EMPLOYMENT TRIBUNALS

Claimant: Mr T Mohammed
v
Respondent: Crown Prosecution Service

Heard at: Reading
On: 5, 6, 7, 8 and 9 September 2022 and in chambers on: 11 and 13 October 2022

Before: Employment Judge Hawksworth
Mrs D Ballard
Dr C Whitehouse

Appearances
For the claimant: In person
For the respondent: Ms L Robinson (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's complaints of failure to make reasonable adjustments fail and are dismissed.

2. The claimant's complaints of discrimination arising from disability fail and are dismissed.

3. The claimant's complaints of disability-related harassment fail and are dismissed.

4. The claimant's complaint of unauthorised deduction from wages fails and is dismissed.

5. The remedy hearing scheduled for 27 February 2023 is not required and has been cancelled.

REASONS

Claim and response

1. The claimant is a barrister. He was employed by the respondent as a Senior Crown Prosecutor from October 2004 until his dismissal on 23 April 2020.

2. The claim was presented on 30 October 2019 after Acas early conciliation started and ended on 30 October 2019. The claimant brings complaints of failure to make reasonable adjustments, discrimination arising from disability, disability-related harassment and unlawful deduction from wages. The complaints relate to his role in Crown Prosecution Service Direct (CPSD) which began in September 2018.

3. The ET3 was presented on 17 December 2019. The respondent defends the claim.

Hearing and evidence

4. This hearing took place in person at Reading employment tribunal. The hearing finished at 3.00pm each day as a reasonable adjustment for the claimant.

5. The hearing bundle prepared by the respondent had 1,447 pages. Page references in these reasons are to that bundle. The parties agreed on the first day that pages 1,417 to 1,423 were not relevant, and that we should not look at those pages.

6. At the start of the hearing, the claimant made an application to strike out the response, and an application for a review of his application to amend his claim which had been refused with reasons at a hearing on 7 June 2021. We refused both of the claimant's applications. We gave our reasons at the hearing and provided written reasons at the claimant's request. Those written reasons have been sent separately.

7. In the course of discussions about the claimant's strike out application, the claimant confirmed that he did not want to make an application to postpone the hearing, because that would inevitably lead to a delay which was likely to be lengthy. He asked that he be allowed some flexibility and assistance with finding pages in the bundle, as the bundle had been provided very late. We agreed that we would do this, and asked the respondent's counsel to assist with finding pages as well, which she did during the course of the hearing. The claimant also said he would find it easier to provide written rather than oral submissions.

8. We agreed a timetable for the witness evidence and took the remainder of the first morning for reading.

9. We began hearing evidence after the lunch break on the first day. The witnesses had all prepared and exchanged witness statements. We started the claimant's evidence on the afternoon of day 1. The claimant's evidence continued on day 2.

10. On the second day of the hearing the claimant made an application for witness orders, we considered this after the parties had left. At the start of the hearing on day 3 we gave our decision and refused the claimant's application for witness orders, for reasons given at the hearing and in writing after the hearing.

11. On day 3 the claimant provided a supplemental bundle of 67 pages. The respondent did not object to the bundle being admitted. The claimant had not brought any copies of the supplemental bundle, but the tribunal administration agreed, on an exceptional basis, to provide copies for the tribunal members, the respondent and the witness stand.

12. The claimant's evidence was completed on the morning of day 3. We then heard from Ms Ara, the claimant's wife. We had agreed to interpose her evidence so that it could be given at any time which was convenient to her, but in the event it was not necessary to interpose her evidence.

13. We began hearing from the respondent's witnesses before lunch on day 3. We heard first from Ms Sawitzki. Her evidence included evidence about Stacey Turner's line management of the claimant, based on documents and what she remembered from being updated by Ms Turner, as Ms Turner herself was not able to attend as a witness.

14. At lunchtime, the judge reminded the claimant to focus his questions on the issues for the tribunal as identified in the list of issues. We declined the claimant's request to be allowed to continue after 3.00pm on day 3. We also had a discussion about timetabling, in response to a question from Ms Robinson about when the parties would be making submissions. The claimant said he would need more time for his submissions, and that he would like an order for the parties to prepare written submissions in writing within 7 days of the end of the hearing. We gave a strong indication that we would agree to this, in light of the fact that the respondent had provided the bundle very late.

15. At the start of day 4, the claimant said that he was grateful that we had not agreed to go beyond 3.00pm the day before, and that on reflection it was right. He requested permission to rely on another supplemental bundle, with 28 pages. This was allowed by consent. Copying was done by the tribunal.

16. The claimant also made an application for pages 1,417 to 1,423 of the tribunal's bundles to be removed and destroyed, rather than left in the bundles but ignored, as had been agreed by the parties on the first day of the hearing. After a discussion, we agreed to remove those pages and they were given to the clerk to be disposed of as confidential waste. The claimant made a further application for parts of Ms Sawitzki's witness statement to be redacted. We took some time to consider this, and allowed the application in part, for reasons explained at the hearing and given separately in writing at the claimant's request.

17. Ms Sawitzki's evidence was concluded on day 4. The respondent's witness Mr Allera gave evidence on day 5.

18. At the start of day 5 the claimant said he had changed his mind and would prefer to make oral submissions. The respondent preferred to make written submissions, and had delayed doing so because of the indication we had given. For reasons given at the conclusion of the evidence and sent to the parties in writing at the claimant's request, we decided that only written submissions would be permitted.

19. At the claimant's request, we allowed 14 days for the parties to send their written submissions. Submissions were due to be sent to the tribunal and the other party by 23 September 2022. The claimant's written submissions were delayed. He sent his submissions on 28 September 2022, followed by a corrected version on 29 September 2022, and an email with further corrections on 30 September 2022. The respondent's submissions were sent on 28 September 2022, when the claimant's first version was sent. We granted a retrospective extension of time for the claimant

to provide his written submissions (in our case management orders dated 14 November 2022).

20. The parties both provided detailed submissions; the claimant's submissions were 58 pages long, the respondent's were 18 pages long.

21. The judgment and reasons for our decision on the claimant's strike out application, and the reasons for the various case management orders made during the course of the hearing and requested in writing by the claimant were sent to the parties on 4 October 2022, together with case management orders dated 9 September 2022, explaining the steps for the parties to take after the hearing.

22. The tribunal panel met in private on 11 and 13 October 2022.

23. On 11 October 2022 the claimant made applications for reconsideration of our strike out judgment, for review of some of our case management orders, and for permission to adduce late evidence. Those applications were refused for reasons set out in a reconsideration judgment and case management orders which were sent to the parties on 23 November 2022.

24. The employment judge apologises for the delay in promulgation of this reserved judgment. This reflects the workload in the employment tribunal which is currently high, and the time required to provide written reasons for interim judgments and orders, to reconsider and review earlier decisions, and to consider late applications.

Issues

25. The issues for us to decide were discussed at a preliminary hearing on 7 June 2021 and listed in the case management summary (pages 53 to 54).

26. At the start of the hearing we confirmed with the parties that these were the issues for us to decide. The claimant suggested that we hear one of the complaints (failure to make reasonable adjustments) as a preliminary issue, before deciding the other issues. We refused this suggestion, for reasons given at the hearing and in writing.

27. The issues for us to decide are as follows (with original numbering retained for ease of reference):

> 1. ***Time limits***
>
> *1.1 Were the Claimant's complaints of discrimination (failure to make reasonable adjustments, discrimination arising from disability and disability related harassment) presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010? Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred, whether there was an act and/or conduct extending over a period, whether time should be extended on a "just and equitable" basis.*
>
> 2. ***Disability***
>
> *2.1 The Respondent concedes that the Claimant was disabled by a heart condition from January 2015 and by depression from 17th April 2016.*

3. *Failure to make reasonable adjustments (section 20 Equality Act 2010)*

3.1 Did the Respondent apply a provision, criterion or practice of:

a) fulfilling the duties of a CPSD lawyer from home by:

i. filling in a digital time-sheet requiring clocking in and clocking out;
ii. advising the police on the telephone;
iii. filling in the MG3 template for recording reviews.

b) CPS South East not sharing the Claimant's HR file ahead of his start date with CPSD;

c) not seeking a medical opinion and legal advice on whether it should treat the Claimant as unfit to return to work and consider ill health retirement in July 2019;

d) not allowing the Claimant to return to work in July 2019.

3.2 Did any such provision, criterion or practice put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant says he was disadvantaged because he became anxious and stressed by the technical requirements of performing the CPSD role from home and that advising the police on the telephone made him stressed and anxious.

