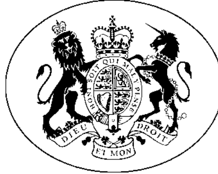


Case Numbers 1303545/2019,
1300234/2020, 1309446/2020 &
130044/2021

EMPLOYMENT TRIBUNALS

Claimant		Respondent
ZMW	**v**	**The Crown Prosecution Service**

FINAL MERITS HEARING
(CONDUCTED IN AS A HYBRID HEARING VIA THE CLOUD VIDEO PLATFORM)

Heard at: **Birmingham** On: **3-7, 10-12 Deliberations 13, 14, 17 & 18 October 2022**
Before: **Employment Judge Perry Mrs J Keene and Mr R Virdee**

Appearances

For the Claimant: Mr C Murray, counsel
For the Respondent: Mr I Wright, counsel

JUDGMENT

1 By agreement the title to these proceedings shall be amended to that above and the claimant shall be referred to throughout this judgment and reasons as *the Claimant*.

2 The complaints comprised in Case Number 130044/2021, those marked as struck through in the amended claim forms lodged on 7 October 2022 relating to claims 1300234/2020 and 1309446/2020 and all the claimant's victimisation complaints across all claims are dismissed on withdrawal.

3 The claimant was not discriminated against in contravention of part 5 of the Equality Act 2010. His complaints concerning the failure to make reasonable adjustments, discrimination because of something arising from disability and harassment are dismissed.

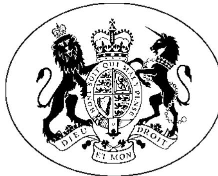
REASONS

References below in circular brackets "()" are to the paragraph of these reasons. Those in square brackets "[ ]" are to the page of the bundle or where preceded by a document reference or the initials of a witness, that document or witness statement. A number after a "§" mark refers to the paragraph or section of a witness statement or document.

BACKGROUND

1 This claim relates to four complaints that have been consolidated to be heard together. Their history is long and protracted and follows on from an earlier claim the outcome of which we address at (136). In summary at the start of this hearing the claims we needed to determine related to:-

1.1 Case Number 1303545/2019 (claim "A") presented on 24 May 2019 [39-57] following early conciliation starting on 12 March and ending on 26 April 2019. This claim includes complaints pursuant to ss. 15, 20-21 & 26 Equality Act 2010 (EqA) and principally relates to complaint about a mid year review (MYR). It was agreed during the hearing the MYR was completed sometime between 31 October and 2 November 2018 but the claimant states he was not aware of the contents of until 31 December 2018. A timing point is raised by the respondent.



1.2 Case Number 1300234/2020 (claim "B"). This includes complaints pursuant to ss. 15, 20-21 & 27 EqA. A copy of the ET1 claim form was not in the bundle but it is agreed that was presented on 17 January 2020 following early conciliation starting on 17 December and ending on 18 December 2019.

1.3 Case Number 1309446/2020 (claim "C") included complaints pursuant to ss. 15, 20-21 & 27 EqA. This claim was presented on 30 September 2020 [143-157 & 158-163] following early conciliation starting between 31 July & 31 August 2020. It was accepted at the start of the hearing this claim was out of time as it relates to meetings of 19 March and 2 April 2020, and hence the conduct complained of occurred before 1 May 2020. An application was made on the first day of evidence (Day 3) by the claimant in that regard.

1.4 Case Number 130044/2021 (claim "D") pursuant to ss. 15 & 20-21 EqA. That was presented on 5 February 2021 [173-185 & 186-195] following early conciliation starting on 18 December 2020 and ending on 5 January 2021.

2 The respondent accepts the claimant's impairments (anxiety, depression, PTSD, and a longstanding lower back infirmity) were disabilities within s.6 EqA at all material times and further that it had knowledge of the same for the purposes of ss. 15 & 20/21 EqA.

3 We ensured the claimant was given the adjustments identified as required at the outset of the hearing (regular breaks). Following a request we adjourned the hearing earlier on one day that might otherwise have been the case because he was feeling extremely tired that being the end of the first week and him having completed his giving evidence the day before. We are grateful to both representatives for the assistance they gave the panel and courtesy in which the hearing proceeded and likewise they expressed their gratitude to the panel for the way in which the hearing was conducted.

APPLICATIONS & THE ISSUES

4 A list of issues provided at the outset omitted substantial core components of the complaints. They were revised at the request of the Tribunal and a schedule of acts of detriments to include unfavourable treatment and unwanted conduct was also provided.

5 Following the claimant's evidence on 7 October 2022 the list of complaints was further revised; Claim D in its entirely was withdrawn and revised details of claim were lodged for claims B & C identifying elements of those claims that were also withdrawn. Immediately prior to submissions the claimant's victimisation complaints in their entirely were also withdrawn.

6 The complaints as they now fall before us to determine comprise two themes:-

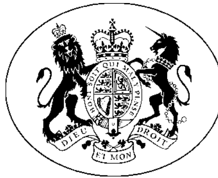
6.1 the undertaking and contents of the MYR in late 2018, and

6.2 the claimant's complaints about the way his grievance dated 14 March 2019 about the MYR ("the Grievance") was addressed,

7 Timing points are raised as to claims A & C it. No points are raised by the respondent in relation to early conciliation having taken place more than once on the basis that later claims were not in respect of the same matter [1].

8 Given the timing issues the tribunal requested that the respondent interrogate its computer systems ascertain if they recorded when the MYR was uploaded and when they were accessed. The claimant indicated in his witness statement that he did not believe that information was available. The result of the enquiry was the provision of two internal emails and attachments to them. Given those attachments included a list of names of individuals not relevant to the proceedings and it was also

[1] see *HMRC v v Serau Garau [2017] UKEAT 0348/16* and *Treska v The Master and Fellows of University College Oxfordv [2017] UKEAT/0298/16*



agreed those emails and their attachments did not need to be included in the bundle. As a result, the matters we relay at (1.1 & 157) were also agreed. An issue remains as to what the claimant was told and when concerning the MYR being logged and when he accessed that. We return to that below (166-172 and also at 237 following).

9 On the first day of evidence the claimant made an application to give oral evidence in relation to an extension of time that was granted and subsequently further disclosure was provided.

10 During the hearing a further issue arose in relation to the matters we address at (233) following. The matters we relay there were agreed and as a result it was agreed no further evidence needed to be admitted in that regard.

11 The respondent indicated at an early stage it intended to apply for written reasons That being so early on the morning submissions were scheduled to be made Mr Murray made an application that the identity of the Claimant should not be disclosed to the public by means of any documents entered on the register or otherwise forming part of the public record (including the judgment and written reasons) and that the Claimant should be referred to in those documents as "the Claimant" and/or three random initials.

12 That application was made pursuant to the claimant's article 8 right to a private life, on the basis that only his partner and a few close friends knew about his mental health conditions, his family and most friends and colleagues do not. Having confirmed the application went no further Mr Wright confirmed despite the late stage and that the hearing had taken place in public without objections having been raised, the respondent raised no objections.

13 That application goes beyond the powers set out in Section 11(1)(b) of the Employment Tribunals Act 1996 however rule 41 of the Employment Tribunal Rules of Procedure 2013 provides that the Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. That general power is not restricted by the Rules. Further rule 50 headed "Privacy and restrictions on disclosure" provides:-

> *"(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act."*
>
> *(2) In considering whether to exercise the discretion to make an order …, a tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression".*

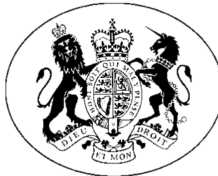
14 The *Convention rights* referred to include amongst other matters article 6.1 of the European Convention of Human Rights which provides *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded …" and* article 10 the right to freedom of expression. All three include qualified elements.

15 Balancing the interference with the claimant's article 8 rights (including the potential for it to impact his disability further) and the public interest in open justice and the need for his name to be published we concluded that despite the very late stage it was made, the restricted nature of the application struck the right balance between the likely interference between the claimant's rights given the likely effect not granting the application could have on his health and the competing public interest rights.

16 By the conclusion of the hearing, timing points aside, the following issues remained:-

<u>Reasonable Adjustments</u>

17 Did the respondent apply the following PCP's:



17.1 requiring the claimant to perform at the expected standard of a Senior Crown Prosecutor (SCP)

17.2 requiring the claimant to undergo a Performance Development Review?

17.3 Prolonging the grievance investigation and outcome?

17.4 Failing thoroughly to investigate the grievance, in particular interviewing Ms Gill Casey

18 Would any of the PCPs put a person with the claimant's disability or disabilities at a substantial disadvantage in comparison with persons without that disability or disabilities? The claimant contends for the following substantial disadvantage:

18.1 he was unable to achieve the expected standard and so failed the mid-year review leading to the perception he was a poor performer.

18.2 They exacerbated the claimant's disabilities

18.3 Led to him having to have time off

18.4 Triggered the disciplinary/attendance management procedure

18.5 Loss of trust and confidence in the grievance procedure

18.6 the claimant's ability to concentrate was impaired resulting in a diminution of quality of his work.

19 Were there steps which it would have been reasonable for the Respondent to take to avoid the disadvantage. The claimant has suggested:

19.1 not subjecting him to a mid-year review

19.2 not using the set criteria

19.3 amending the expectations of a Senior Crown Prosecutor (SCP).

19.4 dealing with the grievance in accordance with the respondent's policies and procedure.

19.5 Thoroughly investigating the grievance by interviewing Gill Casey

<u>Discrimination arising</u>

20 Did the following arise in consequence of the Claimant's disability?

20.1 Did the Claimant have difficulty meeting the standard required of a SCP?

21 Did the respondent treat the claimant unfavourably because of any of those things by:

21.1 Giving a "not achieved" rating

21.2 LM's comments and marking

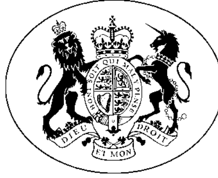
22 Thus those complaints fall into two themes . The first two relate to his mid year review (MYR) undertaken in late 2018 and the second absence and attendance management reviews.

23 The respondent relied upon 5 legitimate aims:

23.1 it is consistent with its public duties that it properly appraises its employees making an honest assessment of their capabilities

23.2 if proper performance management is not carried out it will lead to a loss of public trust in the respondent

23.3 an honest assessment at the mid-year review is necessary to identify any failings at the end of the reporting year.



24 In order to be proportionate it is common ground that the duty to make reasonable adjustments must have been complied with and hence we address that issue first.

Harassment

25 Did the first and second acts of unfavourable treatment relied upon for the something arising complaints constitute unwanted conduct. (A)

26 If so, was the unwanted conduct related to the claimant's disability?

27 If so, did the unwanted conduct have the purpose or effect of:

(i) violating the claimant's dignity or

(ii) creating an intimidating, hostile, degrading or offensive environment for the claimant taking into account-

- The claimant's perception
- The other circumstances of the case
- Whether it was reasonable for the conduct to have that effect.

THE EVIDENCE

28 We read the two witness statements of the claimant, it having been identified that the version of his first (main) statement in the witness statement bundle had been superseded and replaced in its entirety. The new version ran to some 90 pages and 418 paragraphs. We checked his second addition witness statements to ensure it was complete as that had no certificate of truth or signature on it. He confirmed that was the entire second witness statement and that ran to 7 paragraphs.

29 We also heard evidence on behalf of the respondent from:-

29.1 **Mrs Lauranne Middleton**, a Senior Crown Prosecutor and the claimant's line manager between May and October 2018. She became a Level D Legal Manager in 2016 in the respondent's Magistrates' Court Unit. She was line managed by Ms Gill Casey, however in relation to her line management of the Claimant she was line managed by Mr Sean Kyne because the claimant had brought Employment Tribunal claims in 2017 naming Ms Casey as a Respondent;

29.2 **Miss Charlotte Gessey**, a District Crown Prosecutor who was the Claimant's line manager from 22 October 2018 until April 2021. She was line managed by Mr Kyne from October 2018 until he left the respondent's Magistrates' Court Unit in January 2020; She provided two witness statements.

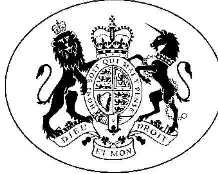
29.3 **Mr Sean Kyne** was the Senior District Crown Prosecutor (Legal Manager Band 2) in the respondent's West Midlands Magistrates' Court Unit from early 2017 until February 2020. He jointly managed the Unit with Ms Casey who was appointed to that Band shortly after him. In addition to undertaking the manging functions we have identified above he attempted to informally resolve the claimant's Grievance;

29.4 **Mr Paul Saxton,** the Head of Business Centre for CPS East Midlands and the investigator of the claimant's Grievance;

29.5 **Mr Mark Paul,** who was the Head of respondent's West Midlands Complex Casework and the commissioning manager and therefore the ultimate decision maker for the Grievance; and

29.6 **Mrs Angela Whitt** who the respondent's Senior HR Business Partner for West Midlands.

30 In addition witness statements were provided by the respondent for



30.1 **Ms Gillian Casey who** was a Senior District Crown Prosecutor and the claimant's line manager from 1 June 2013 to 2 June 2013, from 1 April 2015 to 4 October 2015 and from June 2016 to July 2017; and

30.2 **Mr Stephen Harrett** became Claimant's line manager on 29 March 2021 and continues in that role.

31 We were told at the outset that Ms Casey was unwell and unlikely to be able to attend. That remained so. It was agreed we would give her evidence such weight as we deemed appropriate. Given the matters withdrawn it was agreed Mr Harrett's statement was no longer appeared relevant to the core issues and so could be taken as read. Hence he was called.

32 We had before us an agreed bundle of 1505 pages (we are grateful that the pagination and size of the e-bundle and hard copy married). A chronology and cast list were provided. Both representatives provided written closing submissions that they orally elaborated upon.

THE LAW

33 We were referred to the following authorities; *Southampton City Council v Randall [2006] IRLR 18, (EAT), Environment Agency v Rowan [2008] IRLR 20 (EAT), Prospects For People With Learning Difficulties v Harris* UKEAT/0612/11, *Pnaiser v NHS England [2016] IRLR 170, EAT, Buchanan v Commissioner of the Police for the Metropolis [2016] IRLR 918, Ali v Torrosian and others (t/a Bedford Hill Family Practice) UKEAT 0029/18, City of York Council v Grosset [2018] IRLR 746 (CA), Richmond Pharmacology Ltd v Dhaliwal [2019] IRLR 336 (EAT), Ishola v Transport for London [2020] IRLR 368 (CA), Ministry of Justice v McCloud [2019] ICR 1489* (CA) *and Griffiths v The Secretary of State for Work And Pensions [2017] ICR 160 (CA).*

The duty to make reasonable adjustments

34 Section 39(5) EqA imposes a duty to make reasonable adjustments upon employers. Where such a duty applies sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that the duty comprises three requirements. The requirement that is relevant for us is that in s.20(3)

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

35 A substantial disadvantage is one which is more than minor or trivial [2].

36 The burden is on the Claimant to establish [3]

36.1 facts from which the duty to make reasonable adjustments is triggered, namely, that he has a disability and the relevant PCP caused substantial disadvantage and

36.2 facts from which it could be reasonably inferred, absent an explanation, that a reasonable adjustment should have been made

37 Paragraph 6.10 of the EHRC Code suggests that *'provision, criterion or practice'* should be construed widely to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions and may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied. That is consistent with the purpose of the EqA in eliminating discrimination against those who suffer from a disability [4].

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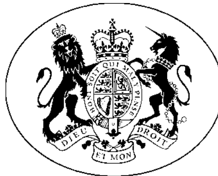
[2] s. 212(1) EqA. That reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. see paragraph 8 of Appendix 1 EqA, EHRC Code; *Sheikholeslami [49]*

[3] *Project Management Institute v Latif [2007] IRLR 579,* UKEAT/0028/07 [44-45]

[4] See *Ishola v Transport for London* [2020] ICR 1204 (CA) [35] and *Lamb v Business Academy Bexley* UKEAT/0226/15 [26]



38 The function of the PCP is to identify what about the employer's management or operation caused disadvantage to the disabled employee, as it is this which is to be justified [5]. Mr Wright reminds us what the Court of Appeal in *Ishola* said as to the phrase *"provision, criterion or practice"* per Simler LJ:

> *"38. … all three words carry the connotation of a state of affairs (whether framed, positively or negatively and however informal)….It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things are generally are or will be done….I consider that although a one-off decision or act can be a practice, it is not necessarily."*

39 Unlike for direct (s.13) or indirect (s.19) discrimination, s.23(1) EqA, which sets out the nature of the comparison for those provisions, does not apply to the duty to make reasonable adjustments. According to ¶6.16 of the EHRC Code the purpose of the comparison exercise is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. In *Griffiths* Elias LJ giving the leading judgment stated

> *"58. … the language of section 20 is very different from the language in section 24 of the Disability Discrimination Act 1995. The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person.* ***The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied****. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove the disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant."*

[Our emphasis]

40 If the duty is engaged and given knowledge is not in issue here the burden then shifts to the Respondent to show either that that adjustment would not have eliminated or reduced the disadvantage or the adjustment was not a reasonable one to make.

