EMPLOYMENT TRIBUNALS

Claimant: Mr M Frazer

Respondent: Highways England Company Limited

Heard at: Manchester (as a hybrid hearing) **On:** 5-9, 12-13 September 2022 and 30 January to 1 February 2023 (in chambers on 2 February, 5 and 17 April 2023)

Before: Employment Judge McDonald
Ms S Khan
Mr G Pennie

REPRESENTATION:

Claimant: Ms L Gould (Counsel)
Respondent: Mr S Lewis (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The correct name of the respondent is Highways England Company Limited.

PID claim

2. The claimant's claim that the respondent, in breach of s.47B of the Employment Rights Act 1996 ("the ERA"), subjected him to detriments on the ground that he made protected disclosures fails and is dismissed.

Harassment

3. The claimant's claim that the respondent subjected him to disability related harassment in breach of ss.26 and 40 of the Equality Act 2010 fails and is dismissed.

Reasonable Adjustments Claim

4. The claimant’s claim that the respondent failed to comply with the duty to make reasonable adjustments in ss.20 and 21 of the Equality Act 2010 succeeds in relation to the following allegations:

    (a) That the respondent failed to make a reasonable adjustment by making a change to its absence management procedure as it applied to the claimant so that the claimant did not have to meet with Mr Crowley-Sweet at the claimant's “absence meetings or otherwise” (allegation 15(b) at paragraph 24(b) of the claimant's Particulars of Claim); and

    (b) That the respondent failed to make a reasonable adjustment to its absence management procedure by failing to fund private medical treatment in relation to paying for counselling (allegation 15(c) at paragraph 24(c) of the claimant's Particulars of Claim).

5. Other than in relation to the matters set out in paragraph 4 (a) and (b) the claimant's claim that the respondent failed to comply with the duty to make reasonable adjustments in sections 20 and 21 Equality Act 2010 fails and is dismissed.

6. The claimant’s successful claim in para 4 (a) above was brought in time.

7. The claimant’s successful claim in para 4(b) was brought outside the relevant time limit but it is just and equitable to extend the time for that claim to be brought.

Indirect discrimination

8. The claimant’s claim that the respondent indirectly discriminated against him in breach of ss.19 and 39 of the Equality Act 2010 fails and is dismissed.

Discrimination arising from disability

9. The claimant’s claim that the respondent treated him unfavourably by reason of his disability in breach of ss.15 and 39 of the Equality Act 2010 fails and is dismissed.

Victimisation

10. The claimant's claim that the respondent victimised him in breach of section 27 of the Equality Act 2010 is dismissed on withdrawal.

Unauthorised deduction from wages

11. The claimant's claim that the respondent made unauthorised deductions from his wages in breach of s.13 of the ERA is dismissed on withdrawal.

REASONS

Introduction

1. By a claim form received by the Tribunal on 18 April 2020 the claimant brought claims that the respondent had subjected him to detriments for making protected disclosures and had subjected him to various forms of disability discrimination in breach of the Equality Act 2010. The claimant's claim of direct disability discrimination was dismissed upon withdrawal by a judgment of Employment Judge Hodgson on 17 February 2021. The claimant during the hearing withdrew his claims of victimisation in breach of section 27 of the Equality Act 2010 and of unauthorised deductions in breach of s.13 of the ERA.

2. This hearing was by way of a hybrid hearing. It had been listed for a 7 day final hearing from 5-13 September 2022. However, it was part-heard after those 7 days and a further 4 days were listed on 30 January to 2 February 2023.

3. We heard evidence on days 2 to 9. We heard oral submissions from Mr Lewis and Ms Gould on Day 10, having allowed the morning for counsel to prepare any written submissions they wanted us to read in advance of the oral submissions.

4. We deliberated in chambers on 2 February, 5 April and 17 April 2023. The Employment Judge apologises to the parties for the delay in finalising this Judgment and sending it to them.