3.3 Did the Respondent have a duty to make a reasonable adjustment (which would avoid the disadvantage) by:

a. ensuring that the Claimant signed a home working agreement;
b. waiving the requirement to fill in a digital time-sheet;
c. agreeing that the Claimant need not give advice to the police over the telephone;
d. agreeing that the Claimant could:
  i. permanently work from home;
  ii. deal with four case files per day;
  iii. not have fixed hours;
  iv. be measured through output;
  v. not start at 9am;
e. CPS South East sharing the Claimant's HR file ahead of his start date with CPSD;
f. seeking a medical opinion and legal advice on whether it should treat the Claimant as unfit to return to work and consider ill health retirement in July 2019;
g. allowing the Claimant to return to work in July 2019.

4. *Discrimination arising from disability (section 15 Equality Act 2010)*

4.1 Was the Claimant treated unfavourably by:

a. *requiring him to give up court advocacy on 24th September 2018 which resulted in the Claimant being de-skilled and having reduced career opportunities;*
b. *being unable to work overtime in court on Saturdays;*
c. *being unaware of opportunities for promotion?*

4.2 Was any such unfavourable treatment because of something arising in consequence of his disability? The Claimant says the something arising in consequence of his disability is the need to work from home.

4.3 Was any such treatment a proportionate means of achieving a legitimate aim?

5. *Harassment (section 26 Equality Act 2010)*

5.1 Did the Respondent engage in unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him by:

a) Stacey Turner requesting that he fill in time sheets from March 2019?

b) Stacey Turner telling the Claimant formal performance action could be considered on 4th June 2019?

c) Stacey Turner failing to implement the home working policy and health and safety checks before the Claimant's sickness absence in July 2019?

5.2 Was any such unwanted conduct related to the Claimant's disability?

6. *Unlawful Deduction from Wages (section 13 Employment Rights Act 1996)*

6.1 Did the Respondent make a deduction of wages properly payable from 15th July 2019 to 23rd April 2020? The issue to be determined is whether there were any wages "properly payable" in that period. The Claimant was absent from work during that period of time. The Respondent says that he had exhausted his entitlement to payment for sickness absence. The Claimant alleges that he was entitled to be paid under the Disability Special Leave policy.

6.2 If so, was any such deduction unlawful under section 13 ERA 1996?

7. ***Remedy***

7.1 If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

28. During the course of the hearing, the claimant withdrew his allegation that there was a PCP relating to the need to fill in an MG3 template when giving advice (issue 3.1 (a)(iii)).

Findings of fact

29. We make the following findings of fact. We do not include here details of all of the evidence we heard and read during the hearing. We include our findings on those matters which we found most helpful to decide the issues which were in dispute between the parties.

Introduction

30. CPS Direct ('CPSD') is a department of the Crown Prosecution Service which provides police officers with telephone advice on charging. The team provides telephone advice 24 hours a day, 365 days a year. It is a high-pressure working environment, as advice and assistance is required on an urgent basis, generally to determine whether an individual in custody should be charged and remain in custody, or be released. There is a recruitment process for lawyers wishing to join CPSD, and charging expertise is required. Most lawyers in CPSD work from home and there are a variety of different shift patterns. The length of time each advice takes varies hugely. Lawyers are required to complete daily records of their hours worked as part of homeworking arrangements, and to ensure accurate pay (some out of hours work attracts premium rates).

31. As CPSD lawyers are not required to attend court, advocacy is not part of the role. However, all CPSD lawyers are allowed to work overtime in courts on Saturdays, and many choose to do this to maintain their advocacy skills.

32. The claimant worked as a senior crown prosecutor in the respondent's South East area from 2004. His role largely comprised duties at court, as an advocate in magistrates' and crown courts.

33. The claimant was on long-term sick leave from late 2014 after a heart attack. He returned to work in March 2015. He was removed from court duties on or around 23 February 2016. He had another period of long-term sick leave from April 2016.

34. We pause here to explain briefly about the claimant's related employment tribunal proceedings. The claimant made a grievance concerning his treatment by the respondent during the period from 2015 to 2017. The grievance investigator found, and the respondent has accepted, that there was a failure to make adjustments for the claimant from September 2015. Those matters (and others) were the subject of the claimant's earlier employment tribunal claims (3323914/2016, 3325340/2017 and 3327768/2017) which were heard together and which succeeded in part. The claimant's complaints of failure to make reasonable adjustments and discrimination arising from disability succeeded, having been admitted by the respondent. The remedy hearing in those claims is taking place in early 2024.

35. Returning to the chronology, in mid-2018 the claimant was still on sick leave from his role as a senior crown prosecutor in the South East area. An occupational health doctor advised in May 2018 that the claimant was unfit for work and that he had raised concerns regarding his particular office environment and colleagues in the South East area (page 325).

36. The South East region's Area Business Manager contacted Ms Sawitzki, the Area Business Manager for CPSD, about the possibility of the claimant being transferred

to a role in CPSD (page 151). The claimant had asked to work from home as a reasonable adjustment, and the respondent thought that a move to CPSD could facilitate his return to work on a home working basis.

37. There were no vacancies in CPSD, and Ms Sawitzki had some concerns about whether CPSD was the right environment for the claimant (page 150). She did not know any specific details about the claimant, but was aware that he would be returning from long term sick leave. She felt that the high-pressure working environment in CPSD was not conducive to people returning from a period of stress or anxiety, and she was worried about the impact of proposed changes to CPSD shift patterns. She asked for the claimant to be told about the stresses and particular challenges of a role in CPSD, in particular that CPSD was in the process of converting to out-of-hours work only, meaning that if the claimant joined CPSD, there would be an increasing requirement for the Claimant to work anti-social shifts during the night and not work daylight hours. She also asked for a full handover so that the claimant could be properly supported on his return to work (page 166-167).

38. The claimant was offered a CPSD home working role as a reasonable adjustment, and he accepted it. Ms Sawitzki was told that the claimant's transfer to CPSD would be going ahead. It was agreed that his return to work with the respondent would initially be managed by the South East area, following which his CPSD induction would take place (page 168).

<u>The claimant's return to work and induction into CPSD</u>

39. The claimant returned to work on 24 September 2018. The initial return to work process in the South East area was due to take until 8 October 2018, but it was extended three times to allow for more training to ensure the claimant was ready to transfer to CPSD (page 189, 195 and 200).

40. The South East region agreed that the claimant would initially work reduced hours of 4 hours a day, but there was a delay in letting CPSD know about this (page 341). The reduced hours were provided under the respondent's Part-time Medical Grounds (PTMG) policy, and the claimant was required to complete weekly PTMG forms to record the reduced hours he had worked, for pay purposes (page 406 and 501).

41. On 4 November 2018 the claimant was sent an invitation to complete online health and safety training and a self-risk assessment questionnaire (page 766).

42. The claimant started at CPSD on 26 November 2018. He had induction training in York with his line manager. The training was due to start at 11.00am on the first day, but the claimant did not arrive until 3.10pm. On the second day, he was due to have a training session at 9.15am but did not arrive until lunchtime. The induction training included health and safety awareness training and Display Screen Equipment (DSE) awareness training (page 179).

43. As part of his induction, the claimant had a meeting with Ms Sawitzki on 28 November 2018. At the meeting, the claimant shared some details about his health and the adjustments he required. He also confirmed that he was comfortable with Ms Sawitzki and his line manager having access to his occupational health reports

(page 315-316). Ms Sawitzki requested this information from the claimant because the respondent did not share full HR files with new managers when staff moved from one department to another.

44. Ms Sawitzki agreed at the meeting that initially the claimant would work daytime hours between 9.00am and 5.00pm, and that he would have a reduced caseload. It was agreed that the claimant would be allocated 3 cases per day (rather than the 6 cases which would normally be expected to be completed in a day). These would be digital cases (allocated electronically) rather than phone advice. There was an expectation that the claimant's caseload would increase to 4 cases a day in week two. These arrangements were confirmed to the claimant in an email (page 316).

45. The claimant's managers had some initial concerns about the claimant's skills and ability to do CPSD work. He was not able to use CMS (the respondent's case management system) and he did not do well in a charging skills case study (page 310).

46. The claimant's managers were also finding it difficult to understand what hours and duties the claimant was doing. On 12 December 2018 Ms Sawitzki found out that it had been agreed that the claimant would work reduced hours (page 341). The respondent had arranged some disclosure training for the claimant in Canterbury, but the claimant was unable to attend as he had a period of annual leave from 13-18 December 2018 (page 352). He had sent an email about this to someone in the South East area before joining CPSD but had not notified CPSD of the leave as suggested (page 365). He did not complete PTMG hours records for the weeks of 7 and 14 January 2019 (page 689).

Changes of working hours

47. In January 2019 Stacey Turner took over line management of the claimant (page 435). The respondent felt that she could better support the claimant as she was a daytime legal manager whose working hours were similar to the claimant's. We have made our findings about Ms Turner's line management of the claimant by reference to the contemporaneous documents. As Ms Turner and the claimant both worked remotely, much of their interaction was by email.

