the claimant's continuing potential misconduct.

Subjecting the Claimant to a flawed and unfair disciplinary hearing and decision, as set out in the ET1 for the Third Claim.

188. It was not established that there was a flawed and unfair disciplinary hearing and decision and the Tribunal is satisfied there was nothing to infer that anything was done on the ground of the fact that the claimant had brought the first and/or second claim.

Charge to be met was specific and Francesca Weisman confirm the nature of what she was considering.

Reason for issuing a Final Written Warning had nothing to do with the charge (where the findings were largely in the Claimant's (favour) and were not even discussed or put to the Claimant at the hearing.

Using legitimate matters of concern raised by the Claimant as reasons for issuing a Final Written Warning, e.g. The Claimant stating that he felt that the actions of the Respondent had ruined his life.

Involvement of a conflicted senior HR Official who advised both in relation whether a charge should be put and then on at the hearing. Disciplining the Claimant for legitimately raising the possibility of conflict

Producing a destructive and biased note of the disciplinary hearing.

Victimising reference to HR having advised the investigating manager (Antony Evans) that it was ok for him to assess my medical fitness to take part in an investigation and ignore medical opinion. Adviser was a conflicted HR official.

Notice of appeal.

189. It was submitted by Mr Weiss that the balance of these allegations were all related to different ways in which the claimant disagreed with the logic of the decision-maker, Francesca Weisman. There is nothing from which it could be inferred that Francesca Weisman's decision, or her rationale,

was influenced by the fact that the claimant had brought the first claim and/or the second claim. Francesca Weisman was someone entirely removed from the claimant's line management chain, had no knowledge of the first and/or second claim save for what the claimant chose to tell her about them and had no vested interest in the outcome of either. None of this was challenged by the claimant. Belatedly, the claimant tried to suggest in cross- examination of Brian Ruggles that he was taking advantage of Francesca Weisman in order to victimise the claimant.

190. What the claimant failed to even try and establish was what Brian Ruggles knew about the protected disclosure/protected act and why, as someone independent of the LAA, and who was not involved in either the LSC pension issue or the first claim, he would have any desire to try and victimise the claimant on those prohibited grounds. The suggestion that Brian Ruggles tried to persuade Janet Peel to change her mind is baseless – as he explained in evidence, he was simply trying to make her aware of whether she had considered all aspects of the allegations the claimant was facing. To provide such advice was his role and does not demonstrate any agenda to victimise the claimant.

191. The Tribunal accepts these submissions and is satisfied that it was not established that any of the alleged actions were victimisation because the claimant had brought the first and/or the second claim. Francesca Weisman was not involved in the claimant's line management. She took into account matters which she considered were not of the claimant's making and found that the charge of gross misconduct was not made out and issued the claimant with a final written warning.
The decision by Francesca Weinstein was with regard to the claimant's conduct and the imposition of a final written warning was not influenced by the fact that the claimant had brought the first and/or second claim. There was no credible evidence that the conduct of the disciplinary hearing and the outcome were influenced by the fact that the claimant had brought the first or second claim.

192. The claimant was given the opportunity to clarify his reference to 'victimising reference to HR' which was not understood, but he failed to do so. There was nothing that could lead the Tribunal to conclude that any of the action was motivated by the fact that the claimant brought his first or second claim.

Flawed appeal outcome resulting in a written warning appearing on the Claimant's record, amounting to a "Do not Employ" edict. Perverse findings including, inter alia that the claimant was in breach of 3.5 of the Civil Service Code.

Refusal by HR to clarify the effect of a written warning despite being invited to do so by

193. The claimant's appeal was successful in that it resulted in the claimant's final written warning being reduced to a first written warning. The duration of that warning was only six months and had lapsed by the time of Joanne Bainbridge's decision. It was expunged from the claimant's record once it had lapsed and would not be disclosed to any potential employers. The Tribunal is satisfied that it did not amount to a "do not employ edict" and was not a detriment.

194. The claimant confirmed that he was, at the time of the Tribunal hearing, in another post with the respondent in which he was doing well and getting on with his line manager. The warning had lapsed after six months and would not be referred to in any reference. The claimant said that he would be unable to take up a consultancy but he did not explain why a lapsed warning would mean this.

195. Joanne Bainbridge had no knowledge of the first or second claim apart from what the claimant chose to disclose to her. The Tribunal is satisfied that there was no evidence which could lead to a conclusion that she was materially influenced by the protected acts or the presentation of the first and/or second claim.

Claim Number 1803850/2021 (the fourth Claim)

Jurisdiction – out of time

Was the claim submitted within three months starting with the date of the act to which the claim relates and as extended by the application of the ACAS early conciliation process? The respondent asserts that any act prior to 22 April 2021 is out of time.

If the claim in relation to any act of discrimination was not submitted within three months, did such act amount to conduct extending over a period, and was the claim brought within three months of the end of that period?