Evidence

5. After dealing with preliminary matters at the start of the hearing the Tribunal took the remainder of Day 1 and the first hour of Day 2 to read the statements and documents in the case. We heard evidence from the claimant on Days 2-5. On Day 6 we heard evidence from the respondent's first witness, Mrs Victoria Williams, at the time Head of Information Management ("Mrs Williams"). We heard evidence from Miss T Clayton, at the time the Regional HR Manager covering the North of England ("Miss Clayton") for the respondent on Day 7. We heard the evidence from Mr Davin Crowley-Sweet, at the relevant time the respondent's Chief Data Officer ("Mr Crowley Sweet") on Days 8 and 9. There were attempts to slot in the evidence from the claimant's witness Mr Peter Smith (Mr Smith) by CVP around his teaching duties and the respondent's' witnesses but the claimant ultimately decided not to call Mr Smith to give live evidence. We had a written witness statement from him. We gave it as much weight as we considered appropriate given the lack of an opportunity for the respondent to cross-examine Mr Smith. Each witness had provided a written witness statement. Each was cross examined, answered questions from the Tribunal and was re-examined where counsel wished to do so.

6. The hearing bundle originally consisted of 2,169 pages. During the hearing supplementary documents were added to that bundle. We refer to the totality of the documentary evidence with those additions in this Judgment as "the Bundle".

7. References in this Judgment to page numbers are to page numbers in the Bundle.

8. The Tribunal asked the parties to provide a chronology of events. That was provided by the end of the hearing but in the form of a framework rather than a detailed chronology. It did not include, for example, the dates of meetings between the claimant and Mr Crowley-Sweet.

Preliminary Matters

Reasonable Adjustments

9. The claimant is a disabled person by reason both of anxiety and functional neurological disorder ("FND"). He experiences symptoms such as "brain fog", shaking and twitching, particularly when tired or under stress. The claimant's conditions also impact his mobility. In an attempt to alleviate the impact of those symptoms we made a number of adjustments during the hearing.

10. In particular:

- We took extended breaks and sat for shorter days when the claimant was giving evidence.
- When the claimant was giving evidence, he started the day already sitting at the witness table rather than him having to walk from the claimant's table.
- The claimant had a piece of paper which he could hold up to act as a "pause button" if he was feeling that his symptoms were manifesting and needed the Tribunal to pause in proceedings. We took breaks where that did happen.
- The claimant's wife sat next to or near to him at all times in order to assist him if his symptoms needing managing.
- On Day 3 the Tribunal moved to a hearing room at the rear of the Tribunal building. That was to move away from noisy drilling works which were being carried out at the front of the building which the claimant found particularly disturbing to his concentration.

11. We are grateful to both counsel for their assistance in taking steps to enable the claimant to have a fair hearing. We are in particular grateful to Mr Lewis for the considerate way in which he cross examined the claimant.

Application to Amend

12. At the start of the hearing Ms Gould confirmed that the claimant would be making an application for permission to amend to add a further alleged act of disability related harassment. The relevant "unwanted conduct" were emails sent by Mr Crowley-Sweet to the claimant on 25 July 2018 and 2 August 2018 during the claimant's sickness absence. On the morning of the second day of the hearing Mr Lewis confirmed the respondent did not object to that application. Permission to amend was given and the allegation added at paragraph 5b of the List of Issues.

Correction of the respondent's name in proceedings

13. During submissions on Day 10 the parties agreed that the correct name of the respondent is "Highways England Company Limited" rather than "Highways England". By consent the respondent's name in these proceedings was corrected to that.

The Issues

14. The List of Issues (taking into account the amendment referred to above) is attached as an Annex to this Judgment. In error, there were originally two detriments "D9" which we renumbered D9a and D9b during the hearing. The version of the List of Issues in the Annex reflects that change.

Findings of Fact

15. Before setting out our findings of fact we make some general observations about those findings. Both Ms Gould and Mr Lewis in their written submissions observed that there were factors in this case which made it complex to deal with. They included the technical nature of much of the matters discussed in the evidence and the number of factual disputes between the parties (referred to in Ms Gould's submissions as "countless"). We agree with those observations.

16. We would add to those an additional factor, which is that we were to some extent joining a story in the middle rather than at the beginning. The claimant's claim is about events following his making protected disclosures from April 2017. However, the claimant had been "fairly passionate" about the issue of health and safety in the Smart Motorways environment "for a number of years" before that disclosure (p.570). The Bundle included a number of documents from 2016 and 2015 which were concerned with the prehistory of the events with which we are concerned. We have limited our findings to those necessary to decide the issues set out in the agreed List of Issues. That means we have not necessarily made detailed findings about all the matters about which we heard evidence.

The credibility of the witnesses and the reliability of their evidence

17. Although the significant proportion of the interactions between the claimant and Mr Crowley-Sweet from 13 March 2018 were documented in the Bundle in the form of emails or meeting notes, it was a feature of this case that certain key events such as meetings in February 2018 between the claimant and Mr Crowley-Sweet were not documented or dealt with in the witness statements as clearly and comprehensively as might be expected.