48. On 14-18 January 2019 the claimant was due to do some work shadowing in Reading but did not attend (pages 383, 440).

49. On 18 January 2019 the claimant was sent a reminder that he had not completed the online health and safety training and self-risk assessment questionnaire which he had been sent on 4 November 2018 (page 766).

50. On 29 January 2019 Ms Turner asked the claimant to let her have a note of the times he worked, so that she could complete his PTMG forms (page 421). She chased up the claimant's working hours records on 4 February 2019, as there were still PTMG forms outstanding for 4 weeks in January. She asked to be provided with details of the claimant's work times and hours at the end of each working week (page 457, 458). On 5 February 2019 Ms Turner reminded the claimant that details of hours worked were still outstanding for two weeks in January. She asked the claimant to use the respondent's telephone routing system (Solidus) as this would be a

mechanism to double check his working hours and allow managers to check he had reported for work, for health and safety reasons (page 461, 462). The claimant still had a reduced caseload of 3 digital cases a day at this time (page 453).

51. By the middle of February Ms Turner was still having difficulty understanding what hours the claimant was working, because he had not completed records of hours for the past three weeks, including for the weeks in January which she had previously chased up. She emailed the claimant again on 15 February 2019 (page 473). When the claimant replied he did not provide any records of his hours worked, but he said that he had increased his hours to 6 hours a day from 21 January 2019 and had worked 6 hours a day since then (page 475). On 21 February 2019 Ms Turner emailed the claimant to clarify what details she needed (page 489). She said she only needed the number of hours worked, for the PTMG form, not times as well as she had previously thought. She said, 'My fault!'. She reminded the claimant that he had still not reported on hours for the week commencing 14 January 2019.

52. The claimant's GP completed a fit note on 26 February 2019 which said that the claimant was now fit for full hours (page 498). Ms Turner completed a PTMG form which confirmed that from 5 March 2019 the claimant would return to his normal weekly hours of 37 hours per week (page 514). As the claimant's hours had increased, Ms Turner asked for his caseload to be increased from 3 digital files a day to 4 digital files a day (page 524). At this time the claimant was working daytime hours.

<u>Daily work records and the claimant's work</u>

53. On 15 March 2019, Ms Turner again asked the claimant to complete a daily record of work, and to send the records to her each week. She explained why she needed them: to record hours of work and activity, and allow her to monitor casework activity and set a reasonable expectation regarding casework output. She provided the claimant with an activity report form to use as a template (page 545).

54. On 18 March 2019 Ms Turner asked the claimant to confirm urgently whether he had the respondent's telephone routing system (Solidus) set up and whether he could use it (page 550). She said she would need to see the claimant's daily record logs every day. The claimant did not reply and Ms Turner chased up the following day. The claimant was booked to attend web-based disclosure training on 18 March 2019, but he did not attend (page 548). On 20 March 2019 the claimant confirmed that he had the Solidus system installed on his computer (page 553, 560).

55. The claimant had a meeting with Ms Turner on 28 March 2019. Ms Turner sent a summary of matters discussed to Ms Sawitzki (page 569). The claimant had asked to work out of hours rather than daytime hours. Ms Turner suggested that updated occupational health advice be sought and Ms Sawitzki agreed that this was sensible as she was concerned that an out of hours home based remote environment may not be the right environment for the claimant at that stage (page 568).

56. On 11 April 2019 Ms Turner emailed the claimant and five of his colleagues to say that she was still waiting to receive their time sheets for a 4 week period starting on 25 February 2019 (page 585).

57. The claimant and Ms Turner had another meeting on 26 April 2019. Ms Turner sent a summary of the meeting to Ms Sawitzki (page 588). It was proposed that the claimant would continue to complete 4 cases each shift, with a comfort break after each case and a meal break. From 3 May 2019 the claimant began working partly out of hours, from 1400 to 2200 (page 618).

58. The work the claimant was doing was advice referrals from mailboxes and pilot cases. He was not doing any telephone advice at this stage. On 8 May 2019 the claimant was allocated a case but struggled with the advice, and another lawyer took over the case from him (page 595).

59. In May 2019 Ms Turner made enquiries with CPSD's facilities officer about a phone number for the claimant (page 605, 606). The facilities officer confirmed that CPS landlines are not installed at homeworkers' homes until after they have been at CPSD for some time. We accept Ms Sawitski's evidence about this. She said that landlines are not fitted and equipment provided until someone has been with CPSD for about 6 months, or long enough for CPSD and the individual to be confident that the role is suitable for them. In the claimant's case, that position had not been reached. Ms Turner arranged for a system to be set up to allow the claimant to make and receive calls via an online (VCT) service rather than a landline. Ms Turner explained this to the claimant (page 607). The claimant had access to online systems which enabled him to perform his role without the need for a landline or other equipment.

60. On 16 May 2019 Ms Turner was notified that the claimant had yet to complete his online risk assessment (page 765).

61. On 23 May 2019 Ms Turner asked the claimant to clarify some anomalies with his hours of work. The hours he was logged into Solidus (the telephone routing system) were not the same as his rota'd shifts, and on one day (17 May) he had not logged in at all (page 618). Ms Turner said that when she looked at the work the claimant had done on the respondent's case management system (CMS), there were some obvious discrepancies there as well.

62. Ms Turner again said she would like the claimant to send his daily record of work to her at the end of each day. She re-sent the activity report form and asked him to complete this from 28 May 2019. It was important for the respondent to have full records of the hours worked by the claimant, because he was working from home and also because he was entitled to premium payments for some hours of work. It was not possible for the respondent to pay the claimant his premium payments without full records of the hours he worked (page 684). (Ms Turner and the claimant's previous manager had regular email exchanges with the respondent's pay team with queries about the claimant's hours worked and pay due (page 571, 572)).

63. Ms Turner sent the claimant another email on 23 May 2019 with some guidance about a case the claimant had done (page 613). She said the claimant's record wrongly identified the type of advice he had provided. She asked him not to use the category 'investigative advice' as this description was reserved for area cases, not for CPSD advice.

64. On 30 May 2019 in an email to the claimant about several points, Ms Turner explained that daily work sheets were recommended to all prosecutors. She said this

was designed to support the claimant, and explained that they showed up any discrepancies in the use of the respondent's various systems (page 617).

65. On 31 May 2019 Ms Turner emailed the claimant with guidance on a case he had done (page 619). She noted that he had again used the category 'investigative advice'. She said that this category never applied to CPSD advice.

66. On 17 June 2019 Ms Turner emailed the claimant to say that despite her instruction to the claimant on 23 May not to use the category 'investigative advice', the claimant had used it five further times (page 645). She said:

> "Please be advised, again, that 'investigative advice' should not be selected from the drop down list and know that I will be advised of any further instances when it is used so that more formal performance action can be considered."

67. Also on 17 June 2019 Ms Turner sent the claimant another email about daily work logs. She had not received daily logs from him and was concerned that he was not working his full hours but also that he would not receive any enhanced payments he may be entitled to (page 657). On 24 June 2019 Ms Turner emailed the claimant again about disparities in working hours. She said she had repeatedly asked for daily activities logs, and unless they were received by return, she said she would 'have to take further advice from senior management/HR' (page 657).

68. Ms Turner also had other concerns about some of the advice the claimant was providing, some of which were serious concerns. Ms Turner raised these with the claimant, for example on 23 May 2019, 31 May 2019, 5 June 2019, 6 June 2019 and 17 June 2019 (pages 612, 613, 619, 620, 625 and 629).

69. During the time the claimant was working for CPSD, he did not ask to work overtime in court on Saturday mornings. Also during this time, the claimant had access to online systems on which internal promotions were advertised.

Work adjustments passport

70. On 31 May 2019 one of the respondent's HR managers sent the claimant an email about his work adjustments passport (WAP) (page 676). A WAP recorded what adjustments an individual required, so that an individual did not need to explain their requirements if they moved department or changed managers. The email said that an app was being introduced to record, monitor and authorised adjustments, and it would go live on 8 July 2019. The email explained the steps the claimant needed to take to transfer his WAP to the app.

71. On 7 July 2019 HR provided the claimant with some more information about the app after a request from the claimant on 1 July about the purpose of the app (page 675. The claimant did not complete the app.

Occupational health referral and disability special leave

72. In late May 2019 the claimant suggested that a further referral to occupational health was necessary to consider whether he should be back at work, the likelihood of recurrence of depression, his working pattern and reasonable adjustments (page 617). Ms Turner began completing an occupational health referral form for the

claimant on 3 June 2019 (page 631). She sent the draft to the claimant on 14 June 2019 (page 638).