If not, would it be just and equitable to allow such claims to proceed?

196. The Tribunal has found that the fourth claim is out of time and it is not just and equitable to extend time as set out above in paragraphs 132-137.

Disability status

Was the Claimant a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time? The Claimant relies upon the conditions of workplace stress and episodes of depression. The material time is April 2020 – August 2021.

197. The claimant had previously suffered from severe depression with psychotic symptoms. He had been off sick for approaching a year between October 2012 and September 2013. The Occupational Health report of 10 March 2020 stated that this could have been classified as a disability at the time. This had been a major mental health problem which required acute treatment. It is stated within the medical evidence that the claimant had fully recovered.

198. The letter from the claimant's GP dated 4 September 2020 stated that the claimant had symptoms of restless sleep, fatigue and emotional lability which were due to ongoing stress related to the problems he faced at his workplace. It referred to the claimant being admitted under section 2 of the Mental Health Act from September 2012 and that his antidepressant medication was stopped in November 2016.

199. The Occupational Health report of 10 September 2020 stated that it was clear that work-related stress was the issue which was continuing and it was stated that his treating doctor had advised him that his mental health may be at risk if work-related stress persisted. It was also stated that there was no evidence that the medical condition would appear to cause substantial impairment of day-to-day activities likely to persist beyond 12 months.

200. On 25 February 2021 the Consultant Occupational Physician stated:

> "… The major barrier to resuming employment would seem to be his dissatisfaction with how he feels he has been treated and a breakdown of trust between him and his team. These issues are essentially non-medical and likely to remain a barrier to progress until mutually satisfactory resolution is achieved through usual management processes."

201. It was also stated that there was no evidence of thought disorder or other symptoms that might suggest recurrence of his past experience of psychosis. The Occupational Health Physician stated that he was not of the opinion that the claimant's current psychological health would meet the criteria for disability under the Equality Act.

202. The claimant had previously had a serious medical condition in 2012 when he was sectioned under the Mental Health Act. He was diagnosed as having suffered from severe depression with psychotic symptoms. He remained in hospital for several weeks and was off work for the following months, returning in September 2013. He came off the medication in 2016/2017.

203. The claimant has a tendency to fly off the handle and make coruscating comments about people in person and in aggressive and disparaging correspondence. His conduct during the Tribunal hearing was a matter of concern. He was, on occasions, abusive to the respondent's representative and witnesses. However, he continued to work for the

respondent as a solicitor and the Tribunal has to determine the issue of disability and how long the impairment is likely to last as at the date of the alleged discriminatory act, not the date of the Tribunal hearing.

204. The evidence before the Tribunal with regard to the claimant's medical condition indicated that the symptoms were a reaction to the claimant's problems at work and were not a recurrence of his earlier mental health condition.

205. There was no credible evidence before the Tribunal to the effect that the claimant had a long-term substantial medical condition that had an adverse effect on his day-to-day living activities at the material time.

206. It appears that the claimant would have been disabled within the meaning of section 6 of the Equality Act in September 2012 and for some time thereafter. The Occupational Health report refers to the treating doctor advising that the claimant's mental health may be at risk if the work-related stress persisted. There was no medical or other evidence to show that the claimant had a condition which had a long-term substantial effect on his day-to-day living activities at the material time.

207. The Tribunal has considered whether the claimant's mental health in 2020 to 2021, the material time, was a disability. The evidence was that the claimant was suffering from an acute stress reaction to events at work. Not a long-term substantial impairment. This is a legal test for the Tribunal, but it must be a decision reached on the basis of the evidence before the Tribunal and, there was no evidence to support a finding of disability at the material time.

208. The Tribunal is not satisfied that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time in 2020 – 2021.

Did the Respondent have knowledge of that disability, and if so, from when?

209. The Tribunal is not satisfied that it has been established that the claimant was a disabled person at the material time. However, if the claimant had been a disabled person then the Tribunal is satisfied that the respondent has shown that it did not know, and could not reasonably be expected to know, that the claimant was a disabled person.

210. The Occupational Health reports did not indicate that the claimant had a substantial long-term impairment. The claimant informed the respondent that he was not depressed but that he was 'stressed to hell'.

211. The claimant said during the course of the Tribunal hearing that he misled the Occupational Health Doctor as to the true state of his health because he wanted to return to work. He also said that he was not candid with his GP because he did not want to go back to hospital. He did not inform the respondent of the true state of his health because he thought Janet Land was trying to kill him.

212. The Tribunal is satisfied that the respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person. There was no actual or constructive knowledge of a disability.

Failure to make reasonable adjustments (section 20 – 21 Equality Act 2010)

Was the Respondent under a duty to make reasonable adjustments?

213. The respondent was not under a duty to make reasonable Adjustments as it did not have actual or constructive knowledge of the alleged disability.