18. The relative credibility of the witnesses we heard from and the reliability of their witness evidence was particularly relevant to two aspects of the case. First, some of the alleged detriments focussed on how Mrs Williams and Mr Crowley-Sweet communicated with the claimant (e.g. "curt dismissal" in 3(a)(i) and "disdain and contempt" in 3(c)(vi) in the List of Issues). Second, we needed to decide whether Mrs Williams and Mr Crowley-Sweet took certain actions because of the protected disclosures. In those circumstances we have decided it is appropriate in

this case to make general findings about the relative credibility of the witnesses and the reliability of their evidence.

19. In making those findings we have taken into account the length of time since the events about which he heard evidence. The incidents which happened before the claimant's sickness absence started on 13 March 2018 took place 4-5 years before we heard the witnesses' evidence about them. That inevitably impacts on witnesses' recollection of events.

The claimant

20. When it comes to assessing the claimant's credibility as a witness, we have been careful to bear in mind the effect of his disabilities on him. As we explained above, we made a number of reasonable adjustments to try and remove or alleviate the impact of the claimant's disabilities on him and ensure he could participate fully in the hearing. Despite that, there were times during his evidence where the claimant did experience symptoms such as brain fog or physical shaking. We bear in mind that even when there were no visible manifestation of his disabilities the claimant was having to cope with the challenges of dealing with his disabilities while giving evidence over a number of days in a stressful situation.

21. We find the claimant was a credible witness in the sense that he was sincere in the evidence he gave. He was not evasive and did his best to answer questions put to him in cross examination accurately and honestly. We find that he was genuinely and passionately committed to the issues raised in his protected disclosure and to his version of events. We find that resulted in a tendency on his part at times to become entrenched and unwilling to change his mind about matters or accept alternative explanations for events. That was reflected at the Tribunal hearing in an unwillingness to concede points put to him which were inconsistent with his version view of events unless he absolutely had to. That that tendency was in place back in early 2017 is, we find, reflected in the feedback provided by Mr Smith to the claimant at that time (p.563). It is also reflected in his email exchange with Ms Thorne about his 2016-17 box markings where he refers to the values of honesty and integrity which he says he and Ms Thorne share but which "do not seem to be valued despite the corporate rhetoric" (p.693). That unwillingness to accept alternative points of view or explanations of events which differed from his own reduced our confidence in the reliability of the claimant's evidence.

The respondents' witnesses

22. We found Mrs Williams to be a credible witness who gave direct and straightforward evidence. She was prepared to acknowledge situations where with hindsight she might have acted differently and willing to accept when she could not recall matters. We found her evidence reliable.

23. We found Mr Crowley-Sweet to a be a credible witness. He was straightforward in his evidence. There were some inconsistencies between his written statement and his oral evidence. We take into account that Mr Crowley-Sweet has dyslexia and the impact that might have, in particular on his written communication. In general we found his evidence to be reliable.

24. We found Miss Clayton's evidence to be less reliable. We found she had a tendency to be somewhat defensive in her evidence. Her credibility was damaged by the fact that her witness statement detailed her participation at the absence meeting in November 2018 which she accepted at the start of her oral evidence she had not attended.

Background Facts

The respondent and its operating context

25. The respondent is a government owned not-for-profit company responsible for operating, maintaining and improving England's Strategic Road Network ("SRN"), i.e. motorways and major roads. It is funded purely by taxpayers' money. It is awarded set amounts of funding by way of investment which must be used up the end of that financial year. If not used in full by the end of the financial year the funds must be returned. There is no provision for carry over of any residual funds unspent by the end of the financial year.

26. The respondent is answerable to the Department for Transport ("DfT") for how it uses its funding and for its performance in general. It is subject to an Operating Licence ("the Licence") which sets out how it should operate. What it is required to do is set out in the DfT's 5 yearly Road Investment Strategy documents ("RIS"). The RIS sets out Key Performance Indicators ("KPIs") and requirements with which the respondent must comply. Its performance in delivering the RIS and complying with the Licence is monitored by the Office of Rail and Road ("the ORR"). The ORR is an independent non-ministerial government department which has enforcement powers including issuing fines to the respondent.