73. The claimant had an appointment with an occupational health doctor on 9 July 2019 (page 667). He was absent from work from 10 July 2019 for planned cardiac surgery.

74. The respondent's special leave procedures (page 1,026) said:

> *"2.7 Disability leave*
>
> *2.7.1 Disability special leave is an example of a reasonable adjustment provided for under the Equality Act 2010 (the Act). It allows reasonable absences during working hours for rehabilitation, assessment and treatment (where this is directly linked to the nature of the person's disability and is not sick absence in the general sense). If approved as disability special leave, absences of a day or more for rehabilitation, treatment and assessment count special leave with pay and must be recorded separately from sick absence.*
>
> *2.14 Applying for disability special leave retrospectively*
>
> *2.14.1 Disability special leave should usually be applied for in advance. However, it may be applied for retrospectively to cover unpredictable absences. Retrospective applications may also be made to cover qualifying absences during the period 1 April 2004 to the date of issue of this guidance."*

75. The respondent's attendance management procedure said at paragraph 15:

> "*15. Disability special leave*
> *DSL may be granted until the reasonable adjustments are available. Where the employee is absent solely due to waiting for reasonable adjustments to be implemented and would otherwise have returned to work, the absence should be recorded as DSL."*

76. The respondent's Disability Special Leave guidance document had a series of Frequently Asked Questions (FAQs) (page 1,364), including:

> *"**An employee is due to undergo a medical procedure for something that is directly related to their disability and will be in hospital for seven days. Would DSL apply?***
>
> *This is a key part of the HRD guidance document. Whilst the issue must be considered against all relevant facts an individual who is receiving treatment for their disability (or an ailment that is a direct consequence of it) would normally be covered by DSL. The complicating factor here is that the individual would be technically unfit for work which would then disqualify them from receiving DSL under strict application of the policy.*
>
> *However, experience has shown that these are the type of issues where an organisation is expected to apply policy sensibly rather than in a technical and robotic fashion.*

…

An employee is certified sick with an ailment that is directly linked to their disability. Would DSL apply?

Disability related absence is not covered by DSL and if there are no presenting factors that would link the absence to any of the DSL categories then it is unlikely to apply. However, managers must review all of the facts to ensure that there are no circumstances that would give rise to an individual suffering a substantial disadvantage."

77. Therefore, under the respondent's policies and procedures on special leave, disability special leave can be granted for absence for rehabilitation, assessment and treatment, and for absence pending implementation of reasonable adjustments. Sickness absence is not usually covered, even if it is disability related. The person seeking disability special leave is required to complete an application, and it is clear from the policy documents that this is so managers can consider the particular circumstances in each case.

78. The claimant did not complete an application for disability special leave. However, Ms Turner retrospectively completed an application on his behalf for 10 to 12 July 2019, the period during which the claimant was in hospital for his operation (page 710). The application was granted and the first three days of the claimant's absence were treated as paid disability special leave.

Sickness absence

79. After the three days disability special leave, the claimant's absence was treated as unpaid sick leave as he had exhausted his sick pay entitlement, having been on sick leave for a significant period between April 2016 and August 2018.

80. On 29 July 2019 the claimant had not returned to work and no fit note had been received from him (page 713). Ms Turner spoke to the claimant on the same day. He said he was still not well enough to return to work, and he would speak to his doctor to get a backdated note in relation to his absence. He had received the draft occupational health report but had not sent his comments or given authority for it to be released to the respondent (page 714).

81. In August 2019 one of the respondent's senior HR business partners emailed the claimant responding to some queries the claimant had raised, including about whether he should be on disability special leave. The HR business partner set out some parts of the disability special leave policy and said that as the claimant was signed off sick, disability special leave would not be appropriate. He went on to say that if the claimant felt that disability special leave would be appropriate, he would be happy to forward the full policy and an application form (page 793). The claimant did not request an application form or make an application for additional days of disability special leave.

82. No sick note was provided by the claimant for the period of absence from 15 July 2019 to 2 September 2019.

83. The occupational health report was sent to the respondent around 18 August 2019 after the claimant requested some amendments and gave his authority for it to be released (page 768). The report was dated 18 July 2019, amended on 8 August and 12 August 2019.

84. In the report, Dr Emslie advised that the claimant has a panoply of medical problems which may well impact on his medical efficiency in the workplace. These included sleep apnoea, as well as a heart condition and anxiety and depression. He recorded that the claimant's major cardiac surgery was on 11 July 2019, he was currently absent from work recuperating, and was due a check up in six weeks. He said he doubted that the claimant would be able to carry out the full remit of a role with court advocacy and 24-hour working including night working. He said he should be permanently excluded from night work.

The claimant's grievance

85. On 1 August 2019 the claimant submitted a formal grievance about issues he had experienced since his return to work on 24 September 2018 (page 741). He said that there had been a failure to make reasonable adjustments for him. He suggested that if adjustments could not be made, alternative solutions could be considered, including flexible early retirement and ill-health early retirement (page 738).

86. The claimant's grievance included complaints against Ms Turner. Because of this, and in accordance with the respondent's policy and procedure, her manager, Anton Allera, was appointed as commissioning manager for the grievance. The commissioning manager oversees the grievance, arranges for an investigation to be carried out and communicates the outcome to the parties involved (page 1293). He asked Ms Turner to maintain her line management of the claimant, particularly in respect of keeping in touch with him while he was on sick leave (page 762).

87. Shakil Butt, an independent HR consultant, was appointed as investigator. He interviewed the claimant by telephone twice, in total the interviews took just under 7 hours (page 786, 788, 931).

Initial discussions about return to work

88. The claimant was absent from work on sick leave in August 2019. There was still no fit note covering his absence from 15 July 2019.

89. In late August 2019 the claimant began to have discussions with Ms Turner and Mr Allera about his return to work. He emailed Mr Allera on 28 August 2019 to say that he had an appointment with his GP on 2 September 2019 and he expected to be able to return to work on that day (page 804). Mr Allera replied, asking the claimant to obtain a note from his GP with as much information as possible, to enable the respondent to discuss with the claimant what adjustments were required to support his return to work. He said it would also be helpful to have any information from the claimant's heart specialist regarding the six week post-operation check up (page 807). Mr Allera said the respondent had not received a copy of the claimant's fit note for his absence in July 2019 and asked for confirmation of who it had been sent or, or for it to be sent as soon as possible. He said Ms Turner would then be in a position

to discuss adjustments, which could be formally recorded in the workplace adjustment passport.

90. On 2 September 2019 the claimant's GP completed a fit note which said that the claimant was fit for work with amended duties from 2 September to 2 November 2019 (page 815). The amended duties recommended by the GP were 'to work from home, with workload adjusted to be appropriate to his medical conditions'. The fit notes said that this was because of the claimant's heart surgery and anxiety and depression.

91. On 10 September 2019 Ms Turner wrote to the claimant about his return to work (page 858). In her letter, she recorded that she and the claimant had agreed that he should work from home on digital cases, on settled hours, although they had not agreed what his hours should be. She said that from what the claimant had told her, she was concerned that he might not be fully fit to take on 8 hour days, and she said she wanted to support the claimant's return to work on terms that were consistent with ensuring his health and well-being were maintained. She suggested that the claimant should start the CBT therapy which was being provided by the respondent.

92. In her letter, Ms Turner also recorded that there had been some discussion about the claimant's use of the Solidus system. The claimant had suggested that he be exempted from using Solidus as a reasonable adjustment. Ms Turner said she had explained that Solidus has two purposes. First, it was the mechanism by which the police made telephone contact with CPSD, and it routed their calls to the next available prosecutor. She went on to say:

> "Secondly, and perhaps more importantly in your case, is that by logging on to the network you are visible to the lead Shift Manager as being 'at work' and you can show precisely the nature of the work you are completing. In this regard, Solidus is almost like a register and is vital to the concept of remote management that your presence on the shift can be seen and recognised. All Duty Prosecutors, and Managers, working for CPSD are required to use Solidus. It is not clear to me how this expectation is detrimental to you returning to and remaining at work, or is linked specifically to a disability, so that you should be treated differently by exclusion from this requirement."

93. The claimant obtained another fit note from his GP surgery and sent this to Ms Turner (page 860, 864). The fit note was dated 12 September 2019. This said that the claimant was fit for work from 2 September 2019 with amended duties, but additionally, with 'amended hours'. The GP's recommendations in the text box were slightly amended to say that the claimant was fit 'to work from home <u>with flexible hours</u>. Workload adjusted to be appropriate to his medical conditions' (emphasis added to highlight the change).