If so, what was the relevant provision, criterion or practice (PCP) which put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant relies on the following as PCPs:

Conducting separate disciplinary proceedings;

214. This was a conscious decision as it was decided not to combine two issues. It became more difficult as Francis Weisman took some of the emails into account. She said this was in order to provide context. Joanne Bainbridge discounted most of the emails at the appeal stage and reduced the punishment to a written warning. Janet Peel did not consider emails that could have been seen by Frances Weisman and her decision was based on six emails.

215. It was submitted by Mr Weiss that the disciplinary processes and the flaws the claimant perceives in them are simply the product of the unique constellation of events. The same can be said for the decision to conduct separate disciplinary proceedings, which was a decision made in the unique context of the claimant's misconduct, and his ill-health.

Placing the Claimant on suspension and continuing with suspension;

216. The respondent concedes that there was a PCP of placing the claimant on suspension and continuing with suspension. If the claimant had been disabled by virtue of the mental impairment then the respondent admits that the claimant would have been placed at a substantial disadvantage in

comparison to someone who did not suffer from his disability by the application of the PCP placing the claimant on suspension in that he would have suffered increased stress levels.

217. Shortening the suspension or not suspending the claimant, finding temporary redeployment for the claimant, and segregating the claimant from those who complained about his conduct were not reasonable adjustments in the circumstances of this case. There was a genuine risk that if the steps the claimant said were reasonable adjustments had been taken, he would damage the reputation of the respondent by pursuing his campaign threats and/or actually making a disclosure outside the MoJ to a non-described person causing reputational damage and/or his behaviour would have deleterious effect on the health and wellbeing of other employees.

218. David Thomas said that it would not be appropriate to burden another area of the business with line management responsibility for the claimant whilst his behaviours were such an objectively justifiable cause for concern

Withholding complaints and/or allegations from the person against whom disciplinary charges are brought;

219. The Tribunal is satisfied that there was no PCP of withholding complaints from the person against whom disciplinary charges are brought. The claimant was provided with sufficient detail of the complaints on 14 April 2020. Janet Land reasonably perceived that sharing further details was likely to escalate matters. Anthony Evans shared further information as soon as he was able to do so in the context of the pandemic and the claimant's suspension.

220. The Tribunal finds that there were no PCPs which placed the claimant at a substantial disadvantage and, in those circumstances, determination of the specific adjustments is not something that has been considered by the Tribunal.

Discrimination arising from disability

(section 15 Equality Act 2010)

Did the Respondent treat the claimant unfavourably by:

Holding two separate disciplinary procedures through both of which he was suspended;

failing to review or end the Claimant's suspension (sooner than the Respondent did)?

What was the something arising in consequence of the Claimant's disability?

Did the Respondent treat the Claimant unfavourably because of the something arising in consequence of his disability?

The Claimant has identified 'because he was ill' as the something arising in consequence relevant to the first allegation above of unfavourable treatment; and 'the ongoing suspension exacerbated his mental health difficulties' as the something arising in consequence relevant to the second allegation of unfavourable treatment.

221. It was submitted by Mr Weiss there was no claim that the claimant's conduct, for which he was disciplined, was something arising from disability in the claim form or in the further and better particulars and the two emails providing further clarification on the further and better particulars. No application to amend has been made and if one was made, it would now be unjust to accede to it given the respondent would have approached the case and the evidence differently and carried out a specific enquiry as to whether the claimant's behaviour was something arising in consequence of his disability by way of providing further disclosure and witness evidence.

222. It was also submitted that the pleaded claim must fail because the reason why the claimant was subject to the unfavourable treatment of not having the suspension ended sooner was not because of "the fact that the ongoing suspension exacerbated my mental health issues"

223. The Tribunal accepts this submission, this was not a claim before the Tribunal. When asked what was the something arising in consequence of his disability, the claimant said that he was ill.

224. The Tribunal is not satisfied that it was established that there was any unfavourable treatment because the claimant was ill. The allegation was of subjecting of the claimant to two separate disciplinary proceedings and failing to review, or end the claimant's suspension sooner, was because of the claimant's conduct.

225. The claim presented by the claimant set out "the "something" arising in consequence of the disability is the fact that the ongoing suspension exacerbated my mental health issues". This is not a claim that the claimant's conduct is a manifestation of his disability. The Tribunal finds that this section 15 claim fails.

226. The claimant has not established, on the balance of probabilities, facts from which the Tribunal could conclude that the respondent had discriminated against him and, if he had, the respondent has shown non-discriminatory reason for the claimant's treatment. This was because of the claimant's conduct.

227. For the reasons set out above, the Tribunal has reached the unanimous decision that the claims of indirect age discrimination, detriment for making a protected disclosure, victimisation, failure to make reasonable adjustments and discrimination arising from disability are not well-founded and are dismissed.

Employment Judge Shepherd
20 May 2022

JUDGMENT SENT TO THE PARTIES ON
24 May 2022