41 Whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable [6]. The focus is on the practical result of measures that can be taken [7]. The EHRC Code ¶7.29 states that what is a reasonable step *"depends on all the circumstances of the case."* before giving a list of factors to be considered. The question of whether, and to what extent, the step would be effective to avoid the disadvantage will always be an important one [8]:

> *"18. … given the language of section 20(3) - where the steps required are those that are reasonable to avoid the disadvantage - the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one 9. Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it; conversely, if*

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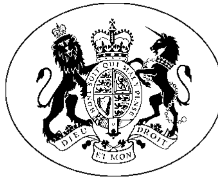
[5] *Ishola* [36]
[6] *Firstgroup Plc v Paulley [2014] EWCA Civ 1573, [2015] 1 WLR 3384, [2014] EWCA Civ 1573*
[7] *Royal Bank of Scotland v Ashton* UKEAT/542/09, [2011] ICR 632 at [24].
[8] *South Warwickshire NHS Foundation Trust v Lee [2018] UKEAT 0287/17* the EAT at [37] (albeit a case on s.15 EqA) repeating the guidance given in *Birmingham City Council v Lawrence [2017] UKEAT/0182/16*
[9] *see per HHJ David Richardson Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341 EAT at [59]*



there was a prospect - even if considerably less than 50 per cent - it could be 10. The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage [11]*; a, or some, prospect of avoiding the disadvantage can be sufficient* [12]*. All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness* [13]*."*

42 To put it another way:

> *"… in our judgment an adjustment which gives a Claimant 'a chance' to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP having the effect of placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive."* [14]

43 This is not a question of strict causation and does not require exact comparators [15].

44 Mr Murray reminds us

44.1 that the following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take [16]:

44.1.1 whether taking any particular steps would be effective in preventing the substantial disadvantage;

44.1.2 the practicability of the step;

44.1.3 the financial and other costs of making the adjustment and the extent of any disruption caused;

44.1.4 the extent of the employer's financial or other resources;

44.1.5 the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

44.1.6 the type and size of the employer.

44.2 A tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for it at the time [17]. It is for the employer to determine what adjustments should be made.

44.3 There is no onus on an employee to suggest what they should be [18].

45 As to the last assertion the employer's lack of knowledge of the adjustment contended for is irrelevant [19]. The only question objectively is whether the employer has complied with his obligations or not. It is also be material whether the employer directed its mind or conducted an assessment or consultation with the disabled person of what reasonable adjustments may be required [20]

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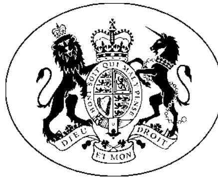
[10] *per HHJ Peter Clark Romec Ltd v Rudham UKEAT/0069/07 at [39]*
[11] *Noor v Foreign & Commonwealth Office [2011] ICR 695 EAT per HHJ David Richardson at [33]*
[12] *per HHJ McMullen QC in Cumbria Probation Board v Collingwood UKEAT/0079/08 at [50] and Keith J in Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10 at [17]*
[13] *see per Elias LJ in Griffiths [29] and per Mitting J in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/ 0341/15 at [18]*
[14] *Lancaster v TBWA Manchester* UKEAT/0460/10 at [46] (Slade J presiding)
[15] Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW [§48-53]
[16] EHRC Code of Practice on Employment para 6.28
[17] Southampton City Council v Randall [2006] IRLR 18, EAT
[18] EHRC code para 6.24
[19] Tarbuck v. Sainsbury Supermarkets Ltd [2006] IRLR 664, [2006] UKEAT 0136/06
[20] Cosgrove v Caesar & Howie EAT/1432/00 at §9; EHRC Employment Code at §6.32.



46 Further by the time of the tribunal hearing the Claimant must identify the broad nature of the adjustment proposed so that the Respondent is given sufficient detail to enable it to with the question, but that need not be at the time of the alleged failure [21]

47 To that end in *South Warwickshire NHS Foundation Trust v Lee & Ors [2018] UKEAT 0287/17* the EAT at [37] (albeit a case on s.15 EqA) repeated the guidance given in *Birmingham City Council v Lawrence [2017] UKEAT/0182/16* where it was held that, given that the duty was to take steps that were reasonable to avoid the disadvantage, the question of whether, and to what extent, the step would be effective to avoid the disadvantage would always be an important one:

> *"18. … given the language of section 20(3) - where the steps required are those that are reasonable to avoid the disadvantage - the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one [22]. Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it; conversely, if there was a prospect - even if considerably less than 50 per cent - it could be [23]. The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage [24]; a, or some, prospect of avoiding the disadvantage can be sufficient [25]. All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness."* [26]

or to put it another way:

> *"… in our judgment an adjustment which gives a Claimant 'a chance' to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP having the effect of placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive."* [27]

48 Where multiple PCPs are engaged, it is necessary to look at their cumulative effect in assessing substantial disadvantage and reasonableness [28].

Discrimination Arising From Disability

49 Section 15 EqA provides so far as is relevant [29] that:

> *'(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> …"

50 Simler, J as she then was, summarised the approach to be taken from the authorities in relation to section 15, in *Pnaiser v NHS England* [30]:

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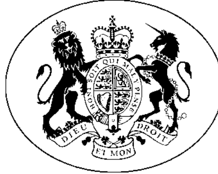
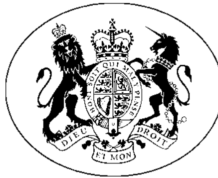
[21] *Project Management Institute v Latif* UKEAT/0028/07 is authority §54-57.
[22] *see per HHJ David Richardson at paragraph 59 of Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341* EAT
[23] *per HHJ Peter Clark at paragraph 39 of Romec Ltd v Rudham UKEAT/0069/07*
[24] *Noor v Foreign & Commonwealth Office [2011] ICR 695 EAT per HHJ David Richardson at 33*
[25] *per HHJ McMullen QC at paragraph 50 in Cumbria Probation Board v Collingwood UKEAT/0079/08 and Keith J at paragraph 17 in Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10*
[26] *see per Elias LJ in Griffiths [29] and per Mitting J at paragraph 18 in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/ 0341/15*
[27] *Lancaster v TBWA Manchester* UKEAT/0460/10 at [46] (Slade J presiding)
[28] Environmental Agency v Rowan [2008] ICR 218 (EAT) at §27
[29] knowledge is not in issue here
[30] *Pnaiser v NHS England & Another [2016] IRLR 170*



"31. 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 section15 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 section15 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, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).*
>
> *(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."*

51 Unfavourable treatment is that which puts an individual at a disadvantage [31]; there is no need for a comparator.

52 Under the "because of" test, the "something arising" need not be the sole reason. The Tribunal needs only to be satisfied that the "something arising" had a significant or at least more than trivial influence on respondent's decision (and influence can be unconscious) [32].

53 If proven, the burden is on the Respondent to demonstrate either that there was a different reason for the unfavourable treatment or that that the unfavourable treatment is a proportionate means of achieving a legitimate aim. Whether the Respondent knows of the connection between the Claimant's disability and the "something arising in consequence of it" is irrelevant[33].

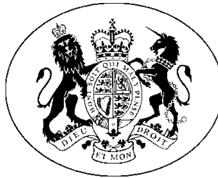
54 We have addressed the failure to make reasonable adjustments complaint first because *"if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified"* [34]. Whilst those comments indicate a degree of certainty that exceeds that which is perhaps warranted it is difficult to foresee circumstances where they are not the case.

Justification

55 If the impugned treatment is the direct result of applying a rule or policy, it will usually be the rule or policy which has to be justified. Thus, in indirect discrimination complaints, justification relates to the PCP. For s.15 complaints it is ordinarily the unfavourable treatment that must be justified. However in Griffiths [35] Elias LJ said this:

> *"27. … it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, … Strictly, in the case of indirect discrimination it is the PCP which needs to be justified whereas in the case of discrimination arising out of disability it is the treatment, but in practice the treatment will flow from the application of the PCP. Accordingly, once the relevant disparate impact is established, both forms of discrimination are likely to stand or fall together. …"*

[31] *EHRC Employment Code* at §5.7
[32] *Secretary of State for Justice v Dunn* [2017] UKEAT/0234/16 at [54].
[33] City of York Council v Grosset [2018] ICR 1492 at [38-40 and 47]
[34] *Griffiths* at [26].
[35] Griffiths v The Secretary of State for Work And Pensions *[2015] EWCA Civ 1265*



56 Thus, the question will turn on whether *"the treatment is the direct result of applying a rule or policy"* or if it occurs as a result of *"series of responses to individual circumstances"*. In the latter case the Tribunal will required *"to look at the treatment itself and ask whether the treatment was proportionate."* [36]

57 As to justification itself the relevant legal principles are summarised in *MacCulloch v Imperial Chemical Industries plc [2008] ICR 1334 EAT at [10]*:

> *"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 863 at [31].*
>
> *(2) The classic test was set out in Bilka-Kaufhas GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end' (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see Rainey v Greater Glasgow Health Board (HL) [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.*
>
> *(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.*
>
> *(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."*

58 Although section 15 (like s.19) places the burden of establishing justification firmly on the employer, it will be for the employee to challenge an assertion that there was nothing else that could have been done; as Baroness Hale observed in *Essop v Home Office, Naeem v MOJ* [2017] UKSC 27; [2017] 1 WLR 1343 SC:

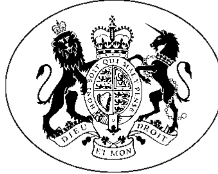
> *"47. … The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this court to do so."*

59 Whilst it is for the alleged perpetrator to justify the provision, criterion or practice the authorities make clear that the alleged perpetrator is not required to provide evidence of justification; Tribunals are expected to use their common sense, reasoned and rational judgment. What may not be prayed in aid are subjective impressions or stereotyped assumptions [37].

60 As to what that requires in practice is encapsulated thus [38]:-

> *"62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of*

[36] Buchanan [45-49]
[37] see Elias J in *Seldon v Clarkson Wright and Jakes* [2009] IRLR 267 EAT at [73] affirmed by the Court of Appeal and Supreme Court and in *Homer [2009] IRLR 601* EAT per Elias (now LJ) at [48] and also paragraph 4.26 of the Code.
[38] per AG Kokott which was adopted following a reference to the EUECJ by the Supreme Court in *Ministry of Justice v O'Brien [2013] ICR 499*



objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued ..." [39]

61 It is important to emphasise that assessment does not give rise to a margin of discretion or *'range of reasonable responses'* test. Further, the test of determining proportionality is objective so it is no bar to the act being justified if the alleged perpetrator had not turned its mind to the question of proportionality at the time and thus matters that have come to light after the event can be relied upon [40].

62 Mr Wright referred us to the comments of Lady Hale in *Seldon v Clarkson, Wright* - *"I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it."*

Harassment

63 A respondent harasses a claimant if the respondent engages in ***unwanted conduct related to*** a relevant protected characteristic (here race), and the conduct has the purpose or effect of either

(i) violating the claimant's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

64 We will refer to the matters in (i) and (ii) as ***'the proscribed consequences'***.

65 In deciding whether conduct has the effect referred to each of the following must be taken into account -

(a) the perception of the claimant;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

66 That means having taking into account all the other circumstances the tribunal must find that a claimant perceived him/herself to have suffered the effect in question and it must be reasonable for the conduct to be regarded as having that effect [41].

67 We first remind ourselves that

"… not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase." [42]

68 Langstaff P subsequently endorsed that view :-

"12. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the

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[39] *see Del Cerro Alonso (Free movement of persons) [2007] EUECJ C-307/05, [2008] ICR 145 para 58, and Angé Serrano v European Parliament (Case C-496/08P) [2010] ECR I-1793, para 44.* Albeit that is essentially a restatement of *R. (Elias) v Secretary of State of Defence[2006] EWCA Civ 1293, [2006] 1 WLR 3213* where Mummery LJ gave the following guidance on what was required :-

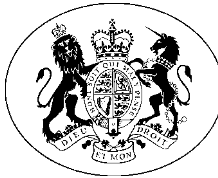
"[151] ... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

Which in turn is a repeat of his view in Hardy & Hansons plc v Lax [2005] IRLR 726 CA at [31 & 32], a view that was endorsed by Lady Hale in Homer at [20-23].

[40] *Cadman v Health and Safety Executive [2004] IRLR 971*

[41] Pemberton v Inwood [2018] IRLR 542, [2018] EWCA Civ 564 per Underhill LJ

[42] Richmond Pharmacology v Dhaliwal [2009] UKEAT/0458/08, [2009] IRLR 336 at [22]



words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence." [43]

69 Elias LJ in Grant v HM Land Registry [44] said this:-

> *"13 … When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.*
>
> **…**
>
> *47 ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

The burden of proof

70 Direct evidence of discrimination is rare. The Equality Act therefore provides that in the absence of any other explanation, if there are facts from which the court could decide, that there has been a contravention of the Equality Act the tribunal ***must*** hold that the contravention occurred unless a respondent shows that the conduct or decision in issue was in no sense because of the relevant protected characteristic [45], that requires a consideration of the subjective reasons which caused the respondent to act as s/he did [46].

71 In undertaking that assessment and save in one respect [47], the ET has to consider all the primary facts, not just those advanced by the complainant. Whilst evidence adduced by a respondent can properly be taken into account at the first stage when a tribunal is deciding what the "facts" are in order to see if a *prima facie* case of discrimination has been established by the claimant [48]. Only the explanation which cannot be considered at the first stage of the analysis.

72 Where facts are proved from which inferences of less favourable treatment because of protected characteristics can be drawn, then the burden of proof moves to the respondent and it is then for the respondent to prove on the balance of probabilities that it did not commit or are not to be treated as having committed the alleged discriminatory act or that treatment was in no sense whatsoever on the ground of protected characteristic [49]. That requires a consideration of the subjective reasons which cause the employer to act as it did [50]:-

> *"At the second stage, the ET must 'assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities'."* [51]

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[43] Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13

[44] [2011] IRLR 748 *CA*

[45] Section 136 EqA & *Ayodele v Citylink Ltd [2017] EWCA Civ 1913*

[46] see *Shamoon [7]* per Lord Nicholls.

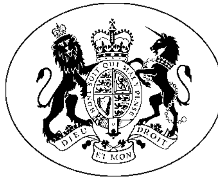
[47] see *Hewage* at [31], and Laing v Manchester City Council *[2006] ICR 1519* at [56 to 59]. *"Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation)."* per Elias P in *Laing* at [65]*)*. Discrimination complaints *"rarely deal with facts which exist in a vacuum and to understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. … one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II … since these both provide the context for and cast light on the overall picture."* (see Kansal v Tullett Prebon Plc UKEAT/0147/16 at [31] where Langstaff J also *referred to* Qureshi v Victoria University of Manchester [2001] ICR 863 and X v Y [2013] a decision of the EAT (UKEAT/0322/12/GE)

[48] *Ayodele v Citylink Ltd [2017] EWCA Civ 1913 per Singh LJ [67]*

[49] Ayodele v Citylink Ltd & Another [2017] EWCA Civ 1913.

[50] see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 341, para. 7, per Lord Nicholls.

[51] see the Igen guidance at Annex paragraph 12 and Laing [51]



73 When considering whether a protected characteristic was a ground for less favourable treatment, the total picture has to be looked at and where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation should be avoided as it omits a consideration of the wider picture [52]. Whilst those provisions are helpful where there is room for doubt, if the tribunal is in a position to make positive findings on the evidence one way or the other that is an end to the matter [53].

> *"… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. …"*

Timing

74 Section 123 EqA provides so far as is relevant:-

> *"(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) 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."*

75 The Tribunal has a wide discretion under EqA s.123(1)(b) The Tribunal is required to assess all relevant factors in the particular case, including in particular the length of, and the reasons for delay prejudice to the Respondent, whether extension would open up historic issues, and the impact of delay on the quality of the evidence [54].

76 The CA in *Robertson v Bexley Community Centre [2003]* IRLR 434 reminds us that time limits are strict in employment claims, there is no presumption that tribunals consider their discretion to consider a claim out of time on just and equitable grounds, indeed the reverse is true, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time.

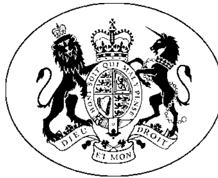
THE FACTS

We make the following primary findings of fact on the balance of probabilities and from the information before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

[52] London Borough of Ealing v Rihal *[2004] IRLR 642* CA applied in *Laing* [59] and endorsed in Madarassy v Nomura International *[2007] IRLR 246* also CA

[53] Hewage v Grampian Health Board [2012] UK SC 37*at [32]*

[54] *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 at [32-33 & 37]



77 The claimant has been employed by the Respondent since 23 January 1998 as a Crown Prosecutor (latterly as a SCP) and remains employed by it.

78 He has been line managed by a number of managers over time. So far as is relevant for us :-

78.1 in June 2013, from 1 April 2015 to 4 October 2015 and from June 2016 to July 2017 Ms Casey who was then a District Crown Prosecutor (she is now am a Senior District Crown Prosecutor),

78.2 from July 2017, Ms Emma Lile took over line management responsibility for him,

78.3 from April 2018 until October 2018, the Claimant was line managed by Mrs Middleton,

78.4 Miss Gessey was the Claimant's line manager from 22 October 2018 until April 2021, and

78.5 Mr Harrett became Claimant's line manager on 29 March 2021. He continues in that role.

79 On 28 October 2015 the claimant told us he had a mental and physical breakdown. He alleges that was caused by work related stress. He told us as a result amongst other matters since then he is slower with decision making and was no longer as decisive as he used to be.

80 In a report dated 30 November 2016 [269-270] the respondent's Occupational Health physician Dr Alan Scott stated *"… it isn't clear if this was a physical illness, like a mini-stroke CNN) or some form of mental breakdown. The fact that he wouldn't leave his house for a month afterwards, and was treated by his GP for depression 3 suggests the latter: However, it is his contention that, regardless, it was brought on by work. I dealt with those issues in my report after I last met with* ***[the Claimant]*****, on 13th January…".*

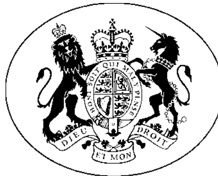
81 That was a reference to an earlier report which correctly should have been dated 13 January 2016 (instead of 2015 as it was) [262-263]. The earlier report identified

> *"… He is fit to resume work but would benefit from a placed return, as he needs time to rebuild his confidence and his work stamina. Ae you know, he is a Court prosecutor who works from a number of sites prepares cases from home.*
>
> *He doesn't like commuting to the Stoke office because he also has a longstanding back condition that doesn't react well to prolonged sitting down In a vehicle.* ***However, he understands that he may need to spend some time in office. getting up to date.*** *I don't know it he can commute to Stoke by train. or more easily to Birmingham, but that can be decided amongst you. I suggest that he resumes work on three days a week, … as he then has maximum time to rest and to prepare his next court. However. there can be flexibility there it necessary. [details of phased return then relayed] … You may wish to consider which courts may be more or less 'stressful' and keep [the claimant] out of the worst, if possible, until towards the end of his phased return.*
>
> *It is essential that he now gets adequate treatment for his condition …"*

[Our emphasis]

82 The claimant commenced legal proceedings on 6 July 2017 alleging harassment, direct disability discrimination and the failure to make reasonable adjustments contrary the Equality Act 2010 concerning his then line manager, Ms Casey's management of him from July 2016. As we state prior to the spring of 2018 the claimant was line managed by Ms Lile.