<u>Discussions about reasonable adjustments</u>

94. After the claimant sent this second fit note, he and Ms Turner exchanged some emails to try and arrange a time to speak, and on 18 September 2019 the claimant sent an email to Ms Turner in which he asked her to consider making five adjustments (page 862). He said:

> "You now have all the information including further clarification from my GP regarding my capacity to work. I have already suggested the following, which may wish to consider again,
>
> 1. Permanently work from home - Part of CPSD working
> 2. Reasonable caseload of 4 files - Manageable
> 3. No phone calls - No change
> 4. No working sheets - Adjust
> 5. No fixed hours – Adjust"

95. Ms Turner sent a reply by email the following day, 19 September 2019 (page 862). In response to the claimant's numbered points 1 and 2 she said it had been agreed that the claimant should work from home and that four advices during a shift seemed to be a perfectly reasonable starting point, however she would want to support him to increase this as the weeks progressed to, say, 6 advices per shift. In relation to the claimant's suggestion about no fixed hours, she said that his hours would be by reference to his contract, but she had always been amendable to discussing the start and finish time to fit with the business need. She said this was 'something to discuss before you return to work'.

96. Ms Turner said she was less clear about the basis for the claimant's suggested amendment number 3 (no phone calls). She said it was the expectation that all CPSD staff receive and make phone calls through Solidus, in progressing responses to digital referrals. She said it had not been suggested by any medical opinion, for OH or the claimant's GP that he was unable to take or make phone calls. She asked for more information about this so that she could consider whether an adjustment would be reasonable given the nature of CPSD business.

97. In relation to point 4 (no working sheets), Ms Turner asked what the claimant meant. She said that every member of staff including her was required to maintain a 4 weekly log of hours worked which could be cross checked against Solidus (as a record of working times) and CMS, the case management system, as a record of work generated. She said she could help the claimant with setting up a daily log to record calls/activity.

98. In summary, Ms Turner's email said that three of the adjustments suggested by the claimant were in place or could be discussed, but she needed further information in relation to one (no phone calls) and she was not sure what the claimant meant about another (no working sheets).

99. The claimant and Ms Turner arranged to speak on 20 September 2019 but the claimant did not make the call. Ms Turner emailed the claimant to ask if everything was OK. She said they needed to have a catch up call and asked the claimant to make email contact with her so they could set it up as soon as possible (page 867).

100. On 25 September 2019 the claimant replied by email (page 866). He asked why, when he had a fit note submitted on 2 September 2019 confirming he was fit for work with amended duties, his pay had not been reinstated. His further comments on his five suggested adjustments were:

1. Work from home – in response to Ms Turner's point that equipment and set up should be formalised from a health and safety perspective, the claimant added that this was the duty of CPSD
2. Caseload of 4 files – in response to the suggestion that Ms Turner would support the claimant to increase his workload to 6 advices per shift, the claimant said this was unrealistic and suggested that 3 files was more appropriate on a permanent basis
3. No phone calls – in response to Ms Turner's request for more information about the basis for this suggested amendment, the claimant said a similar adjustment was made for another CPSD lawyer, and he could 'see no reason why I should not be entitled to the same adjustment'. He did not say why his disability made it difficult for him to make or take phone calls.
4. No working sheets – the claimant said he appreciated that every member of staff was required to maintain a 4 weekly log of hours worked but 'with respect, they are not permanently disabled due to heart condition and progressive depression and anxiety'. He did not explain why his disability prevented him from completing time sheets. In his evidence to us, the claimant said that because of fluctuating mood and medication (which meant he frequently had to stop work to go to the toilet) he could not work consistently and this was why he found it difficult to maintain time sheets.
5. No fixed hours – the claimant said that his contract did not expressly state when or what day of the week his 37 hours must be completed. He said that 'to work within any set hours' was a PCP which CPSD could adjust, and he suggested that his start and finish time both be set at 9.00pm. He said the files would have to be in his inbox the night before, or at 9.00am each day, and he would dispatch his reviews at close of business. He said any more than 3 files a day would be considered as overtime or enhanced payment, but that would be up to him, health permitting.

101. Ms Turner replied to the claimant's email on 30 September 2019 after returning from some absence from work (page 865). She said that she did not want to impede the claimant's return to work, but she had to make sure it was on agreeable terms, both from a business perspective and in support of the claimant's health and well-being. In relation to the five points, she said:

1. Work from home – she was perfectly content to formally agree an adjustment that the claimant work from home, she would want to check that he was properly set up for work from home, from a physical health and safety perspective
2. Caseload of 3 files – she was also content to agree that the claimant should only be expected to complete advice in 3 cases during a full shift for a period of time to ease and support his return to work. She said as with any adjustment, this should be kept under regular reviews
3. No phone calls – she said she had not seen any medical advice that the claimant could not take or make phone calls
4. No working sheets – Ms Turner did not reference this suggested amendment

5. No fixed hours – Ms Turner said that they had to agree settled hours that the claimant was expected to work, as that was required for all staff, most importantly when they are working remotely.

102. The claimant replied to this email on 2 October 2019 (page 869). He said:

> "It is obvious CPSD will not agree with my proposals which, I believe were reasonable, you have said CPSD will not bend or amend its policy of predetermined hours. The CPSD have and quite wrongly adopted an non-acceptable rigid stance in relation to my proposal, which is evident while we fire off emails back and forth in vain.
>
> …
>
> CPSD will be aware of the recent occupational health report, commissioned at my request. In the report and by my own assertions it does not recommend that I remain in my present role and it is not suitable for me.
>
> Therefore, without any further delay please arrange a transfer back to my old job or a better one. I will discuss my reasonable adjustment with my new designated line manager."

103. Ms Turner replied on 3 October 2019 (page 868). She said that the recent occupational health report did not say that the claimant's current role was not suitable for him. She said that as they seemed to be at loggerheads around agreeing reasonable adjustments, she thought it would be beneficial to seek further medical advice from occupational health around reasonable adjustments to support the claimant back to work in a daytime environment.

104. At this time, at the request of the claimant, Ms Sawitzki became involved. She emailed the claimant on 4 October 2019 (page 870). She set out the position regarding the five adjustments sought by the claimant:

1. Flexible start times – Ms Sawitzki said that 7am to 7pm was considered ordinary working hours, and that this gave a 12 hour window for the claimant to complete his 7.2 hours work per day. She said that this would allow the claimant to start at 11am and still complete his contracted hours
2. Reduced caseload – Ms Sawitzki said that Ms Turner had committed to accommodate a reduced caseload and keep this under regular review
3. Work from home – she said that the claimant could continue to work from home whilst working for CPSD
4. No telephone calls – Ms Sawitzki said she was not aware of any medical advice that the claimant could not take or make phone calls. She said if there was further evidence on this point the claimant should share this with her
5. Time recording – Ms Sawitzki said she could see no medical basis on which the requirement to record of hours work would be unreasonable for the claimant. This was something that all CPSD lawyers were

required to do as part of homeworking arrangements and to ensure accurate pay.

105. Ms Sawitzki told the claimant that she felt that an occupational health referral was appropriate, especially as the last two adjustments sought were new and without medical basis. She also mentioned the claimant's reference to ill health retirement in his grievance, and said that the way to progress this would also be via occupational health. In an email on 7 October 2019, the claimant agreed to a further occupational health referral (page 877). The claimant said he would like to know more about the various alternatives such as ill heath retirement and early retirement. Ms Sawitzki said she would arrange for the HR team to move forward with an occupational health assessment. She said that the respondent would not normally seek ill retirement estimates before being told by occupational health that a return to work was unlikely, but that they would seek one as an adjustment if it would help the claimant (page 876).

106. The claimant wrote to Ms Sawitzki on 11 October 2019. He was unhappy that all the adjustments he was seeking were not being immediately put in place (page 879). Ms Sawitzki replied on 15 October 2019 (page 874). She said:

> "I am not aware of any medical evidence that would prevent you from completing a timesheet or making telephone calls. If this does exist then please arrange to share this with me by return. This is the crucial point under consideration, as an employer we have a duty to make reasonable adjustments in accordance with the Equality Act 2010 in order to remove barriers for you in work and while you now seem to be indicating that timesheets and telephone calls are a barrier for you, this has not previously been raised and there appears to be nothing to support this in the previous Occupational Health report."

107. On 21 October 2019 the claimant wrote to Ms Sawitzki (page 881, 886). He said that she was unable to accommodate his requested adjustments (no phone calls and no time recording) and that her strong opinion was to oppose them. He said that he was no longer fit for work, and that even if he returned to work he would not be able to work full time from home because he had let his spare room to a lodger.

108. The claimant's employment tribunal claim was presented on 30 October 2019.

109. The occupational health report and grievance outcome were received after the claim was presented. Also after the claim was presented, on 23 April 2020, the claimant was dismissed by the respondent under the respondent's attendance management procedure. We are not considering any complaint about dismissal. We have included below brief summaries of the occupational health report, grievance outcome and dismissal procedure. This is for completeness and because they shed light on some of the issues we have to decide.