27. Of relevance to this case, under the heading "Asset Management", the Licence provides:

- that the respondent must develop and maintain high quality and readily accessible information about the assets it holds and operates…, including their condition, capability, and capacity, as well as their performance, including against any expectations set out in a RIS (para 5.9)

- that the respondent must develop, maintain and implement an asset management policy and strategy… setting out how it will apply a best practice approach to managing the lifecycle of its assets, including maintaining a registry of its asset inventory and condition (para 5.10)

- that in complying with 5.9 and 5.10, the respondent should adopt a long-term approach to asset management consistent with ISO 55000 standards.

28. Part 7 of the Licence deals with "Collection and provision of data and information". It provides that the respondent must provide data or information on its performance in such form and manner and at such times as the ORR specifies.

29. The first RIS covered the Road Period from 2015/16 to 2019/20 ("RP1"). Part 3 set out the performance specifications the respondent was required to meet. The RIS for RP1 identified 8 areas on which the respondent was to focus. They included, for example, Making the Network Safer; Supporting the Smooth Flow of Traffic; and Keeping the Network in Good Conditions.

30. The RIS for RP1 set out KPIs for each of the 8 areas. Some, but not all, had specific targets associated with the KPIs. For example, for the Traffic Flow area a KPI was "Network Availability" with a target of maximising lane availability so it did not fall below 97% in any one rolling year.

31. For each area, the respondent was also to provide or identify further PIs. The area headed "Keeping the Network in Good Condition", which is particularly relevant to this case, provides an example. The RIS explains that there are five main classes of assets:

- Pavement (e.g. the road surface)
- Structures (e.g. bridges)
- Technology (e.g. overhead message signs)
- Drainage
- Geotechnical works (e.g. embankments).

32. The only KPI for this area was the percentage of pavement asset that does not require further investigation for possible maintenance, the target being maintained at 95% or above. However, the respondent was required to produce a suite of PIs to provide additional information on the asset condition of the SRN as a whole. The "Requirements" for this area were to:

- produce an implementation plan by 31 March 2016 to show how the respondent would improve asset information quality over RP1; and
- develop new condition indicators for Pavements and Structures for agreement by 31 March 2017 and complete validation of these by 31 March 2019; and
- develop new condition indicators for Technology, Drainage and Geotechnical Works for agreement by 31 March 2018 and complete validation of these by 31 March 2020.

33. The respondent and ORR agreed the appropriate metric and targets for the Roadside Technology Performance Indicator. That was the percentage availability of devices. There were different targets for 3 categories of technology assets:

- Control Centre (target 99.60% availability)
- Transmission (99% availability)

- End Devices aka Roadside Technology (97% availability)

34. The respondent was required to report monthly to ORR showing performance against the Technology Indicator. That was based on the data in the Availability Report which the claimant's team was responsible for producing on a monthly basis.

The claimant and his team

35. The claimant was employed by the respondent from 13 September 2010. From April 2015 he was promoted to a Team Leader Role at Pay Band 7. At the time of the incidents giving rise to this case he was Team Leader in the Continuing Service Improvement Team ("the CSI Team"). He remained employed at the date of the Tribunal hearing but had been on long term sickness absence since 13 March 2018.

36. The claimant is a Chartered Engineer which means he is bound to abide by the Rules of Conduct of the Institution of Engineering and Technology ("the IET Rules"). We find the claimant believed that he was personally liable (possibly criminally) if he did not take all reasonable care to limit any danger of death, injury or ill health resulting from his work or the products of that work.

37. In Spring/Summer 2016, Tony Malone ("Mr Malone") the respondent's Chief Information Officer made organisational changes which included setting up an Information and Technology Directorate ("the IT Directorate"). One of the 4 divisions within that directorate was the Information Management Division.

38. From early 2017 the Traffic Technology Division, in which the claimant's CSI team sat, became part of the IT Directorate. We find the team was moved into the Information Management Division because of its key role in providing the Availability Report and performance analysis to enable the respondent to report to ORR against the Technology Indicator.

39. The claimant was the delivery manager for the Technology Indicator. Completion of monthly reporting was a key deliverable in his objectives. In addition to its external reporting obligations, accurate data reporting on the availability and conditions of its Technology Assets was important to the respondent internally to inform decisions on investment and maintenance priorities. We find that assuring the accuracy and reliability of data led to delays in producing monthly reports and to reports having to be caveated in terms of the reliability of the data they contained.

40. His role also included objectives relating to data improvement (including production of a Data Improvement Strategy and review of the Asset Data Management Manual); and developing the respondent's asset management approach in line with ISO 55000. It is clear his team also had a "crisis management" role and were called upon to help dela with ad hoc tasks as they arose which tended to knock longer-term objectives off track.