83 Mrs Middleton took over line management of the Claimant in April 2018. She told us she had only met the Claimant once previously before she took over his line management, when she was a note taker at a meeting between him and a previous line manager at a café. She told us she had no knowledge about the Claimant's previous Employment Tribunal proceedings, save for the fact that those proceedings were pending and that Ms Casey was involved. Mrs Middleton accepts that the Claimant did try to tell her about his claim and was very critical of Ms Casey, but she made it plain to him that she did not want to discuss his claim or Ms Casey given she was her line manager. Given



Ms Casey was her own line manager when she needed any advice about my management of the Claimant, she told us she spoke to Mr Kyne or took advice from HR.

The Phased Return

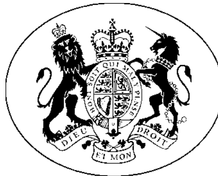
84 When Mrs Middleton took over line management of the Claimant, he was returning to work after a year of sickness absence, disability special leave (sick leave from 27 April 2017 and disability special leave from November 2017 to 29 April 2018) and immediately before his return, a week's holiday.

85 The most recent occupational health advice was that received from Dr Elmslie dated 1 March 2018 [308-309]. That stated there was

> *"… clear evidence of clinical improvement in relationship to his symptoms. We believe that his longstanding vulnerability will mean that he will require enduring medical support for sometime to come and intermittent psychological therapy. Patients with longstanding and recurrent mood disorders remain both statistically and actuarially vulnerable to fluctuations and these can impact on work stability and the ability to render reliable service and attendance. His mental health disorder and low back pain would be classed as a disability under equality legislation but he has sufficient improvement to retain some limited workability in our opinion if workplace adjustments and accommodation can be made." [308]*

86 It went on to state the Claimant was fit to return to work recommending a phased return over two to three months (from a half to core hours), that enabling the claimant *"to carry out some home work as part of a balance between office and home based work this is also likely to be beneficial particularly during days when his psychological health is lowered",* that key performance advocacy indicators be reduced, that until there was further clinical improvement he would struggle with Court work and therefore Court work should be avoided during the rehabilitation period (his ability to return to Court work on an enduring basis was stated to be "as yet unsighted as he has not completed care pathways"). He continued:-

> ***"He will require additional mentorship and support to ensure that he is coping with aspects of his employment duties and probably some time to reengage with the workplace and be updated in any changes to process, policies or technology whilst he has been away from work for so long. If you are able to accommodate these adjustments I would recommend a management meeting to map out the support that you are able to do from an administrative perspective and then he can get his fit note closed.*** *In relationship to his mechanical low back pain, generally one would encourage patients to keep mobile as much as possible. He has no red flags which would indicate that this is a barrier to him returning to work in its own right, however his workstation needs to be ergonomically sound. he should be encouraged to take micro breaks every 20 to 25 minutes for a few minutes at a time as well as other natural breaks during the day. Opportunities to avoid long term standing and walking are likely to be beneficial in terms of symptom control. Historically, he has found home working to be of greatest help to him.*
>
> *As you can see from this report* ***[the Claimant's]**** *ability to return to the totality of his normal role is compromised. He personally reflects great anxiety in return to advocacy, and this may remain see significant barrier. To do so. In the end he shouldn't countenance a return to duties which predictably will make him unwell. I have put in place some recommendations to allow him to return to work and then* ***review his progress with a view to returning to advocacy and Court work depending upon clinical progress, if such progress is not made and/or his role remains significantly limited as a consequence of health issues then you may wish to manage his case administratively through your capability procedures and consider ill health early retirement.*** *I confirm that the disability provisions of the Equality Act remain extant. I have indicated that he remains both statistically and actuarially vulnerable to sickness and absence and relapse of his condition due to its enduring nature. Any office work which requires*



prolonged driving is likely to exacerbate his mechanical back pain so you may wish to consider identifying an office which involves less driving or it he does have to drive.to ensure that he stops every 30 to 40 minutes to get out of his car. Once you have had an opportunity to review this medical report in the context of previous OH advice you may wish to have a Case Conference once you have identified what adjustments you can reasonably accommodate or not, if not then we will need to move forward on grounds of your capability procedures. Further medical evidence from his own doctors we be required at that stage in my opinion. If I can give any further advice our counsel please do not hesitate to contact me."

[Our emphasis]

87 Mrs Middleton wrote to the Claimant on 6 April, enclosing a copy of Dr Elmslie's report and invited him to a meeting on 17 April 2018 to discuss his return to work [316-317].

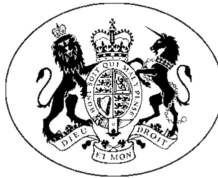
88 The day before they were due to meet the Claimant emailed her setting out the impacts of his condition on his work [314]. They met the following day, 17 April, and discussed amongst other matters a draft return to work plan she had devised which involved a gradual build up of the claimant to full time work over a period of three months and that she told us had been prepare ed in consultation with HR [324-326]. Mrs Middleton's note of the meeting summarising the discussion is at [316-317].

> *"4. Advocacy work is not part of the phased return and following this [claimant] will not be asked to return to advocacy work for at least a further 3 months. Any proposed return to court activities would not be progressed until a further OH referral was progressed at the 6 month stage and discussion with [claimant] re: progress and health status. [claimant] asked that if he was not able to return to advocacy would this result in him being taken down capability routes? LM reassured and explained that the purpose of the suggested phased return is to plan how to support [claimant] to get back to work and that advocacy is not to be required of him during the first six month period from his return date and after that any return would be subject to OH advice and would be done gradually. As this contains so many variables then to discuss ultimate outcomes would not be appropriate at this stage.*
>
> *5. LM explained that the plan incorporated a mix of home and office work, as this would enable appropriate support and training to be provided.*
>
> *6. Workstation Assessment to be completed on day one of return to work. [claimant] said he requires a hard wooden chair at work as this is what he uses at home to manage his back condition. He is aware of some chairs we use at the office which would be suitable for him.*
>
> *7. LM confirmed* ***[the claimant]**** *will not be required to hot desk at the Birmingham office and will have an allocated desk.*
>
> *8. LM discussed possibility of noise cancelling headphones to reduce risk of distractions in the office. It was explained to* ***[the claimant]**** *that due to the VCT system of telephony that most staff wear a headset to take calls and listen to hard media footage so his use of earphones would not stand out."*

89 That attached a detailed return to work plan [324-326]. Although that was revised on a number of occasions subsequently including a letter from Mrs Middleton sent by email setting out the parties respective positions as at 27 April 2018 [355-358] (see (100)).

90 The issues discussed concerning the claimant's chair, workstation, commute and office environment all formed recurrent disputes that continued throughout the period of Mrs Middleton's line management of the claimant.

91 During the meeting the Claimant raised no issues with Mrs Middleton's proposals. Subsequently he raised with her concerns about the potential for a return to advocacy, his working from home arrangements and as to Dr Elmslie's report on the basis he had had no opportunity to give his opinion to Dr Elmslie before it was prepared. The claimant told Mrs Middleton on 23 April [336]



he had met not with Dr Emslie but one of his colleagues. The claimant did accept he had been given an opportunity to consider the report before it was sent to the respondent.

92 In an email of 24 April [335] to Mrs Middleton the claimant said this:-

> *"Thanks for the clarification: there will be no reasonable adjustments as regards homeworking or advocacy after the phased return.*
>
> *This was not clear from the minutes or from my recollection of the meeting, but now it is. Perhaps I missed something.*
>
> *The report did not restrict its recommendations concerning homeworking to just the phased back period as far as I can tell: it might be something that needs further clarification.*
>
> *As regards permanent homeworking the CPS made it clear to the Doctor that homeworking on a full time basis could not be accommodated. His hands were tied on this issue not least because any such recommendation could potentially lead to dismissal.*

93 The restriction on advocacy and because the Claimant could not cope with high-pressure work or with tight timescales this severely limited the types of work that could be allocated to him because much of the CPS Magistrates Court workload work required urgent reviews to be completed for the following day.

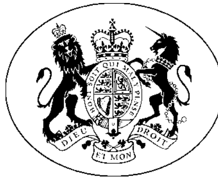
94 The reference to a potential for a return to advocacy also formed part of a recurrent set of concerns. Mrs Middleton following Dr Elmslie's report had made clear in our view at that point that advocacy would not be considered until clinical progress had been made and he was reassessed. Further Dr Elmslie's report had identified that might not occur. Contrary to the contents of the claimant's email we find the minutes recorded that advocacy would not be considered during the return to work plan and only then after a further assessment had taken place. Similarly for homeworking. Contrary to what the claimant suggested that would be permitted in part, but not to the extent sought y the claimant. We find that what the claimant was seeking confirmation that advocacy would never be an option and he could work from home full time and permanently. We find the respondent's failure to grant in full what he was seeking was viewed by him as the respondent failing to undertake reasonable adjustments.

95 Similarly as to the way the claimant portrayed the potential for dismissal; the minutes recorded that it was not appropriate to discuss ultimate outcomes at that point in the context of advocacy not even being reviewed for 6 months. In the context of latter invitations to a long term absence review meeting the claimant repeatedly asserted the reference to the absence management procedure being invoked against him was a threat and what he described as filing the MYR a threat of performance management. As to the latter when asked where this was he could not take us to the threat.

96 A further common theme, namely claimant not raising matters at meetings and only subsequently doing so in correspondence was a common theme. The claimant told us several reasons for that firstly that he needed time to process the issues raised and hence considered the minutes in detail afterwards. At other points he also stated that when he started to read documents that sometimes triggered his symptoms and at other points mention he told us he wished to avoid conflict in meetings.

97 During his evidence the claimant told us "*One of my weakness is that in a long meeting I can't recall what was said and I need to read the minutes to reflect. It all just washes over me.*"

98 Mrs Middleton told us that her view was that after such a long absence in order to assist the Claimant to re-skill, access training and benefit from the support of colleagues attendance at the office was necessary. Specifically she states that he told her that one of the issues he found difficult was decision making and she believed having the support of colleagues in the office and on the job learning from being in the office environment would be important for a successful return to work



and Dr Elmslie had said there was no medical barrier to the Claimant working in the office for part of the week and in the section we highlight above suggests that additional mentoring and supervision was essential. Mrs Middleton took the view that would be best served by requiring him to attend the office several days per week. We find based on the medical advice she was entitled to do so.

99 On 25 April 2018, the Claimant submitted a Fit Note from his GP which said he was fit for work and recommend home working and no advocacy [338]. The claimant accepted his GP had prepared this without sight of Dr Elmslie's report. The Fit Note did not specify the frequency of home working. The same day the Claimant sent Mrs Middleton a revised return to work plan which involved him working in the office for only 15 days over the 12 week return to work plan (rather than the 36 days she had suggested), he proposed to take annual leave on some of the days when he was due to be in the office [344-346].

100 There followed an exchange between the two. On 27 April 2018, the Claimant emailed Mrs Middleton stating *"I will comply with your counter proposal as I don't have the energy to further discuss"* [352]. The claimant then sent to her a further email on 8 May 2018 on similar lines [359].

101 On 21 May 2018 the claimant told us he had a meeting with Mrs Middleton to discuss reasonable adjustments. The claimant states he raised his four hour commute which combined with the noisy office environment aggravated his conditions and made it difficult for him to concentrate and work, which resulted in reduced productivity.

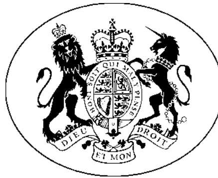
102 Mrs Middleton does not address that meeting in her statement but we did have an email that referred to their meeting which she described as a "catch-up" by email of 25 May 2018 [360]. She identified a number of steps she asserts were taken to support the claimant which amongst others included a deskside assessment in the office (it records the claimant was unwilling to allow the respondent to carry out one at his home), training he had been given and her response to a request he made to claim for travel time. In addition she told the claimant during the 13 week phased return she would not be monitoring his productivity as a reasonable adjustment to allow him to re-adjust to his role. Whilst it was clear he had raised he was struggling with the length of the working day he could use leave as there was a considerable amount outstanding (relating to that accrued during his sickness absence) she also stated he could a flexible working request to reduce the length of the working day.

103 Before us she told us that she it was a mistake and instead she should have made it clear she intended to monitor his progress in so far as it allowed him to move on to the next stages of the phased return; If she had not done she stated if he was not ready she would be setting him up to fail. Indeed one of the complaints in the claims now withdrawn was that the respondent was not adequately monitoring and restricting his workload.

104 We find she was monitoring his work both in terms of quantity and quality (see (114-131)) as she accepted when she later spoke to Mr Saxton (see (206) following below).

105 By mid-June 2018 Mrs Middleton told us she had been hoping to broaden the Claimant's range of work. He had started off doing pre-charging decisions (PCDs) for the police. That comprises one off pieces of advice on whether to take no further action, charge a suspect or delay charge and provide the police with an action plan. By that point, 6 weeks into the return to work plan, she told us she had hoped to progress him on to Not-Guilty Anticipated Pleas (NGAP) preparation, but he took a week's leave and stated he preferred to commence those after his return to work. She stated she gave him positive feedback about the quality of some of the PCDs that she had reviewed and that she proposed to commence him on NGAP on his return from leave and arranged for a fellow SCP to guide him through the process.

106 Amongst other occasions the claimant again raised a concern about his chair was on 4 July 2018 [§54] as part of him raising concerns about his commute into the office. He sought as a reasonable



adjustment to manage his lower back condition that the respondent allow him to use in the office an unpadded wooden chair, like one he used at home [381].

107 On 16 July the Claimant emailed Mrs Middleton to say he was extremely low and was seeing his GP. He subsequently emailed a MED3 sick note signing him off for two weeks citing anxiety as the cause [393-395]. He indicated that he no objection to speaking to an OH Doctor to assess his workstation (Mrs Middleton had previously sought this) during his sick leave and asked if it was possible to arrange for an assessment of my workstation as soon as possible after his return.

108 The Claimant again emailed her concerning the chair on 24 July 2018 stating that the chair he was using in the office aggravated his back condition and asked to work from home until a suitable chair was identified. She sought HR advice in respect of this. On 26 July 2018, she received a further Fit Note from the Claimant's GP to say that the Claimant was fit *"to work exclusively from home from 30/07/18. Conditions and associated symptoms aggravated by work environment, commute and uncertainties about the future"*. She also received an email from the Claimant asking that she consider his Doctor's recommendation posing the question *"if you were not minded to accept his recommendation what would happen if I were to simply follow it myself and work from home against your instructions rejecting it?"*. [428].

109 The claimant remained off work for 10 working days between Monday 16 and Friday 27 July 2018. That was subsequently agreed to be treated as disability paid special leave (see (136)).

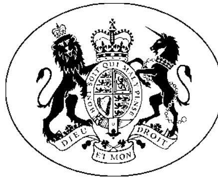
110 An assessment was undertaken for a new chair on 17 September. It arrived on 24 September 2018 and DS Ergonomics were going to attend the office to help him set it up when he was next in the office on 1 October 2018. Mrs Middleton told us on 1 October the Claimant emailed her to say that he had been using the chair for much of the day but the *"plastic ridges on the seat appear to be cutting into me restricting flow of blood to my feet. See how it goes"*. [596]

111 On 25 July 2018 the claimant attended a consultation with Professor Tony Elliott a consultant psychiatrist following an instruction by the claimant's former solicitors. Professor Elliott's report dated 15 August 2018 [437-465] made a number of recommendations including that the claimant by that point saw his place of work as so hostile that avoidance of it was the only way for the Claimant to manage. Thus home based working for the claimant was recommended.

112 There followed a request from the Claimant to approve 06.30 starts as a reasonable adjustment (which was subsequently approved on a trial basis subject to a review after a month), a lengthy exchange about a formal workstation assessment (which took place on 30 July 2018) which included consideration of a special chair for him and an ongoing issue about the suitability of a chair and a reminder from Mrs Middleton that the return to work plan that included training, mentoring and management support and, to be effective, it did require some presence in the office and if he was not able to comply with it, he would need to take sickness absence until he was well enough to continue with and finalise the plan [433-434].

113 On 8 August 2018 Mrs Middleton received an email from Miss Sun Banik, a HR adviser, advising her that the Claimant had passed his trigger point following his two-week absence in July and asking her to arrange a disability absence first review meeting with him as soon as possible [435]. Due to her own leave and the claimant's absence the return to work meeting was not held until 15 August 2018. He said he was continuing to struggle with the commute and office environment, although he accepted that the office was quiet. He said he had received the OH assessment regarding the chair but wished to make some comments about the report before it was provided to the CPS. He said he was continuing to do PCD work, not upgrade file reviews, which he should have been doing according to the plan.

114 The week commencing 21 August 2018 was week 13 of the claimant's return to work plan. On 20 August 2018 Mrs Middleton undertook a file review of the Claimant's PCD work and noted that his throughput was "alarmingly slow" considering the types of work he was producing and noted



that he needed to progress to NGAP work, she asked the team that dealt with the allocation of work to ensure that NGAP cases were allocated to him going forward. She concluded the Claimant had not made the planned progress and could still not handle his own caseload. Whilst specific tasks continued to be allocated, he had no ongoing responsibility for a case list. Despite those matters and given his sickness absence she decided to extend the training and support elements of the return to work plan. She emailed him on 21 August 2018 to confirm that was so [523]:-

> *"I have your phased return plan for Week 10 and 11 which would be weeks commencing 30/7/18 and 6/8/18 saying that:*
>
> *'Proposed **[the Claimant]*** increases hours and works 2 x 6 hour days and 3 full days. 3 of these days to be in the office to continue support and training. **[The Claimant]*** to commence his own caseload and task list'*
>
> *Then Week 12 which is this week (w/c 13/8/18)*
>
> *'Proposed **[the Claimant]*** increases hours and works 2 x 6 hour days and 3 full days. 3 of these days to be in the office to continue support and training'*
>
> *Is this your understanding **[the Claimant]****?
>
> ***I believe we need to extend the training and support element of the plan as we are not where we should be as there have been gaps in the plan and you have wanted to spend some more time familiarising yourself with some of the work however is it your understanding that you will be back full time as of next Monday?"***
>
> ***[our emphasis]***

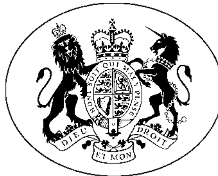
115 Also on 21 August 2018, she wrote to the Claimant to advise that he had exceeded his trigger point for disability related absence and that we needed to have a formal disability related absence review meeting which was originally scheduled for 5 September 2018 [526-527]. On 28 August 2018, the Claimant emailed Mrs Middleton suggesting she had breached the respondent's Attendance Management policy in not holding a return to work meeting with him and said he had had a "wretched weekend" worrying about his return to work plan.