<u>Occupational health report</u>

110. Although the claimant and Ms Sawitzki had both agreed that an occupational health report should be sought, there was a delay while they agreed the form the

referral should take (page 910). The referral was sent off on 12 November 2019 (page 917).

111. Ms Turner's manager, Mr Allera, emailed the claimant on 26 November 2019 to let him know that the date for his occupational health appointment would be 4 December 2019 (page 918). Mr Allera was dealing with this because Ms Turner was on sick leave.

112. The occupational health report of Dr Massey was completed on 30 December 2019 (page 1435). Advising on the question of the claimant's fitness for work, Dr Massey explained that fitness for work is a complex construct, and noted that the claimant had not been able to demonstrate capability in his current role for some time. He went on to say:

> "Pragmatically, my feeling is that with the significant health issues that he has … it is difficult to see how he could be considered likely to be able to perform the complex responsible mental work that he would invariably be required to in the course of his duties as a senior crown prosecutor."

113. In relation to support which could be offered to the claimant to allow him to return to work, Dr Massey said that it tends to be the employee who is best placed to know what support would be helpful, and that it was then up to the employer to consider whether this support could be accommodated. He said that the adjustments the claimant was seeking were substantial because the impairing effects of his health problems (in particular his obstructive sleep apnoea syndrome) are substantial.

114. Dr Massey answered the question about whether ill health retirement would be a consideration for the claimant by saying that only the scheme medical advisor to the pension scheme would be able to give a definitive opinion as to whether the scheme criteria were satisfied or not. He signposted the respondent to the internal scheme adviser for technical advice, noting that the claimant had requested such advice.

Grievance outcome

115. The grievance outcome was sent to the claimant on 2 January 2020 (page 925). Mr Butt, the independent grievance investigator, had prepared a detailed investigation report with 75 pages of information, detailed findings and conclusions. He summarised his view as being that the claimant's main motivation for returning to work on 24 September 2018 was financial rather than ensuring that he was actually fit for work, and that this appeared to be the case during his sickness absence in 2019/2020 as well.

116. Mr Butt concluded that one of the claimant's complaints was upheld: disability special leave had not been properly considered at the time of the claimant's operation. Other than this point, he did not uphold the claimant's grievance. He felt that the grievance was vexatious and not in good faith. He recommended that the respondent consider appropriate action.

117. Mr Allera, the decision-maker concluded that overall the claimant's grievance was not upheld. He noted that, despite the investigator's conclusion that disability special leave had not been properly considered, the claimant had been

retrospectively granted 3 days disability special leave and had been given the option of applying for more if he chose to do so (which he did not). Mr Allera said that he was not proposing to take any action in respect of the investigator's conclusion that the grievance was vexatious.

118. Mr Allera told the claimant he had a right of appeal. The claimant did not appeal.

Consideration of ill-health retirement and dismissal

119. After the grievance outcome was sent to the claimant Mr Allera took over line management responsibility for the claimant, because of Ms Turner's health issues. Mr Allera wrote to the claimant to confirm this on 14 January 2020 (page 1035). Mr Allera met the claimant on 21 January 2020 to discuss the recent occupational health report.

120. On 13 February 2020 the claimant emailed Mr Allera to ask for information about ill health retirement (page 1045). Mr Allera provided quotes which had been obtained on the claimant's behalf in emails of 18 February and 28 February 2020 and offered the claimant support with the process from the respondent's HR manager (page 1051, 1059).

121. On 25 February 2020 Mr Allera wrote to the claimant to set up a formal long term absence meeting under the respondent's attendance policy (page 1057).

122. On 9 March 2020 the respondent's HR manager wrote to the claimant enclosing the forms for him to complete if he wanted to apply for ill health retirement (page 1065). He asked the claimant to return the forms by 9 March 2020 so that they could be submitted to the scheme medical advisor. The claimant did not complete the forms.

123. On 13 March 2020 Mr Allera told the claimant that the option to discuss ill-health retirement remained open (page 1074). On about 27 March 2020 the claimant wrote to Mr Allera. He said that ill health retirement was no longer a viable option because of the pandemic (page 1069, the letter is wrongly dated as is clear from the first paragraph).

124. On 22 April 2020 the claimant was dismissed under the respondent's attendance management procedure (page 1088). His effective date of dismissal was 23 April 2020.

The law

Reasonable Adjustments

125. Section 20 of the Equality Act 2010 provides for a duty to make reasonable adjustments. In relation to an employer, A, section 20(3) says:

> *"The first requirement is a requirement, where a provision, criterion or practice (a '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."*

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

127. The duty to make an adjustment only arises if the adjustment concerned would remove the disadvantage (Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2013] EqLR 1180).

128. In General Dynamics IT Ltd v Carranza [2015] IRLR 43 the EAT said that it is unsatisfactory to define a PCP in terms of a procedure which is intended at least in part to alleviate the disadvantages of disability. The PCP should identify the feature which causes the disadvantage and exclude that which is aimed at alleviating the disadvantage. A tribunal should identify the employer's PCP at issue, identify the non-disabled comparator, and decide the nature and extent of any substantial disadvantage suffered. Without these findings the tribunal will not be able to find what, if any, steps it is reasonable to take to avoid the disadvantage.

129. Paragraph 6.28 of the EHRC Statutory Code of Practice on Employment sets out factors which might be taken into account in determining what is a reasonable step for an employer to have to take. These include the extent to which the taking of the step would prevent the effect on the disabled person, the extent to which it would be practicable for the employer, the costs involved, the disruption to the employer's activities, the employer's financial and other resources, the availability to the employer of financial and other assistance, and the type and size of the employer.

130. There is no specific duty to consult an employee about reasonable adjustments. In Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664 the EAT said in that, '…whilst…it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so – because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments – there is no separate and distinct duty of that kind.'

Discrimination arising from disability

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

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

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

i. there must be unfavourable treatment;
ii. there must be something that arises in consequence of the claimant's disability;

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

Harassment

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

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

134. As the relevant protected characteristic relied on by the claimant is disability, the unwanted conduct must be related to disability.

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

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

Burden of proof

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

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

137. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (Project Management Institute v Latif 2007 IRLR 579, EAT).

138. In a complaint of discrimination arising from disability, the claimant must show that they have a disability within the meaning of section 6 and that they have been treated unfavourably by the employer. It is also for the claimant to show that 'something' arose as a consequence of their disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. The burden of proof is then on the respondent to satisfy the tribunal that the 'something' was not the reason for the unfavourable treatment, or that the measure applied was a proportionate means of achieving a legitimate aim.

139. If the burden shifts to the respondent, the respondent must provide an explanation which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability. The respondent would normally be expected to produce cogent evidence to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Unlawful deduction of wages

140. Section 13(1) of the Employment Rights Act 1996 says:

> *"An employer shall not make a deduction from wages unless*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

141. Section 13(3) says:

> *"Where the total amount of wages paid on any occasion by the employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

Conclusions

142. We have applied these legal principles to the facts as we have found them, to reach the following conclusions on the issues we had to decide.

Failure to make reasonable adjustments

PCPs

143. The claimant alleged that the respondent applied four provisions, criteria or practices ('PCPs'). The first PCP relied on by the claimant is a requirement that a CPSD lawyer working from home should fulfil the duties of the role by filling in a digital time-sheet requiring clocking in and clocking out, and by advising the police on the telephone.

144. (In the course of the hearing before us, the claimant withdrew his complaint that there was a failure to make reasonable adjustments based on a requirement to fill in the MG3 template for recording reviews.)

145. We have found that the respondent required CPSD lawyers to complete time-sheets showing their hours of work each day (a sort of remote clocking in and out). In doing so the respondent applied a PCP.

146. We have also found that the practice of CPSD was to provide charging advice to police officers by telephone, and this amounts to a PCP.

147. The second PCP relied on by the claimant is the respondent's practice of not sharing HR files ahead of staff moves between departments. We have found that the respondent had a practice of this nature. This also amounted to a PCP applied by the respondent.

148. The third PCP relied on by the claimant is the practice of not seeking a medical opinion and legal advice on whether it should treat the claimant as unfit to return to work and consider ill health retirement in July 2019. The fourth PCP relied on by the claimant is not allowing the claimant to return to work in July 2019.

149. We found it quite difficult to understand these alleged PCPs, and the basis on which these aspects of the complaint are put. In part this is because both of these PCPs are defined in terms of the proposed adjustment for them: they are also put (without the word 'not') as suggested adjustments (paragraphs 3.3(f) and (g) of the list of issues). This gives rise to conceptual difficulties similar to those discussed in General Dynamics IT Ltd v Carranza.