41. The claimant had struggled to recruit suitably qualified staff to the team but in September 2016 he recruited 3 new staff members, 2 of whom were to assist with the asset management aspect of the team's work. Mr Smith was one of those recruited for that asset management work.

Events up to April 2017

Line Management

42. Prior to April 2017 the claimant's line manager was Julia Thorne, Head of Enabling Services. We find that the claimant had a good working relationship with Ms Thorne and that he appreciated her management style, which was collaborative and involved him deputising for her on occasion. It is apparent from her comments in the claimant's 2016-17 mid-year and year-end reviews that she thought highly of the claimant.

43. The claimant felt able to speak/email freely with Ms Thorne about his frustrations with the respondent. That is evident, for example, in their exchanges about his end of year rating for 2016-17 in which the claimant refers to being made a scapegoat; to a quota system being applied to end of year ratings; and to "honesty and integrity" not seeming to be valued by the respondent despite corporate rhetoric to the contrary.

44. Ms Thorne was not uncritical of the claimant, however, noting in her end -of - year review comments that the claimant "sometimes gets consumed in the issue [of the purpose of technology]; that it becomes unmanageable and that she has discussed with the claimant the need to be able to explain complex matters in a straightforward uncomplicated manner".

The claimant's concerns about the purpose of Technology Assets

45. In the claimant's 2016-2017 end-of year review (signed off in June 2017). Ms Thorne recorded that the claimant had for some time been frustrated with the "purpose" of Technology and how it was being reported against by the respondent (p.773). The claimant's concerns ultimately resulted in his making what are accepted by the respondent to be protected disclosures in April, July, September and October 2017.

46. In summary, the claimant's concern was that the metrics and performance indicators adopted by the respondent in relation to its Technology Assets did not sufficiently reflect the impact of those assets on road safety. The respondent's position was that while Technology Assets improved safety they were not safety critical, in that the roads would still be safe (as defined in its KPIs) even if those Technology Assets were not in place.

47. The claimant's conviction was that (at least some of) the respondent's Technology Assets should be regarded as safety critical. A prime example in his view was motorway signage on Smart motorways when all lanes are running. In those circumstances, the signage could be crucial in informing drivers that a lane was closed due to a broken-down vehicle or maintenance works being carried out. The claimant's view was that the safety critical nature of Technology Assets meant that if there was a death on the SRN as a direct result of a Technology Asset failure, the respondent could face charges of corporate manslaughter. On a personal level, his view was that as a Chartered Engineer he would be personally liable in such circumstances.

48. The claimant's view was that the Technology Performance Indicator against which the respondent reported should be revisited to be made more meaningful but that could only be done once the respondent had revisited the purpose of its Technology Assets. Only by agreeing the purpose of its Technology Assets could the respondent decide which metrics were appropriate to measure the assets effectiveness against that purpose. The claimant also saw defining the purpose of the Technology Assets as a necessary pre-condition of the work which he and his team were required to do on developing the respondent's Asset Management approach in compliance with ISO 55 000.

49. By April 2017 the claimant had put forward this position Mr Malone and in responses to requests for feedback from colleagues developing other standards, metrics and manuals for the respondent. That included the internal Smart motorways metric. The claimant raised his concerns about how that metric was developed in what the claimant described as "quite firm" terms in an email to Steve Elderkin, the respondent's Chief Analyst, on 21 March 2017. The claimant reported to Mr Elderkin that concerns the CSI team had raised in relation to the new metric (including its potential for giving rise to unknown perverse behaviours) had been ignored, with the claimant being informed that while the concerns were valid, they "just had to deliver something". The claimant's email suggested that the metric was set without sufficient regard for the public interest. The claimant's proposed solution included for Mr Elderkin to consider how the metric was to be used and to "help [the respondent] to live by its corporate values by allowing due process to be given on the conducting of metrics". We find that reflected the fact that the claimant's concern was with what he saw as the organisational culture of the respondent as well as the specific issue of the metric. The claimant's concerns were not alleviated by Mr Elderkin's email in reply nor by what he said at a subsequent meeting with the claimant. We did not have Mr Elderkin's version of that meeting but the claimant reported to Mrs Williams and Ms Thorne that Mr Elderkin had said that the Board had a right to demand a metric and the decision on it had been made above the claimant's paygrade.