116 She responded the following day stating that he would have been aware having received an out of office response that she had been on annual leave until 29 August and the return to work conversation had taken place on 15 August [540-541].

117 The minutes of what appeared to be a catch-up meeting on 3 September [545-546] clearly record Mrs Middleton was undertaking Independent Quality Assessments (IQAs) (a process the respondent internally used) of his work and the claimant was aware of this. Her report to Mr Kyne[542-544] of 3 September stated *"**[the claimant's]*** advice[s] are in the whole legally sound however he does not respond well to feedback at the moment."*. That report also identified a case where the report came to a sudden stop, how Mrs Middleton raised that with the claimant and *"He believes the review does not suddenly end. I believe that it does and have returned to the case to check and in my view part of the public interest test ends mid-sentence so I do not mark this category as met."* We should record that whilst that email is dated 3 September and refers to IQAs for August Mrs Middleton signed off the report with the date "27/7/18".

118 The Disability Related Absence Meeting originally scheduled for 5 September was held on 12 September [565-567].

> *"2. … LM confirms that the phased return has now finished however LM is happy to continue the reasonable adjustment presently in place of 2 set home working days which are currently a Tuesday and Thursday unless there is a specific requirement for **[the claimant]*** to come into the office for training or a specific reason. LM confirms that this will be reviewed on a 3 monthly basis. LM confirms that the other 3 days **[the claimant]*** can request smarter working in line with the other lawyers on the unit*



> *which will be considered depending on the business needs and requirements. LM explains that she would like to see* **[the claimant]*** *in the office at least once a week as she believes it is important that* **[the claimant]*** *does not isolate himself but LM is willing to help and support him in the best way possible.*
>
> *3.* **[the claimant]*** *confirms he is ill and taking medication, he believes that the CPS should be assisting and helping.* **[the claimant]*** *confirms he struggles with the commute to work and he states that working in the office has a detrimental effect on his health. …*
>
> …
>
> *13. … [the claimant] asks Mrs Middleton if she can confirm that working from home eliminates his problems. Mrs Middleton cannot confirm this and she would need to see some more evidence in terms of volume of work and the quality of work carried out by [the claimant]. Mrs Middleton confirms that she will be monitoring productivity and quality as she does with all lawyers she line manages."*

119 It was common ground that by 2018 at the latest the respondent had adopted *"smarter working"* . Mrs Middleton told us *"3. … this tended to be an ad hoc working from home arrangement for a day or two each week. As a large proportion of CPS staff are employed to appear in Magistrates' and Crown Courts, a presence in Court for part of the week is essential."*

120 It does not appear that the claimant at any point sought smarter working which would have enabled him to work at least 4 days per week at home. Instead events superseded this.

121 The minutes of the Disability Related Absence Meeting of Wednesday 12 September make no reference to the continuation of the return to work plan indeed they expressly state *"2. … that the phased return has now finished …"* before going on to say that Mrs Middleton was happy to continue to continue a number of the adjustments that were in place.

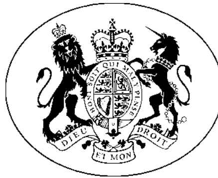
122 The claimant sought clarity of the position on Friday 14 September [569] *"I believe the phased return ended on 30 August. … Can you remind me why it's been extended and why it continues to the end of September?".* Mrs Middleton responded the next working day (Monday 17 September) that the adjustments would continue [569]

> *"I made a decision to extend the support element of the plan until 30 September 2018, which was intended to benefit you. The phased plan was in place to provide appropriate support for you whilst you built up your hours and work following your return to work. Extending it provides a further period of support around NGAPs and trial reviews as I believe that you need to do more NGAP and trial reviews whilst not having the responsibility of managing a task list with the additional tasks, CTLS cases and deadlines this work brings. I hoped that during the month of September, whilst you adjusted to working full time hours you could gradually build up completing more NGAP reviews on a daily basis. As discussed, from 1 October I will be looking to then allocate you a task list for you to maintain and work from. I hope that this clarifies"*

123 On 18 September 2018 Mrs Middleton informed the Claimant [572-573] that she did not propose to take any formal action concerning his breach of the trigger points under the respondent's Disability Related Absence Policy [1360-1370].

124 Mrs Middleton was asked if she had had sight of Professor Elliott's report and told us she did not see that until these proceedings.

125 On 20 September 2018 Mrs Middleton emailed the claimant asking him to let her know what work he had undertaken on 13 September 2018 as she could not identify this on the respondent's case management system. She emailed him against on 29 September as it transpired he did not respond to her, stating that she had looked at the records and it appeared referring to a case that he had spent 350 minutes on [581]. The claimant states he felt this was a disproportionate amount of time and that his decision was poor and was reversed.



126 We read that email as Mrs Middleton raising a concern about the way the claimant firstly was not logging his work on the case management system as he went along but secondly a request that if case was taking a long time he let her know using a form she sent to him so she could decide if it needed to be dealt with in another way and to enable her to charge the time accordingly to business units. We find that was an offer to assist and to support the claimant by offering to allocate work elsewhere. Mrs Middleton acknowledged the case was a complex one and it warranted the extra time the case had taken but she needed to know when cases were complex in order to support him. The claimant did not perceive it in that way. He responded on 1 October [588]

> *"Yes. I always prepare stuff on a word document before committing to CMS and have always done so since*
>
> *CMs' inception. First time it's been an issue.*
>
> *Thanks for the abc form. I will use it in future."*

127 In contrast in his main witness statement the claimant stated *"I was never challenged about not being logged onto the system for several hours or for working outside the system." [§308].*

128 We find that reading those emails that whilst trying to be supportive of the claimant and praise him for work he was doing well yet also monitoring the claimant's progress against the return to work plan and that included both his productivity and the quality of his work. The claimant may not have perceived her emails of 20 & 29 September as such but that is what they were.

129 She told us she attempted to relay to the claimant her concerns but [§54]:-

> *"Unfortunately, he refused to accept any criticism of his work and would argue with me if I raised an issue with him. For example, on one quality review on one of his cases, he had copied and pasted it from another review and it finished mid-sentence. When I told him about this, he flatly denied that this was the case The Claimant would not accept any negative feedback. I have been shown page 707 of the bundle which is the Claimant's grievance interview note in which he says he disagreed with everything I said. This sums up his attitude towards me."*

130 Mr Kyne provides some support for this. He stated [§5] that he had a number of conversations with Mrs Middleton over the period that she managed the Claimant and on one of these she told him that the Claimant was not receptive to her feedback in respect of him improving his performance. He cited the example we give above in relation to the "August IQAs" where one of the claimant's charging advices to the police finished mid-sentence and the Claimant refusal to accept that was the case.

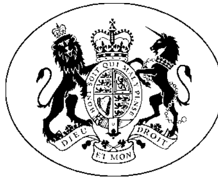
131 Thus, Mrs Middleton's view was that the claimant was slow in completing the work, which meant it was impossible for her to increase his workload. Beyond she told us that

131.1 she received reports from administrative staff who told her that on some days when he attended the office, he had done no work all day and had just sat looking out of the window, and

131.2 on the days he worked from home there would be large chunks of time where he was not logged into the CPS case management system and when she asked him about this, she told us he stated it was because he worked in *Word* and then copied documents across to the case management system (that accords with the example with give above concerning the 13 September).

132 The claimant told us [§69] *"Most of my poor performance occurred in the office, although I accept my productivity even at home was below standard. My poor performance was caused by my mental and physical conditions."*

133 Mrs Middleton also told us that over the period that she line managed him, the claimant only attended the office on 29.5 occasions, the rest of the time was accounted for by home working,



annual leave, sick leave from 16 July to 29 July 2018 and a further period of leave for the week of 2 October 2018. Accordingly, she told us that the majority of his time between April and October was spent working from home and given his output was less than the 70% reasonable adjustment his output at home was therefore below that level.

134 On 1 October Mrs Middleton approved an application for paid special leave for the claimant for 10 days, commencing on 15 October, to allow him to attend the Tribunal hearing in respect of his Employment Tribunal proceedings against the CPS.

135 On 2 October 2018, the claimant emailed her to say that he was unfit for work with insomnia/low mood and this was likely to be unwell for the rest of the week. He forwarded a Fit Note signing him off for the week with "anxiety and work related stress" [590]. The Claimant did not return to work before his Employment Tribunal was due to take place on 15 October 2018. It was subsequently agreed the 2 to 7 October 2018 would be treated as disability paid special leave (see (136)).

136 On the first day of the trial of the claimant's first claim, 15 October 2018 the claimant and respondent reached an agreement in relation to that claim by reference to a COT3 agreement [35-37]. The agreement provided for a number of adjustments to be made to the claimant's working conditions going forward, specifically full time home working, the claimant being exempted from advocacy, a 70% cap on his workload, that he was not to be line managed by anyone who had line managed him in the preceding two years (accordingly Ms Casey and Mrs Middleton did not manage him going forward) and that 14 days of sick leave he took during the period May to October 2018 be converted into disability special leave.

137 Miss Middleton told us she was given no information at all about the terms of settlement of the Claimant's Employment Tribunal proceedings and that all she was told was that the Claimant was to have a fresh start with a new line manager and that this was no reflection on her line management of him and that she had no details about the wording of the COT3 until it was shown to her for the purpose of preparing her witness statement for this claim. That also accords with what she said as part of the investigation of the claimant's grievance (see (206) following). We return to that in a few paragraphs time.

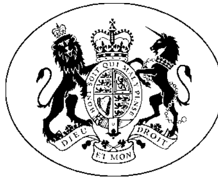
Miss Gessey as the claimant's line manager

138 On 22 October 2018 the claimant returned to work following the COT3 and one week's annual leave. From that date Miss Gessey has had line management responsibility for the Claimant. Whilst she understand that the Claimant had made a previous claim against the respondent and he had named Ms Casey as a Respondent, that had settled just before she took over line management responsibility for him, she understood that he was to move to her line management in order to have a fresh start.

139 Like Mrs Middleton she told us she did not know any of the details of his claim and nor was it necessary for her to but she was provided with the details of the reasonable adjustments agreed for the Claimant in an email from Sarah Hammond, Deputy Chief Crown Prosecutor, dated 22 October 2018 [597] and that it was also agreed that the Claimant would have a 10-day trigger point for disability related absences before any action would be considered under the CPS Absence Management policy in addition to the normal trigger points for non-disability related absences.

140 The claimant told us [§239] he later became aware that Mrs Middleton, Miss Gessey and Ms Casey, were unaware of any compromise agreement at all. They had been simply told that he was returning to work. We accept that was the actuality.

141 Mr Kyne was Ms Gessey's line manager until January 2020. They both told us he had instructed Miss Gessey that the Claimant needed her to be supportive, that he encouraged her to check in on



the Claimant's wellbeing and if there was any dips in output or quality, to approach these issues from the wellbeing/support perspective.

142 Ms Gessey met with the Claimant on Tuesday 30 October 2018. Her note of what was agreed at that meeting [609] made clear how his workload was to start at 50% of the full allocation plus one PCD per day, that would be reviewed after 2 weeks with a view to increasing his allocation to 70% (the figure agreed in the COT3) with 2 PCDs per day. Whilst subsequent issues arose how that 70% of workload was to be calculated by the end of this hearing those complaints were withdrawn.

143 Ms Gessey told us that she discussed with the claimant around the time she took over his line management that Mrs Middleton was completing a mid-year review for him. We return to that at (168).

144 The first time we can trace a paper record of the raising the cap that had been agreed on his workload was on 4 March 2019 when he was allocated a custody time limit case, which was listed for trial on 26 March 2019 [626-627].

145 The allocation of work remained an ongoing concern for the claimant. He raised it against amongst other occasions on 25 July 2019 [688]. He told us he was finding it difficult to do the work he was allocated and was struggling to find a reason for this. As a result he asserted the system which allocated a large part of the work to staff and which he had been allocated work pursuant to for some time ("the randomiser") should that the 70% cap should apply to both allocation and output. As we say that was withdrawn as a complaint before us but that remained a concern for the claimant. For example Miss Gessey told us that on 3 December 2020, his first day back after a two week sickness absence, the Claimant spent significant time going through the caseloads of other Prosecutors and the allocation of work to them before later complaining the type of cases they were given were quick and easy to prepare and were seen as "easy wins". She told us that she checked and he had the same allocation of them as other lawyers but notwithstanding re-allocated 20 traffic cases to him which had a long lead up time so that he was not required to do any urgent work on them and took other work away from him [857-859].

146 The claimant accepted before us that over the period prior to that point there were issues with his performance.

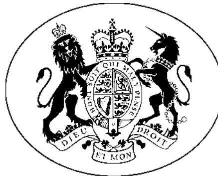
<u>The MYR</u>

The respondent's procedures

147 The CPS appraisal year runs from 1 April to 31 March. In around October of each year, in the middle of the appraisal year, line managers have interim appraisal meetings with those in their line management claim. This is an opportunity for line managers and their reports to have a conversation about what is going well and where there are areas for improvement. It is also an opportunity for the line manager to give an indication of how the report is performing at the mid-year point. The CPS has a box marking system for appraisals. These are Not Met, Met and Exceeded

148 The respondent's performance and development policy ("PDP") [1370-1377] provided

> *"8.3. The mid-year performance and development review provides an opportunity for the employee to discuss with their line manager progress against their objectives and their development plan. This is an opportunity for the line manager to celebrate achievements and offer constructive feedback where more needs to be done. …*
>
> *8.4. The line manager and employee are required to record their comments on the e—PDR once the mid-year review discussion is complete. Should there be a disagreement over the comments or indicative rating then the employee should record this in the employee comments of the e-PDR. [1374-75]*
>
> *…*



9.6. Where an employee has 60 days of actual performance during the year but they are absent for the end-of-year review, the manager must try to meet them to discuss their performance. This does not have to be in the office if not practicable and alternatives, for example meeting at a mutually convenient place, should be considered. If, for any reason, it is not possible to meet to discuss performance the manager should confirm the final rating with the employee following the end of year consistency check. [1376]"

149 The PDP had appended to it a document headed *"Performance and Development Advice and Tools"* [1378-….] whose contents included amongst others sections headed *"Questions and Answers"* and *"Special Circumstances"*. In the questions and answers section it said this :-

*"**Q8. Why do we include an indicative performance rating at the mid-year?***

This enables the line manager and employee to have a discussion at the mid-year about where the individual is at that point on the performance wave. This also provides an indication of what they need to do to improve or maintain this performance rating. [1381]"

150 In paragraph 3 of the document headed *"Special Circumstances"* stated that where an employee has a change of line manager, the previous line manager should hold a performance discussion with the employee.

151 Paragraph 15 of the document headed *"Special Circumstances"* indicated that employees who have had a significant amount of absence should have their objectives reviewed when they return to work after the absence and adjusted if required. It then went on to address the issue in 9.6. that employees absent at the end of year would still normally need to be awarded a rating by the line manager if the employee had completed 60 days actual performance within the reporting year stating the rating awarded will be based on the rating that was achieved during that period of actual performance. There was an a exception:-

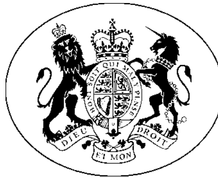
"However, where the reason for the absence is related to maternity, adoption, pregnancy or sickness due to disability covered by the Equality Act, the manager may want to take advice from HR if they are considering a 'Not Achieved' rating based on actual performance. The approach the line manager takes will depend on the individual circumstances such as nature and length of the absence and the impact of the absence on performance. It may be when considering these factors that the employee's circumstances are considered exceptional and no report is needed and they will be deemed to have 'Achieved'. [1387]"

152 For completeness the PDP sets out the consequences of failing two consecutive end of year reviews:-

"6.5. If an employee has received a second consecutive final performance rating of "Not Achieved", the line manager should discuss the case with their HR Business Partner (HRBP) to review what action has been taken to help the individual improve both their performance and rating, and agree appropriate next steps.

6.6. Where performance remains at an unacceptable level the line manager must start formal procedures in accordance with the Managing Poor Performance policy. The line manager must inform the employee of this action and the reasons why."

153 Thus, the PDP does not provide that a performance management process will ensue from a "Not Achieved" rating. Nor indeed from a "Not Achieved" rating at an end of year review. However given a performance management process ultimately could ensue that in out judgement strengthens the need as the PDP stresses at various points for there to be ongoing discussions about performance and in particular for an MYR to take place so if an employee's performance is lacking that is pointed out so it can be achieved and an end of year "Not Achieved" rating avoided.



Events leading up to the MYR

154 We had before us an *Outlook* diary entry from the claimant indicating an MYR had been arranged and cancelled [611]. Mrs Middleton indicated that she placed those meetings in calendars well in advance and so that was probably done in September. She could not recall when it was cancelled.

155 When it was put to him that he did not check for the MYR because he wished to close his mind to it the claimant rejected that and told us that was because he had received notification cancelling the MYR from Mrs Middleton and because she was prohibited from line managing him, he did not check. That accords with what he told us in his witness statement [§87]. We enquired when the MYR meeting was cancelled. The parties were unable to tell us. When reviewing the evidence as part of our deliberations we identified in a subsequent email to Mr Saxton on 21 August [728] the claimant stated he was aware on his return to the office on 22 October 2019 that mid year review had been cancelled (see (239)).