150. In any event, we have not found that the facts which form the basis for the third and fourth PCPs happened as alleged. In relation to the third PCP, we have found that the respondent did seek a medical opinion from occupational health at around this time; the claimant had his appointment on 9 July 2019 and the report was sent to the respondent on about 18 August 2019 after amendments were requested by the claimant earlier in August.

151. In relation to the fourth PCP, we have not found that the respondent did not allow the claimant to return to work in July 2019. The claimant was at work until 9 July 2019. After that, he was absent from work because he was unfit to work, not because the respondent did not allow him to return to work. He was not certified as fit to return to work with adjustments until 2 September 2019. If the fourth PCP meant to say that the respondent did not allow the claimant to return to work in September 2019, we have not found that this happened either. We have found that after this date the respondent and the claimant were considering whether the adjustments requested by the claimant were reasonable.

152. We have concluded that the respondent did not apply the third and fourth PCPs as alleged by the claimant. They did not happen as alleged. They may be better viewed as part of the claimant's case on the first PCP, rather than separate PCPs in themselves.

Substantial disadvantage

153. The next issue for us to consider is whether the first and second PCPs which we have found to have been applied by the respondent put the claimant at a substantial disadvantage in comparison with persons who are not disabled.

154. In relation to the first part of the first PCP, the claimant says he was disadvantaged because he became anxious and stressed by the technical requirements of performing the CPSD role from home.

155. In his evidence to us, the claimant said that because of fluctuating mood, and because his medication meant he had to stop work frequently to go to the toilet, he could not work consistently and he found it difficult to maintain time sheets. There was no medical evidence which said that the claimant would have difficulty with keeping time sheets, or that said whether any such difficulty was related to his disability, so that he was disadvantaged in comparison to people who are not disabled.

156. In relation to the second part of the first PCP, the claimant says that advising the police on the telephone made him stressed and anxious. Again, there was no medical evidence supporting this or explaining how any such disadvantage was related to the claimant's disability.

157. In relation to the second PCP, there was no evidence to suggest that the claimant was disadvantaged by the respondent's practice of not sharing HR files ahead of moves between departments. The claimant accepted in evidence that he might have been disadvantaged if his HR file had been shared, as it contained information which he was unhappy about and which he preferred that his new managers did not see. Further, as the claimant gave consent for his new managers to see his occupational health reports, relevant information about his disability-related requirements was shared with them without the need for his full HR file to be shared.

158. We have concluded that neither the first or the second PCPs put the claimant at a substantial disadvantage in comparison with persons who are not disabled. This means that the complaint of failure to make reasonable adjustments fails.

159. We have gone on to consider whether, if the claimant had been put at that disadvantage by either the first or second PCPs, the respondent would have had a duty to make any of the suggested adjustments to avoid the disadvantage, and if so whether it failed in that duty. We have considered the claimant's suggested amendments in turn.

Suggested adjustments

160. Issue 3.3(a) – ensuring that the claimant signed a home working agreement. There was no evidence before us as to how this would have avoided any disadvantage to the claimant arising from the first or second PCPs. There is no basis on which we can find that it would have done. Further, if by ensuring he signed a home working agreement the claimant means that the respondent should have provided him with a land line and equipment, we have found that he was provided with access to online systems which enabled him to perform his role.

161. Issue 3.3(b) - waiving the requirement to fill in a digital time-sheet. In the claimant's discussions with the respondent about returning to work in September/October 2019, this was one of the five adjustments he was seeking. This is at the heart of the claimant's case on whether the respondent made reasonable

adjustments to support his return to work in 2019, as it was this requested adjustment which primarily caused the impasse between the parties.

162. There was no medical evidence to support the claimant's request for this adjustment. The respondent asked the claimant for details as to why he was unable to complete time-sheets, but he did not provide any further information. Even if there had been medical evidence or further information which suggested that the claimant was not able to complete time sheets (and if we had found that the claimant was put at a substantial disadvantage by the first PCP), it would not have been reasonable for the respondent to waive the requirement to complete time sheets, for the following reasons:

(a) The claimant worked fully from home, so time sheets were needed for the respondent to monitor the hours the claimant was working. They were the remote equivalent of clocking in and out.

(b) There were health and safety reasons why the respondent needed to know the hours the claimant was working, particularly when he was returning from a period of sickness absence, as he would have been in September 2019.

(c) There were premiums payable to the claimant depending on the times he was working, so the respondent needed to know when the claimant was working, as well as the number of hours he worked.

(d) It would not be reasonable for the respondent to have to rely entirely on other systems or the claimant's work output to understand what hours he was working. This would mean estimating work times, or checking a number of systems and piecing together information to understand his hours of work. Cases vary hugely and the respondent would find it difficult to know how long each had taken, without the claimant keeping a record. It would have made meaningful management of the claimant extremely difficult.

(e) The claimant told us in the hearing that it was an inability to work consistently which was the problem with time sheets. It would not be reasonable to expect the respondent (a publicly-funded body) to allow the claimant to work inconsistently, without the respondent being aware of the number of hours he was working.

163. We have concluded that it was not reasonable for the respondent to have to waive the requirement for the claimant to complete time sheets. That was not an adjustment which it would have been reasonable for the respondent to have made.

164. Finally in relation this proposed adjustment, paragraph 20(1)(b) of Schedule 8 of the Equality Act is relevant. It provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage. While the respondent was aware that the claimant was disabled by a heart condition and depression, it was not aware that the claimant was likely to be placed at a disadvantage by the requirement to complete time sheets, in comparison with people who are not disabled. The claimant did not complete the respondent's work adjustments passport app, or tell the respondent why he thought he was disadvantaged by the need to complete time sheets. The

respondent could not reasonably have been expected to know this without being told this by the claimant.

165. Issue 3.3(c) - agreeing that the claimant need not give advice to the police over the telephone. From the time the claimant started with CPSD in November 2018 until 10 July 2019 this adjustment was in place. The claimant had not been required to give advice to the police over the telephone. He had provided advice on digital case files only. On one occasion he provided telephone advice under a colleague's supervision but he struggled and was not required to do any more. When the claimant asked in September 2019 to continue the arrangement where he did not provide telephone advice, the respondent did not refuse this request. Rather, Ms Sawitzki asked for further evidence in support of the request as it was not mentioned on the fit notes from the claimant's GP or any other medical reports. The claimant did not provide any further evidence. After the claimant raised it, the respondent asked the occupational health doctor for advice on the point, which was a reasonable step. In delaying its agreement pending medical evidence about this request, the respondent did not fail to make a reasonable adjustment. It would not have been a reasonable adjustment for the respondent to have had to agree to the claimant's request without any medical evidence or further information about this including about the disadvantage to him.

166. Issue 3.3 (d) - agreeing that the Claimant could:

(a) permanently work from home;
(b) deal with four case files per day;
(c) not have fixed hours;
(d) be measured through output;
(e) not start at 9am;

167. Four of these adjustments were agreed. In the discussions the claimant had with Ms Turner and Ms Sawitzki about his return to work in September 2019, it was agreed that the claimant could work permanently from home (like the majority of CPSD lawyers), that he could deal with four (or, later, with three) case files a day, that he need not have fixed hours and that he could start later than 9.00am. Ms Sawitzki told the claimant that there was a 12 hour window from 7am to 7pm for the claimant to complete his 7.2 hours work per day, and this would allow the claimant to start at any time up to 11.00am. It would not have been reasonable for the respondent to have allowed the claimant more flexibility than allowing him to work between 7am and 7pm, because the occupational health advisor had advised in August 2019 that the claimant should be permanently excluded from night work.

168. All of these suggested adjustments in issue 3.3(d) were agreed by the respondent, except the suggestion that the claimant could be measured through output. For the same reasons set out above in relation to waiver of the requirement for the claimant to complete time sheets, we have concluded that it would not have been a reasonable adjustment for the respondent to have measured the claimant through his output of work only.

169. Issue 3.3(e) - CPS South East sharing the claimant's HR file ahead of his start date with CPSD. This suggested amendment does not address any substantial disadvantage to which the claimant was subject. The claimant accepted that it would

have been less beneficial to him than providing his managers with occupational health records only, as there was information on his HR file which he did not want his new managers to see. It was reasonable for HR, rather than the claimant's line managers, to be the 'gatekeepers' of the claimant's HR file. Sharing the claimant's file with new managers would not have been a reasonable adjustment for the respondent to have made.

170. Issue 3.3(f) - seeking a medical opinion and legal advice on whether it should treat the claimant as unfit to return to work and consider ill health retirement in July 2019. The respondent did not fail to take this step, as it did seek a medical opinion in July/August 2019 about the claimant's fitness for work.