The claimant's 2016-2017 sickness absence and return to work

50. The claimant was absent from work due to stress from October 2016 until February 2017. That involved two periods of absence, the first from October to early November 2017 and the second from late November 2017, the claimant having attempted to return to work in between. The claimant's evidence was that the focus of the stress which caused his sickness absence was not being able to resolve the concerns outline above. He decided that addressing those concerns would assist his health on his return to work.

51. The move of the CSI Team to the Information Management Division happened during the claimant's sickness absence. His line management should have transferred to Mrs Williams on his return to work in February 2017. However, to ensure some continuity for the claimant Ms Thorne initially remained his line manager until the financial year starting April 2017. There was a period of overlap with Ms Thorne signing off the claimant's 2016-2017 end of year review in June 2017 but with Mrs Williams and the claimant being in touch from around the end of March 2017.

Events from April 2017 to October 2017 – protected disclosures, line management by Mrs Williams and the ILG meetings

The Protected Disclosures

52. The respondent accepts that the claimant made protected disclosures (PIDs) in 2017. For the purposes of his claim the PIDs relied on were:

- The submission of 2 documents. One was called "Defining the Purpose of Traffic Technology" and the other "Background to Purpose". The first was sent to Mr Malone, Mrs Williams and James Findlay of the respondent by email on 21 April 2017 (PD1a) (p.614) and the second was sent to Mr Malone, Mrs Williams and members of the Information Leadership Group ("ILG") on 6 July 2017 (PD1b) (p.708); and

- Presentations made by the claimant to the ILG at its meetings on 5 September 2017 (PD2a) and 3 October 2017 (PD2b).

53. Because the respondent conceded these were PIDs we did not hear detailed evidence about them or detailed discussion of their contents. In summary, they reflected and explained the claimant's concerns which we summarised in paras 45-49 above. The "Defining the Purpose" document also included a recommendation section which proposed that the CSI Team explore a number of areas in order to clarify the purpose of the respondent's Technology Assets (p.617-618). Those areas were broad ranging including determining the risk appetite at board level; identifying organisational and cultural changes required; the role of safety; smart motorway operating requirements; and developing appropriate metrics arising from the determined purpose.

54. It is not part of the Tribunal's role in this case to determine whether the concerns raised by the claimant were correct. It is clear that they were sincerely and deeply held on his part. We can understand the logic of needing to establish the purpose of assets in order to measure their effectiveness in achieving that purpose and determining how to manage those assets. We can also understand the point the claimant makes about the contribution of Technology Assets in reducing the risks to the safety of those using and maintaining the SRN.

55. What we do find is that the claimant's recommendations in the "Defining the Purpose" document are illustrative of a difference in point of view between the claimant and Mrs Williams and Mr Crowley-Sweet when it came to the role and priorities of the claimant and his team.

56. First, those recommendations proposed that the CSI team would take the lead in clarifying fundamental questions about how and why the respondent operated. The recommendations themselves acknowledge that the outcome of the proposed work could be organisational and cultural change. Those could be profound if one outcome of the proposed work was to determine that the Technology Assets were indeed safety critical. We find that in the view of both Mr Crowley-Sweet and Mrs Williams it was perfectly in order for the claimant to raise concerns about safety and the purpose of Technology Assets but that making those

fundamental strategic decisions about the respondent's organisation and ways of working was for senior management and not for someone at the claimant's level of accountability and responsibility.

57. Second, the recommendations envisaged the CSI team exploring and conducting research into broad strategic areas. We find that the claimant saw a key part of his team's role to be "thought leaders" on the development of the respondent's compliance with ISO 55000 and in developing the future Technology Performance Indicators. We do find the claimant devoted a significant part of his energies to this aspect of his team's role because it dovetailed with his concerns about safety and the role Technology Assets played in that. In contrast, we find that for both Mrs Williams and Mr Crowley-Sweet the priority for the CSI Team was the more immediate task of ensuring that the respondent had reliable and meaningful data about its Technology Assets to help it manage its business, with that data presented in the most helpful form for colleagues, primarily via the Technology Availability Report. In broad terms there was an underlying contrast and on occasion conflict between the more long-term quasi-academic "thought leadership" work and the need to provide data and reports which contributed to day-to-day operations in the here and now.

Line Management by Mrs Williams

58. The claimant alleged that Mrs Williams subjected him to a lack of support in the period February 2017 to December 2017. Specifically, he alleged that Mrs Williams failed to answer or attend regular catch-up meetings or calls.