156 Given the claimant did assert he spoke to Miss Gessey and the first mention both make of a discussion was on 30 October (see (142))) it follows he was aware of the cancellation before he met her and that the explanation the claimant gives does not explain why he did not check for it.

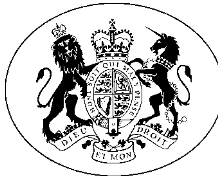
157 In the two emails that were supplied to the Tribunal that we refer to at (7) on 25 October 2018, Miss Banik, one of the respondent's HR managers sent a chasing email to Gillian Casey, Sean Kyne and another member of staff with a list of Outstanding Mid-Year reviews for the Magistrates Court Team seeking they chase managers for completion of these by the deadline for the Mid-Year reviews of Wednesday 31 October 2018. An attachment showed the claimant was one of the individuals where neither the manager nor employee had completed the mid year review. A reminder email with an attachment of those outstanding was sent on 2 November seeking they be actioned the following week as a priority. That second list indicated the review had been completed by the claimant' manager but not by the claimant. Neither email on its face was copied to the claimant. From that it was agreed the MYR for the claimant was undertaken some time between 25 October 2018 (when the first list was generated) and 2 November (when the second list was generated).

158 Mrs Middleton told us that after a brief conversation with Miss Gessey as to who should undertake the claimant's MYR (the general rule being that the line manager who has managed the lawyer for the majority of the reporting period does the review and that was her) she and Miss Gessey approached Gill Casey to ask whether Mrs Middleton should complete a MYR for the Claimant. She said that Ms Casey told her to put her comments on the system and let the Claimant know. Mrs Middleton said she thinks she would have done this in late October/early November. That accords with what she said in the investigation of the claimant's subsequent grievance to Mr Saxton (see (206) following).

159 Miss Gessey did not mention that discussion in her initial statement. In her second statement she confirm that she was in the office when the discussion between Mrs Middleton and Ms Casey took place. The conversation was brief and what Mrs Middleton told us about it in her statement was correct.

160 Ms Casey in her statement stated she had a a vague recollection that at around the time of the mid-year reviews that year that Mrs Middleton asked her whether she had to do a mid-year review for the Claimant. Her witness statement relayed that Mrs Middleton had told her that the Claimant had been at work on a graduated return to work plan after a period of long-term sickness and so Ms Casey's view was that as the claimant had been at work for the vast majority of the appraisal year, a mid-year review was required.

161 Ms Casey in her statement said her recollection was vague, made no mention of Miss Gessey and in addition did not attend and was not cross examined. For those reasons whilst we give her evidence on its own little weight it does however support what Mrs Middleton stated both before us and to Mr Saxton.



162 The claimant in his main witness statement [§75] points out the respondent's PDR computer system does not generate dates when entries are made on it. We accept that is so but find that surprised for an entity such as the respondent that from a security perspective its system was such that it could not identify when entries were uploaded by whom or when they were accessed and again by whom.

The MYR itself

163 Mrs Middleton' MYR assessment of the claimant [628-642] was "not achieved" [632] and her rationale as set out in her commentary was thus [634]

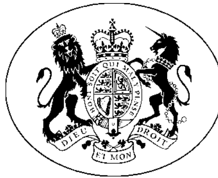
> *"[The claimant] has been on a return to work plan for the majority of this reporting period with a view to supporting his return to work and gradually building up both his hours and his workload. [The claimant] has done a lot of pre charge advice work during this period He had also started to do some NGAP reviews towards the end of the plan. Whilst [the claimant] did carry out PCD work and some reviews I did not feel at the end of the 13 weeks period of the plan that he was capable at this stage of moving straight to having his own caseload as he had not done a sufficient amount NGAP reviews at this point and his productivity was such that he would not meet the expectations of a SCP and therefore I would have had to be considering performance management if his productivity remained the same. The plan was thus extended to give [the claimant] an extended period of support and this took [the claimant] up to the time he went on leave and my line management of him has now ceased. [The claimant] can occasionally do more than two reviews a day however this has not been on many occasions over the last few months.*
>
> *I have completed IQAS on [the claimant]'s work and have remarked positively on his frequent reference to CPS policies and he has had some positive feedback in his IQAS.*
>
> *[The claimant] has not been given CTLS cases to deal with throughout the return plan. . When he gets his own caseloead [sic.] this was something that was planned for him to do doing going forward. Also the objectives regarding case progression and managing tasks etc cannot be considered met*
>
> *[The claimant] has completed all mandatory training courses. He completes his REMS.*
>
> *I cannot say that [the claimant] has achieved all the objectives at this stage but this is unsurprising during a phased return plan which was created with the view of him returning to the role of an SCP gradually so he should not be disheartened by this rating on this occasion as it reflects a time when the set of circumstances were different and [the claimant] was readjusting to being at work after a period of leave. I canot [sic.] however say that all of the objectives of an SCP have been met during this specific reporting period.*
>
> *I wish [the claimant] well in the future and with his new line manager."*

164 Mrs Middleton explained that her decision to give the claimant that mark was hers alone, based solely her assessment of his performance from April to October. In reaching her assessment she told us she took into account that the Claimant was doing a reduced SCP role (no advocacy, no custody time limits work, no other work of an urgent nature and a reduced workload) and that she was assessing him on the return to work plan. Significantly she pointed out that the return to work plan was designed so that on its completion he would be operating at 70% capacity as compared to other SCPs; managing his own reduced caseload; and doing a broader range of work including NGAP cases.

165 She told us that none of those objectives were achieved. The Claimant does not disagree with her assessment only the reason underlying why that was so.

Events after the MYR

166 The claimant told us that on New Year's Eve 2018 he received an email from Mrs Middleton (it was timed at 08:03) asking for a response to the mid-year review she had completed [620-621]. He



was asked to respond by 3 January 2019. He told us he did not know the MYR had been completed and this email was the first he knew it had been done.

167 He emailed Miss Gessey approximately 15 minutes later at 10.17 a.m., asking if she knew when the MYR was written because he could not find any details indicating when that had been done.

168 Miss Gessey responded on 2 January 2019 saying it had been written 'in October of this year', and reminding him that she had told him in a meeting that Mrs Middleton would be completing his mid-year review [619].

169 That is in contrast to what he told us about when he formed the view when the meeting was cancelled that the MYR would no longer be taking place. We address our findings on that issue at (154 & 239).

170 On 3 January 2019 he emailed Mrs Middleton apologising for not entering my response to the MYR, accepted that Miss Gessey had told him at the end of October to expect an entry but *"it slipped his mind"* and again asked for clarification when it was written [623]. She responded later that day again stating as the reviews were due by the end of October she assumed it was done then.

171 He told us he recalled the conversation but Miss Gessey had told him to expect an entry from Mrs Middleton who would be *"writing a few lines"* for the MYR. He states he left the meeting with Miss Gessey expecting the MYR to be done some time in the future. He alleges that at no time was he told prior to New Year's Eve 2018 that the MYR was completed and/or ready to view. In contrast he also told us that he believed the MYR was not going ahead when the MYR meeting was cancelled. We address this at (239).

172 He told us he was so shocked by the MYR that he immediately sought legal advice and on 4 January 2019 he told Mrs Middleton [622] and Miss Gessey [619] that was the reason he was unable to sign off the MYR.

<u>The Grievance</u>

The requirements of the respondent's grievance policy

173 The respondent's grievance policy and procedure [1412-1431] is stated to be effective from October 2018. we were not taken to the earlier version in the bundle dating from October 2010 [1394-1411] and no issue was raised as to the applicable version. Given it is a lengthy document and we were taken to large tranches of it we do not repeated it here given a precis of the key principles that the parties took us will suffice:-

173.1 Employees must try to resolve any issues at work themselves in the first instance raising them with the individual concerned. [§4.3.5.1],

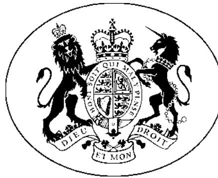
173.2 Having made all reasonable attempts to resolve the issue(s) and those attempts were unsuccessful, the employee should raise the matter with their Line Manager (or if the matter concerned the Line Manager their Line Manager's manager) [§4.2.5.3],

173.3 That should be done as soon as possible in any event within 1 month of the incident that caused concern (or the last incident if a series) [§4.3.5.2],

173.4 That a complaint should only be raised and addressed formally (i.e. as a formal grievance) where

173.4.1 All avenues, in consultation with HR, to resolve the complaint informally have been exhausted without a reasonable resolution being achieved, and/or

173.4.2 The nature of the complaint raised is of such a serious and/or complex nature that it would be inappropriate to attempt to try and address and resolve matters informally [§4.4.1];



173.5 Formal grievances should be raised within 1 month of the completion of attempts to resolve the matter informally where this has failed or, where appropriate, within 1 month of the incident that has caused concern (or the last incident in a series of linked events) unless there are exceptional reasons for not being able to do so (e.g. a personal bereavement or an incapacity due to ill health, the nature of which could be reasonably considered to have prevented a person from being able to raise their concerns) [§4.4.3.1]

173.6 The formal process required a consideration of issues by the Commissioning Manager ("CM") (defined [§2.2]) and the involvement of HR and an EDU representative where the grievance disclosure issues concerning equality and diversity [§4.4.5]. Where a grievance appeared to disclose issues relating to discrimination, harassment, bullying or victimisation, and / or where a grievance appears to be of a particularly serious and/or complex nature the appointment of an Investigating Officer ("IO") (defined [§2.3]) also needed to be considered [§4.4.5.] The consideration by the CM might also involve seeking clarification from the complainant if the complaint was unclear [§4.4.5.2]. Three outcomes were identified:-

173.6.1 That further reasonable attempts to resolve the matter informally be made by the employee and the manager responsible for managing the complaint. The employee's agreement to proceed with this approach will be sought

173.6.2 That the CM will progress the case formally

173.6.3 The appointment of an IO

173.7 Whatever the decision the CM took s/he was required to write to the complainant within 5 working days of the grievance being submitted, providing an acknowledgment of its receipt and notification of the way in which the grievance proceed or if not reasons why were to be provided together with a the new timescale [§4.4.4.5].

173.8 If the process was to be progressed formally amongst matters :-

173.8.1 any employees who were the subject of the grievance were to be notified [§4.4.6.1].

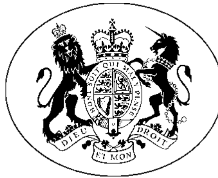
173.8.2 the CM (or where relevant, the IO) was to write to the complainant at the earliest opportunity and without unreasonable delay, to invite them to attend a formal meeting to discuss the grievance. The employee was required to be given at least 5 working days' notice in writing of the date of the grievance meeting and to be informed of the right to be accompanied [§4.4.8.2]

173.8.3 A summary record of the notes of the meeting was to usually be sent to the employee within 5 working days of the date of the meeting and the employee had 5 working days to respond and identify any significant disagreements as to the content of the summary [§4.4.8.2]

173.8.4 The complainant was to be notified of the outcome of the formal grievance meeting in writing including reasons for the decision, within 5 working days of agreeing the summary record of the meeting, or another date (where agreed) [§4.4.9.1]. The procedure provided for three outcome options [§4.4.9.2(a)-(c)]:-

173.8.4.1. No further inquiry or investigation

173.8.4.2. That the issues complained about required further inquiry before a decision can be reached (in which case the CM was to inform the employee of the expected timescale within which the inquiries would be completed and an outcome provided. Inquiries were required to be concluded quickly and within 20



working clays of the first meeting held between the CM and the complainant (unless there were exceptional circumstances in which case a revised timescale was to be agreed).

173.8.4.3. The IO needed to carry out further investigation on a formal basis. Again that investigation was required to be concluded quickly and within a maximum of 30 working days of the first meeting held between the IO and the complainant (unless there were exceptional circumstances in which case a revised timescale for was to be communicated in writing [§4.4.10.2].

173.8.4.4. The CM in consultation with the designated HR officer was to decide what, if any, further action should be taken in light of the IO's decision on the grievance and notify both the complainant and any employee who was the subject of the grievance, the outcome of the grievance within 5 working days of receiving the IO's completed investigation report [§4.4.12.1].

174 Whilst an appeal procedure was included that does not form part of the complaints before us.

The claimant's grievance

175 On 14 March 2019 the Claimant raised a grievance to Miss Gessey [637-642] concerning his mid-year review for the period 1 April 2018 – 30 September 2018. The grievance included a complaint that it was unfair that he had been subjected to an MYR (arguing the manager could have used his/her discretion not to undertake one (we address this at (237) following)), the claimant should not have received a "not achieved" marking and he was being treated unfairly because his manager at the time did not apply a reasonable adjustment by allowing an exemption from the mid-year review.

176 The grievance form asked if the person bringing the grievance would be willing to agree to informal attempts at resolution. The claimant ticked the "yes" box. The "No" box required a reason to be given for refusing (further) informal attempts at settlement. Despite not having ticked it the claimant inserted in the answer *"If setting with ACAS can be considered informal".*

177 When asked why he did not raise it informally he told us it was too serious and the nature of the complaint meant that would be inappropriate [§4.4.1]. When asked why it was not raised by the end of January he told us he was in no condition to. Whilst he accepted he was at work at the time he stated he filed it away because of stress and in that way he could can control the symptoms.

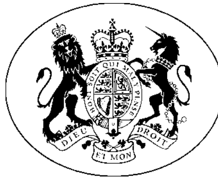
178 By the date the Grievance was lodged the claimant had already commenced early conciliation in relation to claim "A" on 12 March 2019.

179 Miss Gessey forwarded the grievance to Mr Kyne who was line managing her regarding any issues concerning the claimant. However it is unclear when she did so.

180 Mr Kyne wrote to the Claimant on 12 April 2019 [646] and asked him if he was agreeable to meet on 2 May 2019 to discuss his grievance.

181 Early conciliation in relation to claim "A" ended on 26/4/19.

182 On the day Mr Kyne and the claimant were due to meet, 2 May, the claimant emailed Mr Kyne to ask if the meeting was not a full grievance hearing. Mr Kyne responded stating he wanted to resolve the grievance. The claimant initially indicated that he did not see how this was appropriate, given that his solicitor was lodging formal proceedings, but later confirmed that he would attend the meeting.



183 The meeting went ahead and latter that day Mr Kyne emailed the claimant [650] setting out his understanding of what had been said [651] and attaching the minutes [652-653]. It is not in dispute that Mr Kyne sought to identify what the claimant was seeking as a resolution to his grievance and that Mr Kyne offered to remove the MYR from the claimant's record (the second of the three resolutions the claimant was seeking). There was a dispute as to the mechanics of that but that is not a matter we need to address.

184 Whilst Mr Kyne told us that he was of the view that completing the mid-year review was appropriate, he could see no point in having it remain on the Claimant's record if it was causing him distress and was creating a barrier for a successful and sustained return to work. Mr Kyne told us his focus was to provide the Claimant with whatever support he needed in order to succeed, the claimant was no longer being line managed by Mrs Middleton, had the opportunity for a fresh start with Miss Gessey and he believed it made sense to look forward and remove the mid-year review if it was a barrier to him moving forward in a positive frame of mind under Miss Gessey's line management. That accords with one of the respondent's rationales for the use of MYRs, namely for it to act as a "red flag" if an employee was not performing. Both parties agree the claimant was not performing during the period the MTR related to but was by the time the claimant met Mr Kyne. On Mr Kyne's version the MYR had thus served its purpose.

185 Mr Kyne told us that whilst he felt that it was appropriate for an MYR to have been undertaken he did not consider its substantive contents. Given he told us that he knew the claimant was meeting expectations by then from his discussions with Miss Gessey we accept that is consistent with the reminder of his rationale.

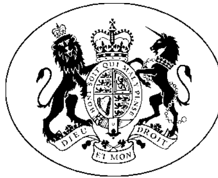
186 It was agreed that the claimant explained that *"… his complaint was that the Mid-Year Review was unfair and discriminatory. … that he agrees that his performance was unachieved as he did not have the required reasonable adjustments in place however he found the Mid-Year Review to be unfair."*

187 Mr Kyne told us he explained he was not in a position to resolve the first and third resolutions the claimant was seeking (compensation and the amendment of the COT3), and whilst the claimant pressed him to do so it was not for him to decide if it was discriminatory.

188 Mr Kyne states the claimant also initially suggested that he had no idea that there would be a MYR and that it had come as an enormous shock to him. Mr Kyne states that having pointed out that the claimant had many years' service in the CPS and it should have been obvious to him that he would have a mid-year review, the claimant conceded that he did know that there would be a mid-year review, but that it had slipped his mind. Mr Kyne also stated that he told the claimant that given it had been agreed in the COT3 that Mrs Middleton would not manage him going forward so that was probably why there had been no face-to-face MYR meeting.

189 The Claimant emailed Mr Kyne on 7 May 2019 [657] to say that he did not agree that he knew that a MYR would be carried out instead he was told *"a few lines would be written which did not indicate to [him] there would be a mid year review."*, and did not accept that his grievance had been determined informally or otherwise, and wished for the grievance to be dealt with formally. He continued:-

> *"I say the CPS had a duty to make a reasonable adjustment exempting me from the mid-year review and the failure to do so amounts to disability discrimination. This breach of duty has not been extinguished by the amendment and not made any less unlawful. Four months after discovering it this breach continues to preoccupy my mind continuously and has had a detrimental affect on my health. It is not an isolated incident but the latest chapter in a saga of discriminatory behaviour towards me which started on June 2016. It is in this context that it must be seen. The matter needs investigating to establish whether the CPS were obliged under the Equality Act to make an adjustment, whether the failure was unfair or amounted to discrimination and/or a breach of the COT3, and who ultimately was responsible for the mid-year review. Unless we can establish what went wrong I fear such behaviours will continue."*



190 On 9 May 2019 Mr Kyne emailed Helen Armstrong and Angela Whitt of the respondent's HR team copying to them the claimant's response and stating he thought an investigating officer needed to be appointed [661].