171. As to considering ill health, the claimant had not raised the question of ill health retirement in July 2019. There was no indication in July 2019 that the claimant would be unable to return to work. If the claimant means that ill health retirement should have been considered in September 2019, the respondent was taking steps to do this in, as the claimant's managers raised this with him and included it in the occupational health referral which was being discussed with the claimant in early October 2019. The respondent provided the claimant with forms to complete in March 2020 if he wanted to apply for ill health retirement, but the claimant did not fill these in. In any event, considering ill health retirement would not be a reasonable adjustment, as it would not be a step which would enable the claimant to remain in work.

172. The respondent seeking legal advice would not have avoided any substantial disadvantage to the claimant.

173. Issue 3.3(g) - allowing the claimant to return to work in July 2019. We assume that this is intended to refer to September 2019, as the claimant was at work in the first half of July 2019, and then unfit for work from 10 July 2019 to 1 September 2019.

174. We have not found that the respondent failed to allow the claimant to return to work in either July 2019 or September 2019. Rather, after the claimant was certified fit to return to work by his GP on 2 September 2019, the respondent was in discussions with the claimant about the arrangements for his return. All the adjustments which were suggested on the fit note were agreed. The main sticking point was the question of whether the claimant would be required to complete time sheets. This was not an adjustment which was mentioned on the claimant's GP's fit note. It was not reasonable for the respondent to allow the claimant to return to work without requiring him to complete timesheets, for the reasons explained above.

175. We have concluded that of the suggested amendments put forward by the claimant, either the respondent had already put these adjustments in place or agreed that they could be put in place, or they were not steps which would avoid any disadvantage the claimant was at, or it was not reasonable for the respondent to have to take them. This means that if we had found that any of the alleged PCPs put the claimant at a substantial disadvantage in comparison with people who are not disabled, we would not have found that the respondent failed in the duty to make reasonable adjustments.

176. The claimant's complaints of failure to make reasonable adjustments fail and are dismissed.

Discrimination arising from disability

177. The claimant says he was treated unfavourably by:

(a) being required to give up court advocacy on 24th September 2018 which resulted in him being de-skilled and having reduced career opportunities;
(b) being unable to work overtime in court on Saturdays;
(c) being unaware of opportunities for promotion.

178. We have not found that the claimant was required to give up court advocacy. He requested a role with home working as a reasonable adjustment. He was offered, and accepted a home working role in CPSD. That necessarily meant that he would be performing the role of a CPSD lawyer, and CPSD lawyers are not required to do court advocacy. It was not unfavourable treatment to transfer the claimant into a home working role as he had requested, or to transfer to him to a role he had expressly accepted.

179. We have not found that the claimant was treated unfavourably by being unable to work overtime in court on Saturdays. CPSD lawyers were able to work overtime in court in Saturdays. That was open to all CPSD lawyers, and many chose to take this up to maintain their skills. The claimant did not ask to do so.

180. There was no evidence that the claimant was subject to unfavourable treatment by being unaware of opportunities for promotion. Opportunities were advertised internally on CPSD systems to which the claimant had access.

181. As we have not found any of the alleged unfavourable treatment to have occurred, the complaint of discrimination arising from disability fails and is dismissed.

Harassment

182. The claimant said that he was subjected to unwanted conduct by Ms Turner in that:

(a) she requested that he fill in time sheets from March 2019;
(b) she told him on 4th June 2019 that formal performance action could be considered; and
(c) she failed to implement the home working policy and health and safety checks before the claimant's sickness absence in July 2019.

Request to fill in time sheets

183. We have found that Ms Turner asked the claimant to fill in time sheets. She did so regularly from early February 2019 until about late June 2019 in emails to the claimant. She had to make repeated requests for time sheets for some weeks.

184. The requests for the claimant to fill in time sheets do not meet the legal test for harassment. They did not have the purpose or the effect of violating the claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The emails Ms Turner sent the claimant were reasonable

management requests, and Ms Turner's requests were polite in tone and language. She carefully explained the reasons why she needed the claimant to fill in time sheets. They were part of the administrative arrangements necessary for him to work in a role from home. They were required to ensure that his line managers could properly support and supervise him, and so that he could be properly paid.

185. Further, Ms Turner's requests for the claimant to complete time sheets were not related to disability. All CPSD staff were required to complete time sheets, and Ms Turner chased up colleagues of the claimant who had not completed time sheets, as well as the claimant. If the claimant's disability impacted on his ability to complete time sheets, he did not tell Ms Turner this.

186. This complaint of disability-related harassment fails, as the conduct does not meet the required test, and it was not conduct related to disability.

Reference to formal performance action

187. The second allegation of disability-related harassment relates to a comment Ms Turner made in an email to the claimant, about formal performance action. This is said to have been made on 4 June 2019. We have found that the conduct referred to in this allegation took place on 17 June 2019 when Ms Turner emailed the claimant about his use of the wrong advice category in his records of advice (the email is at page 645). She had asked him on 23 May 2019 (and 31 May 2019) not to use the category 'investigative advice' but the claimant had continued to use this. Ms Turner explained to the claimant that she would consider formal performance action if this happened again.

188. The email of 17 June 2019 did not have the purpose or the effect of violating the claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It was a reasonable management instruction about an administrative issue. Ms Turner reasonably made her expectations clear to the claimant, and explained what the next step would be if the claimant did not follow her instruction. If the claimant had been unable to comply with her instruction, it would have been reasonable to consider whether action under formal performance procedures was required to address this.

189. The email and the instruction about what category of advice the claimant should be recording was not related to disability.

190. The second complaint of disability-related harassment fails, as the conduct does not meet the required test, and it was not conduct related to disability.

Home working and health and safety checks

191. We have not found that Ms Turner failed to implement the home working policy. The respondent's policy was to wait until it was clear that the CPSD role was suitable for the individual before providing a landline and equipment. That point had not been reached with the claimant. Ms Turner arranged for the claimant to be provided with an online VCT system to make phone calls, and with access to online systems, such as Solidus, and these enabled the claimant to carry out his work from home.

192. We have not found that Ms Turner failed to carry out health and safety checks. The respondent provided the claimant with health and safety awareness training and Display Screen Equipment (DSE) awareness training (page 179) as part of his induction training. The claimant was also asked to complete an online health and safety assessment and was sent a reminder when he failed to do so. It was the claimant's choice not to complete a health and safety assessment.

193. The third complaint of disability-related harassment fails because we have not found the alleged conduct to have taken place.

194. The claimant's complaints of harassment by Ms Turner therefore fail and are dismissed.

Unlawful Deduction from Wages

195. The claimant says that he was entitled to paid disability special leave for the period from 15 July 2019 until his dismissal on 23 April 2020. This relates to the period when the claimant was absent from work after heart surgery.

196. The respondent's guidance documents and procedures said that absence for rehabilitation, assessment and treatment can be treated as disability special leave but sickness absence is not covered. We have found that the claimant was granted three days' disability special leave from 10 to 12 July 2019. This covered the period when the claimant was in hospital for his operation. This was in line with the written procedures and the disability special leave FAQs. This leave was granted on the basis of a retrospective application completed by Ms Turner on the claimant's behalf.

197. The claimant's absence after 12 July 2019 was treated as unpaid disability-related sickness absence. Again, this was in line with the respondent's procedures and the disability special leave FAQs. The procedures did not entitle employees to disability special leave for every period of disability related sickness absence. Disability special leave is not the same as disability related sickness absence. Also, the claimant was not entitled to sick pay during his period of sickness absence, because he had exhausted his entitlement to sick pay.

198. The respondent's procedures said that entitlement to disability special leave requires an application to be made and approved. The respondent invited the claimant to apply for further days to be considered as disability special leave. The claimant did not do so. The claimant therefore had no further entitlement to disability special leave under the respondent's policy.

199. During the period from 2 September 2019 the claimant was in discussions with his managers about what adjustments it would be reasonable to implement for him. This is not the same as waiting for agreed reasonable adjustments to be implemented such that he would be entitled to disability special leave under the attendance management procedure. The claimant's circumstances did not fall within the entitlement to disability special leave set out in the attendance management procedure.

200. Pay for disability special leave was therefore not 'properly payable' to the claimant during the period 15 July 2019 to 23 April 2020. To be entitled to disability

special leave, the individual must have made an application, and had it approved. The claimant did not make an application, and therefore had no further entitlement to disability special leave after the three days which were granted for 10 to 12 July 2019.

201. The respondent has not made any unauthorised deduction from the claimant's wages. The complaint of unauthorised deduction from wages in respect of disability special leave fails and is dismissed.

Employment Judge Hawksworth

Date: 8 December 2022

Sent to the parties on: 12 December 2022

For the Tribunals Office