59. Mrs Williams line-managed the claimant for a period of 8 months from April to December 2017. She was the respondent's Head of Information Management. Following the re-organisation implemented by Mr Malone, she was managing 2 teams new to her and had 9 direct line reports including the claimant. She was not familiar with the work of the CSI Team. We find she was overstretched in terms of her management responsibilities and was reliant on her line reports to bring her up to speed about their work. She accepted she was not an expert in the areas of work covered by the teams she was managing. We find that Mr Malone had made it clear to her that a priority was ensuring that the respondent was improving the data the respondent was collecting about its assets and making good use of that data. We find Mrs Williams saw improving the Technology Performance Report for which the claimant had responsibility as a priority.

60. Mrs Williams set up regular 1-2-1 catch-ups with her line reports on a weekly or fortnightly basis including the claimant. However, Mrs Williams accepted that she had had to postpone some meetings or calls with the claimant and there was evidence of her doing so in emails in the Bundle (e.g. pp.644 and 898). That evidence showed her on at least some occasions letting the claimant know in advance of postponements, explaining why she needed to postpone or push back. In those emails she encouraged the claimant to raise any burning issues and/or suggested alternative times or dates to catch-up. At least one of those postponements was in March 2017, before the first protected disclosure (p.586). We find that those meetings were cancelled because Mrs Williams's managerial commitments left her overstretched. She had to cancel meetings with other line

reports for the same reason. Mrs Williams was candid in her evidence that due to the number of emails she received on a daily basis, some "slipped through the net". She was not based in the same office as the claimant which meant there were fewer opportunities for ad hoc face to face get togethers than there were for those of her line report based in the same office.

61. The claimant in evidence accepted that some catch-ups with Mrs Williams did take place. We also accept Mrs Williams's evidence that in addition to regular 1-2-1 catch-ups she and the claimant had ad hoc informal catch-ups but that these were not documented. Although there were no notes of those meetings there was reference to such discussions in email exchanges in the Bundle.

62. We do find that the claimant's working relationship with Mrs Williams was not as close the claimant's relationship with Ms Thorne had been and that he found her management less conducive. We find there were a number of reasons for that. In no particular order, they were that Mrs Williams line managed the claimant for a relatively short period of time compared to Ms Thorne; that the competing demands on her time meant she did not have as much time to devote to building that relationship as she would ideally have liked; that she was dealing with the disruption caused by the reorganisation and ongoing tasks relating to it; and that her remit was broad and covered areas in which she did not have expertise.

63. We find that at times Mrs Williams found it difficult to understand what the claimant was trying to say. This was something which Ms Thorne fed back to the claimant in June 2017 (p.663). We find that this was partly due to what Mrs Williams acknowledged was her lack of technical expertise in the work covered by the CSI Team. However, we also find it was partly due to the claimant at times struggling to communicate his ideas in plain English to those not as expert or engaged with issues or areas as himself. Ms Thorne's suggestion was that he try and "dumb it down" when talking to Mrs Williams. We find that was an issue which Ms Thorne had raised with the claimant in his 2015-16 Performance Review (pp.204-2018), noting a tendency on his part to "dump" information" and tell everything he knew when asked about something and needing to be more specific and concise in imparting information. That need to be specific and concise was particularly pertinent in his dealings with Mrs Williams given how overstretched she was and the limited time she had to devote to each line report.

64. We find that Mrs Williams was clear from her steer from Mr Malone that the priority for the claimant's team was to produce and improve the monthly report (see, e.g. p.758). She was less interested and, by her own admission, understood less about the Asset Management aspects of the CSI Team's work. When it came to those aspects, she deferred very much to Mr Malone who had a better understanding of the issues in general and the claimant's perspective on it from their previous interactions. That applied also to the subject matter of the claimant's PIDs.

The presentation to the ILG Meetings

65. Mr Smith in his performance review feedback to the claimant in March 2017 said that the claimant's focus on what he believed to be correct sometimes led to his being perceived as being unwilling to change his mind and being entrenched and unable to see another option (p.563). We find that by April 2017 that perception

reflected the reality of the situation. Mrs Williams in her evidence described the claimant as being fixated with the issue of defining the purpose of roadside technology. She acknowledged that was a strongly worded description. The claimant's own evidence was that when he returned to work in February 2017, he was passionately committed to resolving the issues he set out in the PIDs. We find that by April 2017 he was convinced that resolving the "Purpose" issue was important in order for his team to achieve its objectives. We also find that he felt he needed to resolve his concerns about safety criticality and his potential personal liability to his satisfaction because he had identified those as the root causes of the stress which led to his sickness absence in 2016-2017. We find that he was seeking to position his team as the team to provide the answers to the issues he was raising.