191 On 10 May the claimant chased Miss Gessey stating he was awaiting a date for his formal grievance to be heard stating *"The delay has caused me serious stress and has had a detrimental effect on his health"*. [662] That was part of a chain of emails starting on 3 May where he had told her he had been expecting the meeting on 2 May was not the full grievance he was expecting.

192 Claim "A" was presented on 24 May 2019 [39-57].

193 Mr Kyne responded by email to the claimant on 30 May to say that an independent person from outside of the Unit would consider the grievance [664]. The same day he had the MYR removed from the Claimant's personnel record [666].

The grievance investigation

194 Mrs Whitt, who at that point was on a temporary promotion as a Senior HR business partner, was responsible for co-ordinating the formal grievance investigation and liaising with the grievance commissioning manager, Mr David Elliott, the Senior District Crown Prosecutor for the West Midlands.

195 She told us that prior to the claimant's grievance she had previously found difficulties locating a investigator to undertake a misconduct investigation. That misconduct investigation required an equality and diversity trained investigator. At the time the Claimant's grievance was being formally investigated she told us grievances were allocated to managers who were ideally out of region, and those including equalities complaints were allocated to equalities investigators of which there were a limited number in the CPS. At the time, grievance investigators were required to undertake investigations alongside their day job.

196 The respondent has since changed its processes so staff are permanently dedicated to such roles.

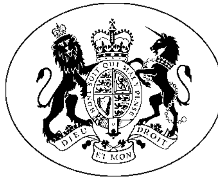
197 On 1 June 2019, Mrs Whitt asked Mr Paul Saxton, Head of the Business Centre at CPS East Midlands if he would take on the role of grievance investigator. Mrs Whitt told us Mr Saxton told her that he would not be able to consider the grievance within the 30-day policy timescale and that the summer holidays might lead to some delay. She formed the view that whilst there may be some delay, that the delays would be encountered even if she had been able to re-allocate the grievance.

198 That may have been so but what she, Mr Saxton and/or Mr Elliot all failed to do was to inform the claimant of those delays and the reasons for them at that point.

199 On 19 June 2019 Mr Saxton was appointed by Mr Elliott to undertake a formal grievance investigation pursuant and was forwarded relevant documents [669-673]. On 21 June 2019 Mr Elliott, wrote to the claimant to say that he had been appointed as the Commissioning Manager for the formal grievance and had asked Mr Saxton, to investigate it [674-676].

200 Ten days later on 1 July 2019 Mr Saxton wrote to the Claimant to invite him to a formal face-to-face grievance meeting on 2 August 2019 (682-683). He explained to that claimant in that email and told us that was the first available date where there was a meeting room available in the Birmingham office where they could meet.

201 The claimant acknowledged receipt and confirmed his attendance [682]. Mr Saxton told us that had the claimant raised the meeting being held outside the grievance policy time frames he would have offered to hold the meeting by telephone. Mr Saxton should have known delay was already an issue for the claimant had he been forwarded the various emails the claimant had sent to Miss Gessey and Mr Kyne (see (189 & 191)).



202 The claimant met with Mr Saxton on 2 August 2019. The minutes [710-714] record that during the meeting Mr Saxton asked the claimant what he would like as an outcome to this grievance:-

> *"73. … [the claimant] confirms he wants an investigation to establish if the review was unfair and/or discriminatory, and an investigation into how the review came to be made so as to avoid such an a occurrence in the future. [the claimant] would expect it be established who was managing LM at the time and the conversations and advice received which compelled LM to make the review. The ET3 says LM apparently received advice from two managers."*

203 The last comment appears to have emanated from the grounds of resistance forwarded to the claimant's representative on 29 July 2019 in response to claim A.

204 Elsewhere in the minutes the claimant made clear he wanted confirmation that there had been a failure in policy, to ensure that it would not happen again and that he wanted the investigation to be a formal one.

205 On 12 August the claimant suggested certain amendments to the minutes [728-729]. He also further clarified his position to Mr Saxton on 21 August [728] stating he found out on his return from annual leave on 22 October 2019 that the MYR had been cancelled, he was told Mrs Middleton would so something with the mid year review, was not told until New Year's Eve that one had been completed and Mrs Middleton could not say when she wrote it.

206 Mr Saxton interviewed Mrs Middleton on 20 August 2019. He told they had been unable to meet prior to then because one or other had both been on leave for the preceding three weeks. The notes of the meeting are at [725-727].

207 Mrs Middleton confirmed to Mr Saxton that she approached Ms Casey with Miss Gessey in late October/early November to ask whether she should complete a MYR for the Claimant. She stated that Ms Casey advised her *"to put her comments on the PDR system and let the Claimant know this is what she had done"* [726 [§16]]. Whilst Mrs Middleton said she thinks she would have done this there is no record of her telling the claimant. Mrs Middleton went on to explain that she quality assessed the claimant's work using IQAs and she discussed these at length with the claimant. She explained that whilst that was not about judging the claimant's volume of work, he was not doing enough work for Mrs Middleton to access how well he was doing and whether he was ready for the next stage.

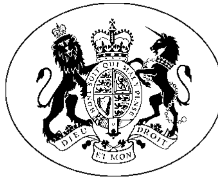
208 The notes record that Mrs Middleton explained to Mr Saxton that the claimant's performance was static, he was not taking her feedback on board and did not accept any negative feedback regarding his performance, although she went on to say later that the claimant accepted that his work during this period in question was not on par with what it should have been.

209 Concerning the return to work back plan Mrs Middleton stated the respondent's London HQ had approved this, it had been tailored to meet the claimant's needs and so was not rigid, the claimant was not meeting the standards and due to the plan needing to be extended.

210 As to her explanation why the claimant was marked as "not achieved" Mrs Middleton told Mr Saxton that she believed that was a fair assessment of the claimant's performance, explaining that the job role of a SCP included custody time limit cases, youth court work, multi handers and lengthy trial dates and she did not feel able to give the claimant any of this work. Neither did he have a task list and therefore he was not dealing with witness care and special measures information. Whilst the claimant considered this to be a failure she did not consider it to be such.

211 When asked whether the claimant was measured against standard SCP objectives. She responded "yes" caveating from that advocacy which was "off the table".

212 We address our findings as to Mrs Middleton's rationale for acting as she did and the conclusions Mr Saxton drew from these below (see (258) following).



213 Mr Saxton told us between 2 and 16 September 2019 he was covering for the Area Business Manager and he then took further annual leave between 23 and 27 September 2019 and so was unable to make any further progress in respect of the Grievance.

214 The claimant chased for updates on:

214.1 24 September 2019 Mr Saxton replied the following day. He apologised for the delay, said he was planning to meet a further witness, was away from the office until 7 October but that he should have been in a position to provide his report during week commencing 21 October [845/46],

214.2 29 October 2019. Mr Saxton replied two days later on Friday 1 November. He again apologised for the delay and stated his last meeting was scheduled to take place "next Friday" [844] and

214.3 6 December 2019, to which no reply was received.

215 Given Mr Saxton told us he was on annual leave between 23 and 27 September 2019 it was not explored with him why he told the claimant on 25 September 2019 that he (Mr Saxton) was away from the office until 7 October. It could have been that was correct and he was not on leave but was working away from the office but the potential disparity was not explored.

216 It is now accepted by all that Mr Saxton made an error in his report. He told us that he believes that having returned from leave he received some incorrect verbal advice from Mrs Whitt that Mr Kyne and Mrs Middleton had had a conversation about the Claimant's MYR. That appeared to be based on an assumption that Mrs Middleton would have spoken to her line manager about the MYR. He accepts had he properly reviewed the notes of his grievance meeting with Mrs Middleton he would have identified that she had told him she spoke to Ms Casey and not Mr Kyne about the MYR.

217 He would have also identified given Mrs Middleton referred to Miss Gessey being involved that she also might be able to give relevant evidence.

218 In error Mr Saxton decided to interview Mr Kyne. They met by telephone on 8 November 2019. The notes of the meeting with Mr Kyne were before us [788-790]. Mr Kyne stated he had no recollection of having had a conversation with Mrs Middleton about the Claimant's MYR, but was happy to accept that they had had such a conversation, if Mrs Middleton had a recollection of it.

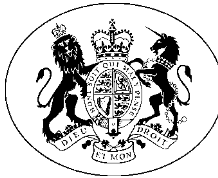
219 There was a further delay from 11 November to 4 December 2019 when Mr Saxton sought advice from the respondent's national HR policy team concerning appraisals for employees who had returned from a long absence [824-835].

220 After that 3 week hiatus there was then a further 3 week delay before Mr Saxton forwarded his grievance investigation report under cover of an email dated 24 December 2019 to Mr Elliott and Mrs Whitt [885 and 971-975].

221 Mr Saxton partially upheld the Claimant's grievance. He concluded that, contrary to the claimant's assertions, that the Claimant would have known that he would be subject to a MYR and that it was appropriate that this was completed. In contrast Mr Saxton concluded a review meeting should have been held to set objectives for the claimant when he returned to work, that was not done, the objectives the Claimant was given were standard SCP objectives, that he should have been rated against his ease back objectives; and advice should have been sought from HR before a decision was made to produce a MYR.

The grievance outcome

222 On 4 January 2020 Mr Mark Paul (Head of the Complex Casework for CPS West Midlands) was asked by Mrs Whitt, to take over the role of Commissioning Manager for the Claimant's grievance



because of the imminent departure from the CPS of Mr Elliott. She forwarded to him a history of the matter and relevant documents [722-724].

223 Mr Paul sought guidance from Mrs Whitt on 7 January 2020 [902] as to the extent to which he was to check and review the investigator's findings and whether we should be explaining the delay in the grievance being finalised. She responded later that day indicating it was important for him to consider the report and decide if he agreed with the outcome before going on to explain the issues concerning equality trained grievance investigators that we refer to above. She stated that whilst Mr Saxton had told her when he agreed to investigate the grievance that he would not be able to complete the grievance investigation within 30 days because of witness availability over the summer period because the holiday period would have posed the same problem for anyone else she had not changed the investigator. She stated she had not expected the length of time it had ultimately taken but a delay of an additional four to six weeks or so. She also explained about the delay caused by seeking advice from the national HR policy team. She said he could address this in his response to the grievance and offer an apology if he thought this was appropriate.

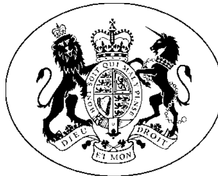
224 Mr Paul emailed Mrs Whitt on 8 January indicating that he did not think that Mr Saxton had made it sufficiently clear in his report that the Performance and Development Review objectives had taken into account the Claimant's reasonable adjustment in that he was not required to do advocacy in court but that save for that adjustment, the objectives were standard Senior Crown Prosecutor (SCP) objectives. He asked her to send the grievance report back to Mr Saxton to review this [900]. She emailed Mr Saxton on 9 January [938]. He responded to Mrs Whitt on 21 January indicating he was content to amend the report and she forwarded that to Mr Paul the same day [937-938].

225 Mr Paul emailed the outcome to the Claimant on 23 January 2020 [958] enclosing his letter in response to the Grievance and a copy of the Grievance Investigation Report [959-961]. He apologised to the Claimant for the delay in completing the investigation explaining that was due to the unavailability of suitably trained investigators over the summer and delays in obtaining advice from CPS HQ in respect of policies. He explained that it was appropriate for the Claimant to be subject to the Performance & Development Review process and have a mid-year review completed, but not in respect of standard SCP objectives and so the grievance was partially upheld.

226 Mr Paul told us that he was satisfied that CPS policy required objectives to be reviewed, and, if necessary, adjusted for employees who had come back to work after a significant amount of absence but the Claimant had not raised this in his grievance and he could not say whether any review of objectives would have led to the standard objectives being amended, particularly where existing objectives were broad and generic. He took the view this was the only mistake made by Mrs Middleton and that her focus had been on supporting the Claimant to work through his return to work plan.

227 Mr Paul went on to note as part of the Mr Kyne's informal resolution process for the grievance, he had already agreed that the mid-year review mark was not required but made further recommendations as to training for managers in respect of PDRs and objectives with a particular focus on staff who are absent or returning from periods of absence relating to sickness covered by the Equality Act and that in cases where a "not achieved" rating had been given, quality assurance processes be adopted. He relayed the claimant's right of appeal.

228 The same day Mr Paul wrote to Mrs Middleton and Mr Kyne to inform them of the outcome of the grievance and the recommendations he had made. Just over 10 minutes after receiving the outcome Mrs Middleton emailed Mr Paul [967] to tell him that there was an error in the investigation report, that she had not spoken to Mr Kyne about the mid-year review, but Ms Casey and that the minutes of her meeting with Mr Saxton recorded that is what she had told the grievance investigator.



229 Mr Paul commendably accepts that is not something he had spotted. Having taken advice Mr Paul tells us he was told that a final report could not be amended but Mrs Middleton's comments could be noted alongside the completed report which is what was done [975].

230 The claimant also subsequently identified the error and on 30 January 2020 he emailed Mr Paul asking amongst other matters whether Ms Casey had been interviewed as part of the grievance in light of Mrs Middleton's comments [999-1000].

231 Mr Paul sought clarification from Mrs Whitt on that point. Mrs Whitt's explanation to Mr Paul including Mrs Middleton's comments as to the reason Ms Casey was not interviewed were forwarded to the Claimant by Mr Paul in an email dated 4 February 2020 [1002-1004].

232 There followed exchanges concerning the Claimant seeking an extension of time to lodge and submit his appeal to the appeal officer, Suzanne Llewellyn, Deputy Chief Crown Prosecutor. Those matters do not form part of the complaints before us.

Other matters

233 The claimant in his witness statement told us that it was the receipt of the grievance report that caused him to start a period of absence. That absence started on 22 January 2020. It was put to him firstly that his GP notes timed at 10:32 on 22 January 2020 [1289] indicated his absence was due to *"flare up of stress and anxiety at work anxiety worsened after reading a report"* but that was not the grievance report as that was not received by him until the following day, 23 January.

234 That gave rise to a complaint from the claimant that the outcome had been sent to his lawyers on 22 January 2020 (prior to it being sent to him on 23 January by Mr Paul).

235 This was not addressed in the bundle but upon enquiry it was common ground that the grievance report was sent to the claimant's representatives by the Government Legal Department (GLD) during the afternoon of 22 January 2020. That was to comply with Tribunal directions regarding disclosure concerning claim A. Ms Whitt explained that she had been asked to provided disclosure of relevant documents to the GLD and so provided a copy of the report. It was not clear if this was the original draft of the report sent out by Mr Saxton on 24 December or the draft sent out by Mr Paul to the claimant on 23 January because this was not addressed in witness evidence or in the documents. What was clear (and the claimant accepted this) that was the copy of the report supplied by the GLD to the claimant's solicitors was not disclosed until several hours after he had seen his GP. Accordingly the claimant accepted it could not have been the outcome of his grievance that caused his visit to his GP but instead told us it was the minutes of a return to work meeting held on 8 January 2020 [908-912] that were forwarded to him on 14 January [919] that caused that.

<u>Our findings</u>

236 Before we turn to our determinations on the various issues we first need to set out what the parties agreed were the list of absences the claimant had during the period that concerns us and the reasons set out in his GP notes:-

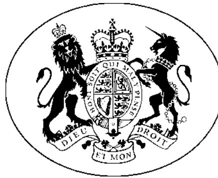
236.1 16 to 29 July 2018 *

236.2 2 to 7 October 2018 *

236.3 5 to 9 August 2019 [1291] "stress related problem (new)". The notes refer to the grievance meeting on 2 August

236.4 28 October to 1 November 2019 [1291] "stress related problem". The notes refer to workload/output and the unresolved grievance.

236.5 18 to 20 December 2019 [1289] "anxiety". Here the notes refer to concerning a dispute adjustments.



236.6 22 January 2020 to 20 March 2020 [1287-1289] "stress and anxiety". The notes initially refer to the cause being the claimant reading a report and thereafter to the grievance outcome.

236.7 19 to 23 October 2020 (albeit there is a dispute over the end date) [1287] "stress and anxiety". The notes refer to unresolved issues concerning workload.

* This was treated as a disability paid special leave

The MYR

237 We find the claimant was a long serving and highly experienced Crown Prosecutor. He knew or ought to have known had he considered the point that the respondent undertook as a matter of course MYRs. We find that neither party considered that when they agreed the COT3 despite it was around the time MYRs were to be undertaken that the claimant was due to undergo one. That was an omission on the part of both parties.

238 We find that contrary to the way the claimant now portrays matters he raised no issue that a MYR would be carried out when he was told that by Miss Gessey (we find on balance that occurred at the first meeting they both reference on 30 October 2018 (see (143))), when the claimant responded to Miss Gessey's request on 31 December to review the MYR or on 3 January to Mrs Middleton (see (166) following). We find his objection at the time before and immediately after he viewed it, was not that it had been undertaken (and it follows, that it was required) but as to its contents.

239 The claimant's comment to Mrs Middleton on 3 January that the MYR had "*slipped his mind*" was reinforced by his oral evidence that he had not checked for an MYR because he had not received a reminder (see (171)). As we state above the claimant also gave a contrasting explanation when he told us that despite what he accepted Miss Gessey had told him in October he believed the MYR was not going ahead when the MYR meeting was cancelled.

240 Whilst the claimant was asked about that his belief the MYR was not going ahead when the MYR meeting was cancelled, the conflict between that account and what he told Mr Saxton on 21 August, namely that he was aware the MYR meeting had been cancelled when he returned to work on 22 October 2019 (see (205)) was not specifically put to the claimant. It was common ground at the meeting between the claimant and Miss Gessey she mentioned that Mrs Middleton would be conducting the MYR. We found on balance that discussion took place on 30 October. That being so in our judgment the cancellation of the MYR meeting could not reasonably have caused the claimant to conclude that Miss Gessey's comments were no longer correct because the meeting was cancelled before he heard Miss Gessey's comments and if there was confusion in his mind he could and no doubt would have challenged her about that.

241 For those reasons we find he had been told Mrs Middleton was going to conduct an MYR but as he stated in his email to Mrs Middleton of 3 January 2019 "*it had slipped [his] mind*" [623]. In forming that view we take into account that the claimant had already seen the MYR by the time he emailed Mrs Middleton on 3 January 2019, had had a few days to think about it and what Miss Gessey had told him in October and that the contents of that email are closer in time to the way he now portrays matters. We find he should have been aware after their discussion which we place to their meeting on 30 October that Mrs Middleton was in the process of completing the MYR and that he needed to keep a look out for it.

242 That is yet further reinforced by the claimant's comments to us concerning his inability to recall the contents of meetings that we address at (97) and other matters such as the issue we address at (126-127) and his assertion as to the reason for his absence on 22 January 2020 (see (233) following). Those matters and particularly his admitted inability to recall the contents of meetings, lead us to give little weight to the claimant's account where it is not supported by other evidence

243 When asked about not holding a MYR as an option Mrs Middleton told us that was for people on probation, maternity leave or not in work (the 60 day exemption did not apply and in any event we not that only relates to end of year reviews). In her view the claimant did not fit into those categories. In our judgment the respondent's procedures (see [147-153]) support what Mrs Middleton (and the other respondent's witnesses) told us about why MYRs were undertaken, the limited exemptions from that and that normally an outgoing line manager was required to undertake one.

244 The distinction drawn in the procedures between MYRs and end of year reviews and that ordinarily performance procedures would only be commenced following two "not achieved" end of year reviews (whereas without more an MYR did not (see [152] and [§6.5])) also supports the respondent's contention that the MYR was to ensure employees did not receive a surprise at an end of year review rather than directly leading to a performance process of itself (see [149] and [Q.8])). Accordingly, had an MYR not been undertaken and the claimant had failed at his year end performance review the respondent rightly could have been criticised by the claimant.

245 The reminder emails of 25 October and 2 November to undertake the MYR had also come from Miss Banik, the HR advisor who had also sent the reminder to Mrs Middleton on 8 August 2018 asking her to arrange the disability absence review meeting on 17 September and who had been involved in the discussions concerning the claimant's chair. That leads us to conclude that Miss Banik had either not identified the claimant was on the list or if she had that an MYR was required.

246 In our judgment she was entitled to form the view that she did that it needed to be carried out.

247 That caused an issue in that Mrs Middleton was aware that the claimant was to have a fresh start and she was to play no part in his line management. Mrs Middleton and Miss Gessey were unsure as to who should conduct the MYR and so they spoke to Ms Casey about who should undertake it, again the guidance was clear, that even if the line manager was about to/had ceased being the line manager that person should conduct the MYR.

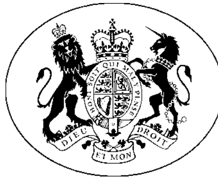
248 When it was mentioned by Miss Gessey that Mrs Middleton would be *"writing a few lines"* as the claimant put it he did not object to her doing so or to say that a meeting was required.

249 Whilst the claimant now raises issues with regards to natural justice following the cancellation of the meeting, in the sense that he could not input into the comments Mrs Middleton made, any view she came to was hers to form and we in our findings above we determined she had been feeding back to him about his performance. Further, the MYR process allowed for comments to be made by the claimant where he did not agree with them.

250 Whilst we accept whilst the COT3 wording had not been disclosed to Miss Gessey and Mrs Middleton they were clearly aware the claimant's line manager had changed and there was to be a fresh start. Miss Gessey had been forward the email setting out the agreed adjustments we refer to at (139).

251 Accordingly, we find that Mrs Middleton was entitled to conclude the MYR meeting should be cancelled. Had it taken place with Mrs Middleton conducting it the claimant would have no doubt felt he had grounds for complaint.

252 We find Mrs Middleton's assessment was that the claimant was "not achieving". In our judgment she made in clear both in the MYR notes and her evidence to Mr Saxton and to this Tribunal that the reason for that was that the claimant had not progressed through his return to work plan as had been planned that had had to be extended on several occasions and thus she had been unable to assess him against the full range of tasks and where she had there were issues. Mr Saxton formed the view that her assessment was against the unamended objectives of an SCP apart from advocacy. We find that whilst that was the answer she gave at their meeting to a direct question that disregarded the remainder of what she had said as to context and background at that meeting. Under



the last revision of the return to work plan the claimant was not due to be taking on a case load until 1 October (and did not because he then commenced a period of sick leave on 2 October). Thus he was not only not undertaking advocacy and had a reduced workload, but nor was he undertaking custody time limits work or other work of an urgent nature or have a case load. She was simply not in a position to be able to assess the claimant's performance across a number of types of work. That was because she had made an adjustment to adopt the return to work plan and then further adjustments to extend that. In our judgment it was reasonable for her to do so.

253 That was not just her evidence of what her view was but also is supported by the contemporaneous emails. Putting that another way Mr Saxton indicated the claimant's objectives should have been amended and a meeting held to agree these. In practical terms that is exactly what had been undertaken in the various meetings we refer to above with regards to the return to work plan and it was that return to work that we find that Mrs Middleton assessed the claimant against.

254 Further we accept Mrs Middleton's evidence that the decision to give him that marking was hers alone, that accords with what she had been communicating to the claimant prior to the assessment.

255 Whilst the claimant asserts his performance was poor due to his disability those extensions were in part because he had taken leave thereby protracting the plan. Thus, a plan that was scheduled to take 13 weeks was still incomplete after 6 months. The medical evidence before us does not support that the leave was required as a further adjustment.

256 As the Court of Appeal made plain in ***Griffiths*** the fact that someone is disabled does not prevent an employer informing the employee that they are underperforming or undertaking performance management. Indeed, that may be required so that adjustments can be properly considered.

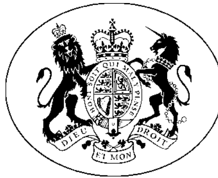
257 What Mrs Middleton did not explain was why she did consider taking advice from HR given she had formed the view a 'Not Achieved' rating given the respondent's procedures required that. We find that was a failing on her part and she should have done so. As we say she had been told by HR to undertake the review. Whilst the respondent's procedures required in such circumstances her to discuss those matters with HR we find that was because she was not aware of the requirement to do so. Whilst that was a failing on her part we find given HR were tasked with ensuring procedures were followed and had been advising on the extensions of the return to work plan HR should have been more proactive when sending out the instruction to undertake the MYR in this case and highlighted the need to take advice if a "not achieved" score was to be given. We find that was a mistake and that alone wholly unrelated to the claimant's disability.

The grievance

258 The claimant sought to suggest it was inappropriate to attempt informal resolution but also dealing with that before commencing a formal process delayed matters.

259 Firstly, not only does good practice and ACAS guidance suggest that informal resolution should be undertaken (that is the purpose behind the requirement to undertake ACAS early conciliation prior to commencing Tribunal proceedings) but the respondent's procedures normally required that. Whilst this case was one of the exemptions from informal resolution those procedures provide for the claimant gave mixed messages by ticking the box saying "yes" to informal resolution but also completed the explanation that was only required where "no" was ticked stating further that If setting with ACAS can be considered informal". What that meant and therefore what the claimant was seeking was unclear. In our view Mr Kyne was entitled to explore with the claimant what he meant by that and to satisfy himself the exemptions from informal resolution applied.

260 As we say above whilst there was a further delay on Mr Kyne's part removing the MYR he informed Mrs Whitt on 9 May 2019 (7 days after he met the claimant and 2 after he received the claimant' email) that an investigator needed to be appointed. Whilst the initial delay during which he sought to clarify if the complaint could be addressed informally necessarily required the informal and



formal processes to be run consecutively (we accept here Mr Kyne was entitled to form the view that it was not appropriate for the informal and formal stages of the grievance to run in parallel), once he had determined a view that an informal resolution would not be acceptable to the claimant then the respondent should have progressed the formal stages of the grievance matters and sought to appoint an investigator. The first reference we have to Mrs Whitt contacting Mr Saxton was on 1 June, 3 weeks after Mr Kyne emailed her and the claimant was not informed Mr Saxton had been appointed until 21 June, 3 weeks later.

261 Whilst much of that delay could have been accounted for in locating Mr Saxton and then securing his agreement to act there is no reason why given the difficulties we relay in locating grievance investigators willing to undertake the role why the respondent could not have started looking for a suitable investigator as soon as it received the grievance. We are conscious that may be imposing upon the respondent counsel of perfection but we mention it to demonstrate far more could have been done to reduce potential delays.

262 The delay between the lodging of the grievance on 14 March and Mr Kyne' email of 9 May was in less than the delay of the claimant complying with the time limits in the respondent's procedure. The claimant had taken advice straightaway and yet took 2½ months to lodge the grievance. To place that into context the grievance procedure allowed for a month, the limitation period for a Tribunal claim had almost expired and the events that these maters concerned dated as far back as 6 months before. The explanations the claimant gave for his delay given he accepts he took legal advice straight away and was not on sick leave at the time do not in our view adequately explain the delay.

263 There was then a failure on the respondent's part informing the claimant there would be a further delay due to Mr Saxton's commitments and the summer period. There followed extensive delays on Mr Saxton's part not just limited to failing to progress his investigation (Mr Saxton did not keep to his own estimates nor have the courtesy to respond to the final reasonable emails from the claimant asking why time limits had not been met).

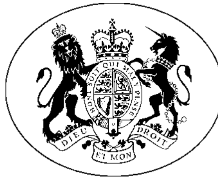
264 Mr Saxton's concluded amongst other matters [971]

> *"4.6 … no first review meeting held. Mrs Middleton states that her focus was on the ease —back plan.*
>
> *4.7 … It is my view that [the claimant] should have expected a PDR to be undertaken and that this was in accordance with CPS policy.*
>
> *4.8 … The support for [the claimant] in respect of his ease-back plan was extended until 30 September 2018. Having considered the CPS Performance and Development Advice document that states "Employees who have had a significant amount of absence should have their objectives reviewed when they return to work after the absence and adjusted if required". It is my opinion that the objectives for [the claimant] should have been tailored to reflect his agreed ease— back duties and not standard SCP objectives. It is also my opinion that he should have been rated against objectives linked to his ease-back duties.*
>
> *4.9 … In my opinion it would have been beneficial to take advice on the proposed not achieved rating from HR."*

265 In our judgment Mr Saxton's outcome:-

265.1 failed to record in his report the change to the claimant's desired outcome that the claimant wanted to know who had given the advice to Mrs Middleton to undertake the MYR as set out in the response lodged on 29 July 2019 (see (202 & 203)),

265.2 given that was so, nor did Mr Saxton address that request or say why he decided not to do so



265.3 he failed to take account of the evidence of Mrs Middleton at interview which made clear she had taken advice from Ms Casey when forming the view that he needed to speak to Mr Kyne and

265.4 failed to address how and why the return to work plan did not address revised objective setting.

266 When he interviewed Mrs Middleton 3 weeks after he interviewed the claimant Mr Saxton did not link what Mrs Middleton said about whom she had spoken to about the claimant's request to know who had given that instruction. Had he done so he would or should have released that he needed to speak to both Ms Casey **and** Miss Gessey to verify what Mrs Middleton had told him about why she had undertaken the MYR and to verify if they had played any part in Mrs Middleton's decision. Whilst he was not a lawyer he was a trained investigator and so those forensic skills were part of the role hat had ben assigned to him He neither did so at the time nor later.

267 Had the investigation not been so protracted Mr Saxton may have had what Mrs Middleton had told him about whom she had taken advice from regarding who should undertake the MYR [726 paragraphs 16 & 17] when he spoke to Mrs Whitt in late September/early October and thus not decided to speak to Mr Kyne. That was over a month after he had interviewed Mrs Middleton and nearly two months after he had interviewed the claimant.

268 We find that looking at the substance of the interview with Mrs Middleton and the narrative to the MYR it should or ought to have been clear to Mr Saxton that Mrs Middleton and the claimant had met to set objectives in so far as she could as that was at the very heart of the return to work plan but that plan and any objectives at least to a degree had to be fluid because of the nature of the claimant's disability.

269 Whilst there were clearly performance issues in terms of quality and quantity on the part of the claimant we find that the basis of Mrs Middleton's assessment centred on the claimant's failure to meet the return to work plan and given that had repeatedly been extended, that he was not undertaking the range or volume of work that allowed her to assess him against the standards of an SCP. Essentially Mr Saxton in our judgment failed to look at matters in the round.

270 We find her view was not that the claimant did not meet the standards of an SCP but that she was not even in a position to assess him against those standards.

271 Whilst Mr Saxton was clearly right to conclude that Mrs Middleton should have taken advice from HR on the proposed "not achieved" rating that aside we find that Mr Saxton's investigation fundamentally failed to engage with the claimant's grievance.

272 The failings did not stop there. Mr Paul did not appreciate the significance of the claimant's change of outcome and instead of concluding that Ms Casey **and** Miss Gessey needed to be interviewed he accepted what Mrs Whitt told him. Mrs Whitt was not the investigator and so it was not her role to substantively consider those matters but she too appears to have played a role in the flawed view that was come to.

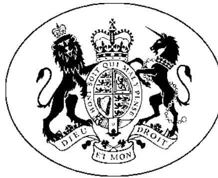
OUR CONCLUSIONS & FURTHER FINDINGS

273 We are required to take into account the EHRC Code of Practice "*in any case in which it appears to the court or tribunal to be relevant*" [55]. Given the Code provides

> "*5.21. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified …*" [56].

[55] s.15(4)(b) EqA 2006

[56] See *City of York Council v Grosset* *[2018] EWCA Civ 1105, [2018] IRLR 746* at *[57]*



we address the failure to make reasonable adjustments complaint first.

The duty to make reasonable adjustments

274 Given the third requirement relating to adjustments in the EqA, auxiliary aids, is not argued here (nor for that matter is a physical feature of premises) we can adopt the staged approach in *Environment Agency v Rowan*[*2008] IRLR 20* without modification.

The PCPs

275 The respondent accepts there was a requirement to undergo a MYR which being of general application it accepts amounts to a PCP. It disputes the first, third and fourth PCPs contended for. As to the disputed PCPs our determinations are as follows:-

Requiring the claimant to perform at the expected standard of a SCP

276 The claimant during all of the period in question was working under a return to work plan (and latterly the adjustments agreed within the COT3). The return to work plan expressly did not require him to undertake advocacy or the complete range of work types of an SCP, manage a case load, undertake urgent work or the full workload (70% not 100%) an SCP would have ordinarily been expected to achieve.

277 The claimant in our judgment was not expected to perform at the standard of a SCP instead he duties were amended in accordance with the return to work plan which included a reduced workload and no advocacy amongst other matters and that the PCP alleged was not applied.

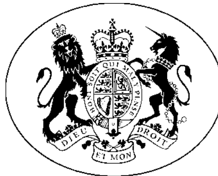
Prolonging the grievance investigation and outcome?

278 We have commented already how the claimant's own failure to grieve as speedily as he should have done contributed and/or to engage in informal resolution to delays. We found above how the respondent's procedures required that to be explored, there was a potential for confusion over his indication he was prepared to engage in a voluntary process given the comment concerning settlement via ACAS and the exemption if any from voluntary resolution also needed to be explored.

279 We find Mr Kyne needed to consider informal resolution or why it was exempt as part of the respondent's procedures and explore whether the claimant wished to engage in it or not. He was entitled to come to the view he came to meet the claimant to address those matters. The claimant's failure to attempt to resolve those matters informally or explain why that was not appropriate if that was his view goes supports that. What Mr Kyne should have done was to have actioned all those matters more quickly.

280 As to the further delays finding and then appointing an investigator, and then on the investigator's part the respondents policy was to use Equality Act trained investigators. That is a good practice to follow but Mrs Whitt told us when she had tried to locate an investigator to undertake a misconduct investigation investigators were unwilling to do so because at the time they were expected to undertake investigations alongside their normal duties and also to do so out of region. That practice has changed but it is understandable that investigators were reluctant to take on investigations.

281 We were not pointed to evidence that showed that an investigator other than Mr Saxton had been appointed (whether that be by reference to a grievance or misconduct investigation) had delayed the investigation. Mrs Whitt accepted that she expected there to be a delay over the summer period but her contemporaneous emails in our view suggest surprise and frustration on her part at the delays on Mr Saxtons' part. No doubt the timing and frequency of Mr Saxton's leave periods caused problems as did the delay in the respondent's HR advice from its national HQ. Those matters aside we found above Mr Saxton's investigation was protracted and delayed.



282 In addition given our findings that investigation fundamentally failed to engage with events those matters collectively caused us to carefully reflect on whether there was some collective motivation or practice behind that. It was noteworthy in our view that Mr Paul acted at all times expeditiously. That in conjunction with the backdrop to such investigations generally and specifically here, that we address in the paragraphs that immediately precede this led us to conclude there was no collective practice but those delays as the result of an unfortunate aggregation of events undertaken by a series of individuals who actions whilst linked, acted independently of each other (save for HR advice received).

283 In forming that view we find that the delays encountered here were the exception not the norm (as what we describes as Mrs Whitt's frustrations demonstrated). Whilst we cannot say that any party involved (and that includes the claimant and his initial delay acting) showed any compulsion to act quickly or in accordance with the respondent's procedures we find on balance that was not deliberate on any of the parties' part and that it was not the intention on any one individual's part or collectively to prolong the grievance investigation and outcome. That was not *"…the way in which things are generally are or will be done"* [57] and thus that did not form part of part of or was equivalent to a continuum and thus capable of forming a provision, criterion or practice.

Failing thoroughly to investigate the grievance, in particular interviewing Gill Casey

284 As we say above, the failure to investigate went beyond the matters the claimant refers to. We set out above how this was merely one of a series of failures on Mr Saxton's part that led us to the determinations we reached about him at (265-271).

285 Whilst those were errors on Mr Saxton's part and Mr Paul also failed to engage properly with Mr Saxton's conclusions – had he done so he would have read the minutes and identified the error pointed out by Mrs Middleton - he was not the commissioning manager, had come to matters at a very late stage and given the "steers" he sought at the outset appeared to be new to what the process and his role required. We found he did seek to "push back" at aspects of Mr Saxton's rationale and the reasons for it and sought to raise with him issues. That led us to conclude that whatever his failures he was trying to investigate the matter properly. We find he was trying to do his best but the errors on his part were through inexperience or him being appointed mid-way through the process.

286 Nor can we say this was a generic training issue on the respondent's part as it appeared that at least those investigators dealing with discrimination and equalities complaints received specialist training.

287 We find this did not form a provision or practice on the respondent's part; to do so would require that the respondent's managers and HR team were acting in concert. We found that was not the case, these were a series of individual failures and nor were the individuals acting in concert as Mr Paul "pushing back" against Mr Saxton demonstrated.

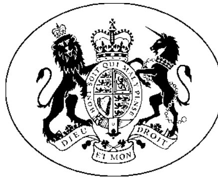
288 Again we find that the alleged provision, criterion or practice was not applied.

Disadvantage

289 The burden lies with the claimant to show that the duty to make adjustments arises, in order to be placed at a disadvantage he will need to show that they *"… bite harder on the disabled, or a category of them, than it does on the able bodied."* and *"… the fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant."*.

290 We again address the five disadvantages in turn.

[57] Ishola [38]



He was unable to achieve the expected standard and so failed the mid-year review leading to the perception he was a poor performer.

291 We found above that the claimant was not required to achieve at the standard normally expected of a SCP and he failed the MYR because the return to work plan had repeatedly had to be put back as a reasonable adjustment and thus Mrs Middleton was unable to assess the claimant on the band of work that would allow her to assess the claimant. Whilst it was common ground his performance was poor at that point in our judgment he did not as he alleged "fail" the MYR but it is accurate to say he had "not achieved" because the return to work plan had repeatedly been deferred.

292 Whilst the claimant makes generalised assertions that he was unable to meet what he states were the required standards due to his disability they do not engage with the detail why he or more generally persons with his disabilities could not. Mrs Middleton identified how matters other than the claimant's disability were at play and the leave he took and his focus on what other colleagues did detracted away from him getting on with his work.

They exacerbated the claimant's disabilities

Led to him having to have time off

293 We address these together. We determined the PCPs concerning the standard expected of the claimant, prolongation of the grievance investigation and outcome and the respondent failing to thoroughly investigate the grievance, and interview Ms Casey were not applied.

294 Given the only PCP that was thus applied was to undergo a MYR any exacerbation relating to performance must date to the period from the claimant reading his Mid-Year Review on 31 December 2018 to March 2019 (the end of his appraisal year) because by then his performance was satisfactory and he had lodged his grievance.

295 As we identify at (236) during that period the claimant had no absences from work. Any absences there were related to the period during which the grievance was ongoing and its aftermath. We find that insofar as absences after the grievance were lodged occurred they were related to the grievance.

296 We find that the disadvantage alleged concerning time off is thus not made out at the relevant time.

297 The claimant told us that he was prescribed additional diazepam in January and March 2019 because he felt his position at work was insecure, his anxiety had been aggravated by the MYR and he was struggling to deal with the issues that flowed from it (main §80 & 81). His GP notes confirm that medication was prescribed. However those GP notes also identify that his sertraline was reduced but that he was to trial diazepam on a "prn" (as needed) basis as he had done so previously. The notes from 17 August & 2 October 2018 [1294] confirm that was so and he was using diazepam 4 out of 7 days at that time. What is clear from the notes is that the claimant was encountering flares up of stress and anxiety both before and after the start of 2019 and that related to a host of issues.

Triggered the disciplinary/attendance management procedure

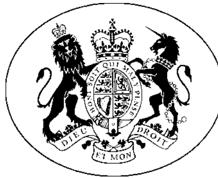
298 For the reasons we give above concerning absences (294-295) no attendance management triggers were activated because of absences associated with the MYR.

Loss of trust and confidence in the grievance procedure

299 Whilst the protracted nature of the grievance investigation and the respondent failing to thoroughly investigate it would have effected any employee given the admitted impairments we accept it is more likely than not that these would have *bit harder* on the claimant.

The claimant's ability to concentrate was impaired resulting in a diminution of quality of his work.

300 Whilst the claimant identified he struggled to concentrate following him finding out about the contents of the MYR that was also something he told us occurred before that (main §49, 53 & 58).



Whilst at points issues were raised with the claimant's performance they all predated the claimant discovering the result of the MYR. Thus whilst the claimant considered the quality of his work diminished we were not taken to any evidence that was so. Both he and the respondents witnesses accepted there were no such issues after that he discovered the result of the MYR.

The reasonableness of the adjustment contended for

301 We address these in turn.

Not subjecting him to a MYR

302 For the reasons we give above (237-246) the respondent was entitled to undertake an MYR.

Not using the set criteria

Amending the expectations of a SCP

303 We address these together. We set out above (252 & 276-277) why we found that the expectations were of the claimant were amended in accordance with the return to work plan and that was on the advice of an OH physician. Whilst the claimant was not content with them he did not show the report on which they were based to his GP. Nor have we been told his GP was an OH expert. Whilst the claimant takes issue with the basis on which Dr Elmslie gave his advice much of that repeats matters that are not disputed and earlier advices. For those reasons we attach less weight to the recommendations from his GP than those from Dr Elmslie. Accordingly in our judgment the adjustments were based on the best advice that was available at the time, the adjustments were considered, proportionate and the return to work plan was applied in such a way that the claimant was not pushed to undertake skills or work too flexibly with the result the timescale was modified on several occasions.

Dealing with the grievance in accordance with R's policies and procedures

Thoroughly investigating the grievance by interviewing Gill Casey.

304 We determined the PCPs concerning the prolongation of the grievance investigation and outcome and the respondent failing to thoroughly investigate the grievance and interview Ms Casey were not applied and any disadvantages the claimant was put to during that period (if any) that arose from the protracted nature of the grievance or failures relating to the investigation were related to them and not the MYR.

Discrimination arising from disability

The something - *Did the Claimant have difficulty meeting the standard required of a SCP?*

305 We determined above (276-277) that the claimant was not expected to meet the standard of an SCP. Further given the basis on which the assessment was carried out, in our judgment the claimant has not shown on balance that the reasons he was given a "not achieved" score arose from his disability or if they were from other factors such as the focus on what work colleagues were allocated, or the leave he took.

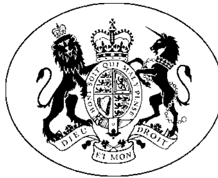
The unfavourable treatment

306 Notwithstanding that determination we have addressed the remaining issues. We first turn to what is unfavourable? The Supreme Court in Williams v The Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65 concluded as follows:-

> *"28. … It is enough that it was not in any sense "unfavourable", nor (applying the approach of the Code) could it reasonably have been so regarded."*

307 The unfavourable treatment relied upon was:-

307.1 Giving a "not achieved" rating



307.2 LM's comments and marking

308 In our judgment the focus should not be on whether colleagues were or would have been treated the same but this was unfavourable treatment. Whilst for the reasons we gave above they were warranted that forms part of a justification argument because otherwise an employer could for instance argue that dismissal was warranted and thus the treatment was not unfavourable. Viewed objectively they were unfavourable treatment the claimant's performance was taken issue with.

Justification

309 Notwithstanding our findings above we address this for completeness.

310 The Legitimate aims relied upon were

> *1. it is consistent with its public duties that it properly appraises its employees making an honest assessment of their capabilities*
>
> *2. if proper performance management is not carried out it will lead to a loss of public trust in* R
>
> *3. an honest assessment at the mid-year review is necessary to identify any failings at the end of the reporting year.*

311 We found that the respondent was entitled to conduct MYRs of its staff. If it had not done so it could rightly have been open to criticism due to the potential consequences of a "not achieved" at an end of year review. Whilst we accept performance management would only following two end of year reviews an employee who had been assessed as "not achieved" at one end of year review would have had the potential for performance management procedures hanging over him/her for the next year and thus want to know at the earliest point. Further, being a public role that was required. We thus accept aims the respondent has advanced were legitimate.

312 As to proportionality Mrs Middleton had attempted to identify problems with the claimant's performance but as she told Mr Kyne he was not taking them on board (see (208)) and thus it cannot be said the respondent had not sought to address that by other means first. The respondent had in our judgment undertaken reasonable adjustments and followed the occupational health advice it had received.

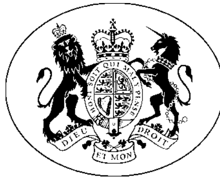
313 For the reasons we give in the preceding paragraphs and at (see (237-246)) it was necessary for the MYR to undertaken both from the claimant's perspective but also from the respondent's perspective in relation to aims 1 & 2.

314 We found Mrs Middleton was entitled to come to the view she came to and in so far as there was an issue (which it is accepted there was with the claimant's performance) to point that out. Indeed had she not done so the respondent could have been criticised for that.

315 The claimant references an implied/express threat. Elias LJ in ***Griffiths*** having pointed out that it was unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature and that the employee has in some sense been culpable. However, he went on to say that an employer was entitled to conclude:-

> *"76. … after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate."*

316 The case solely concerned the duty to make adjustments. The relevance here is that notwithstanding any threat expressed or implied by reference to criticism of an employee's work or to performance or attendance management processes that would ensue that cannot in our judgment preclude an employer from being entitled to raise performance or attendance issues with an employee. If that



were so it would necessarily prevent any action being taken in the context of disability related performance or absence.

317 In our judgment the MYR was not only relevant and necessary for the reasons we give but that was all the more so here because the claimant had not been taking on board comments from Mrs Middleton about his performance (see (312)).

318 As to the contents of the MYR the claimant did not argue that his performance was not poor and thus that needed to be conveyed not least so both the claimant and his new line manager were aware of those concerns and so for instance further adjustments could be considered.

319 In our judgment the contents of the MYR were also proportionate. Mrs Middleton assessed the claimant against the return to work plan and further her comments were balanced.

320 If the unfavourable treatment had occurred as alleged in our judgment the respondent has shown it was justified.

Harassment

321 Whilst from the claimant's perspective the comments in the MYR were unwanted he accepted there were issues with his performance. For the reasons we gave above MYRs were used in part to ensure that employees knew what they were doing well and where they were failing to meet expected standards that these were highlighted so these did not come as a surprise and the employees had an opportunity to address them.

322 Where there are failures to meet expected standards the communication of those failures is not easy to deliver or to hear. But such situations are a fact of life and are necessary. Without them no employee disabled or not could be performance managed.

323 The claimant knew that such reviews were undertaken. Despite the other terms in the settlement agreement the terms did not include a provision indicating the MYR would not take place.

324 We found the claimant should have been on notice the MYR was in train – he accepted he was told so by Ms Gessey when she took over his line management in October. We rejected the claimant's suggestion that he believed that her comments has been superseded by the cancellation of the MYR meeting for the reasons we gave.

325 The claimant accepted the comments were a fair description. They were objective and measured, identifying where the claimant had done well where he had not. Whilst conveying a message the claimant did not want to hear no criticism was made of the way that was done. We find reading those comments and hearing from Mrs Middleton those comments were not made to create the "proscribed consequences" but instead to convey a message that the claimant needed to hear and had rejected. For the reasons we give at (315-316) an employer cannot be precluded from conveying that type of message provided the manner it which it is done is a courteous, polite and objective. That was the case here.

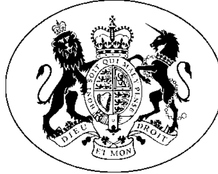
326 We reminded ourselves at (67-69) how the "proscribed consequences" should be viewed and considered. in our judgment the claimant's dignity was not violated nor was the proscribed environment created by the MYR nor was he entitled to consider it as such.

Timing

327 Given our findings this point is otiose but we have been asked to specifically address it.

Claim A

328 Whilst time runs from the date of act complained of given the complaint includes but is not limited to a complaint of harassment and thus about the prescribed consequences, in our judgment they



can only arise when the claimant becomes aware of the act. That act also forms the basis of the discrimination because of something arising from disability complaint.

329 Those matters aside the act that gave rise to each having been agreed to have been undertaken sometime between 25 October and 2 November 2018, the claim was presented on 24 May 2019 after early conciliation that commenced on 12 March and ended on 26 April 2019, the complaint was presented out of time and thus it falls for us to consider if we should exercise our discretion to extend time.

330 Given timing issues had been raised and that the complaints included alleged breaches of ss 20-21 the Employment Judge referred the representatives at the outset of the hearing to Matuszowicz v Kingston Upon Hull City Council [2009] EWCA Civ 22, [2009] ICR 1170. Having identified the significance of the judgment in that case on time limits for continuing omissions Sedley LJ said this

> *"36. For obvious reasons this can create very real difficulties for claimants and their advisers. But there are at least two ways in which the problem may be eased.*
>
> *37. One is that claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission.*
>
> *38. The other is that, when deciding whether to enlarge time under paragraph 3(2), tribunals can be expected to have sympathetic regard to the difficulty paragraph 3(4)(b) will create for some claimants. As Lloyd LJ points out, its forensic effect is to give the employer an interest in asserting that it could reasonably have been expected to act sooner, perhaps much sooner, than it did, and the employee in asserting the contrary. Both contentions will demand a measure of poker-faced insincerity which only a lawyer could understand or a casuist forgive."*

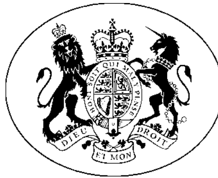
331 The respondent argues that the claimant should or ought to have been aware of given what we found Miss Gessey had told him that the MYR was in train. Whilst we do not impute to him that should have know what was being said that does impact on whether we would have exercised our discretion to extend time. Having considered matters we conclude would not have done so. Our reasons for that are as follows:-

332 Firstly, the claimant took legal advice as soon as he became aware of the MYR. Had he been properly advised he would have been told he was out of time and yet contrary to Lord Justice Sedley's injunction to act quickly and start proceedings sooner rather than later, he did not do so. Had he conciliated straight away and then commenced a claim within a month of conciliation terminating he would have been in time. He did not and was not. Instead he waited two and a half months before conciliating and thus the claim was presented a month and a half out of time.

333 Two, the fault for that lies entirely at the claimant's and his solicitors door. He not only had access to lawyers but he himself is a lawyer. Whilst not an employment lawyer the document he sought be admitted after having been permitted to give oral evidence, an email to his legal advisors albeit dated 4 June 2020 including an awareness of time points demonstrated that he was aware of time limits at that point. He had been involved in employment litigation before.

334 Thirdly, the claimant thus had a right of action against his lawyers and that forms part of the balancing exercise we must undertake as to prejudice. Whilst he states he has not done so because of the other issues he has to deal with in this set of claims and generally. He is still in time to bring such a claim and as his attendance and conduct of this claim had shown, he could if he chose do so.

335 Fourth, timing points having been raised the claimant and his lawyers took no steps to address that until the morning evidence was due to start.



336 Fifth, that delay, albeit compounded by the delay caused by that complaint being the first in a series of four claims and the protracted nature of these proceedings has led to a number of evidential issues arsing. The respondent's software system, review management system and grievance investigation process have all changed causing the witnesses to repeatedly stated it was difficult to recall what the respondent's procedure was at the relevant time. The claimant repeatedly along with other witness also answered that they could not recall. That is unsurprising some of the events that concern us occurred almost 4½ years ago and form part of a series of complaints stretching back far longer.

337 The burden is on a claimant to persuade the tribunal to exercise it discretion to extend time. He or she must persuade us the balance of prejudice is greater for him or her. Given the claimant had access to advice, the delay here was avoidable and entirely in the claimant's hands, he has a right of action against his lawyers militating against the prejudice he would suffer if we did not grant the extension of time by virtue of his loss of a right of action and the prejudice caused to both parties caused by the delay and effect on the witnesses recall of events as demonstrated by their answers we conclude the prejudice to the respondent outweighs that to the claimant.

Claim C

338 This claim was presented on 30 September 2020 [143-157 & 158-163] following early conciliation starting between 31 July & 31 August 2020 and it was accepted at the outset the claim was out of time as was any conduct that occurred before 1 May 2020.

339 We also were told at the outset of the hearing that these complaints emanated out of meetings on 19 March and 2 April 2020. The complaint that relate to those meetings have been withdrawn.

340 In the final version of the list of issues Mr Murray referenced this claims to

340.1 prolonging the grievance investigation and outcome (grievance period 14.3.19-14.3.20)

340.2 failing to interview Gill Casey (within the grievance procedure)

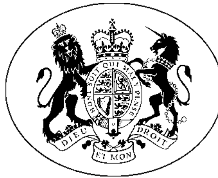
341 They are complaints concerning the duty to make adjustments and again *Matuszowicz* impacts on the time limits for continuing omissions.

342 In this instance the claimant told us he emailed his lawyers on 4 June 2020 when having identified in the first few lines when time started to run for limitation purposes he went on to state "*Time limits appear not to be a problem. The final incident for the additional grievance issues was 14 April 2020 … The final incident for the attendance management issue was 8 April 2020*" although he also referred to other earlier acts.

343 He told us his lawyers here accepted they were at fault. He had contacted them at the end of May 2020 and sent the ET1 claim form at the end of June. He then chased on at least two occasions before being told the early conciliation certificate was started on 31 July, and as far as he was aware everything in hand. He was informed on 9 September the claim was out of time and his representatives were at fault, the lawyer dealing with his claims had been on sick leave and they were doing the best they could in the aftermath of COVID.

344 By this time the claimant was clearly aware of time limits having commenced three sets of claims by then and clearly referred to timing at point in his email.

345 Again, the burden lies on the claimant to persuade us to exercise our discretion. Unlike above the fault here lies squarely at his lawyer's door and the delay is on their part. Again he has a right of remedy against them and likewise the fourth and fifth points we made as to timing on claim A arise. Again in our view the prejudice caused to both parties caused by the delay and effect on the witnesses recall of events as demonstrated by their answers in conjunction with the right of action the claimant has against his lawyers again leads us to conclude the greater prejudice is to the



respondent and that outweighs that to the claimant. Accordingly, had the issue arisen, again we would not have exercised our discretion to extend time.

[*]

Signed by EJ Perry on 21/10/2022