66. Mrs Williams was concerned that the claimant's focus on defining technology purpose was getting in the way of delivering on tasks like improving the monthly reporting for which his team was responsible. We find she made her perspective clear to the claimant in catch-ups with him. We do not find that Mrs Williams was unsupportive when it came to the claimant pursuing the matters raised in PD1a and PD1b with Mr Malone and via the ILG. We do find it was Mr Malone who took the lead in the exchanges with the claimant. We find that that was because of his familiarity with the issues and because he was chair of the ILG. The ILG was a sub-group of the respondent's Executive Committee. It was made up of the respondent's Senior Leadership Group and Executive Directors, i.e. colleagues senior to Mrs Williams.

67. Following the claimant's email of 21 April 2017 (PD1a) Mr Malone asked Mrs Williams to arrange a meeting for them and the claimant. That meeting took place on 23 May 2017. Mr Smith also attended. It was agreed that the claimant would arrange a slot at a forthcoming ILG meeting to raise the subject of purpose in a "conversational way".

68. The claimant attended the ILG meeting on 5 July 2017 but there was no time to hear the claimant's item. The claimant shared the Defining the Purpose and the Background documents by email, having provided paper copies to those in Birmingham where he attended (pp.707-708). It was agreed that the claimant would present his paper at the next ILG meeting over an hour-long slot. Following a further conversation between the claimant and Mr Malone in August, however, it was agreed that the presentation would be split into two. There would be a 30-minute presentation on papers PPD1a and PD1b at the September ILG followed by a 30 minute presentation of a case study at the October ILG. The case study was intended to highlight the real impact of the issues the claimant was raising (p.857).

69. The September ILG meeting was chaired by Mr Malone. The claimant raised no complaint about his treatment at that meeting. The claimant was due to attend the October ILG meeting to present his case study. His evidence was that it was difficult to provide a formal case study so he tried instead in his presentation for that October meeting to further explain the nature and seriousness of his concerns.

70. We accept Mrs Williams's evidence that she spent a couple of hours with the claimant and Mr Smith in Birmingham between the two ILG meetings providing feedback on the proposed presentation. As a regular attendee at ILG meetings she

was well place to advise the claimant on ILG as an audience. She was concerned his proposed presentation was too complicated. She suggested that the claimant keep his presentation simple and jargon free to maximise his chance of getting his points across to the ILG members. We find the claimant did not take on board those suggestions.

71. Mr Malone was absent from the October ILG meeting so it was chaired by Mrs Williams. We find that put her under a degree of pressure because the majority of the attendees were senior to her. We find that the claimant's presentation did not go well. We find that he "lost his audience" and was unable to get across quickly and simply the points he was trying to make. One of the members of the Senior Leadership Team made it clear she was finding it difficult to follow what the claimant was saying. Other members of ILG, including Mike Wilson, the respondent's Chief Engineer, made it clear to the claimant that the matters he was raising were already being dealt with as part of Mr Wilson's area of responsibility, in particular through the Technology Maintenance and Management Manual.

72. We find that Mrs Williams decided that she needed to move matters on. It seems clear to us that she had taken the view that the claimant was floundering and that it served no purpose to prolong his slot. We find that she was particularly aware that she was acting up as chair and that her performance in that role was under scrutiny given that the meeting involved a number of senior managers. We find that to some extent she was sparing the claimant's blushes by bringing the item to an end and moving on.

73. As to the allegation that she then "advocated and championed" the next agenda item raised by another member of her team, we find that Mrs Williams did seek to re-energise the meeting after the claimant's presentation had not gone well. We do not find that she did so in the polarised sense suggested in the particulars of claim, i.e. that she "curtly" dismissed the claimant's presentation while "advocating and championing" the next item. We find instead that what she was seeking to do was to get the meeting back on track.

74. We also accept Mrs Williams's evidence that after the meeting she had a "debriefing" with the claimant. The claimant expressed the view to her that he felt as though he had been "put back in his box". In response Mrs Williams reassured him that he had done all he could do in terms of raising his concerns and that it was now time to let others with the appropriate expertise and remit to deal with the issues he'd raised.

<u>Events in October 2017 and November 2017 – Mr Crowley-Sweet's appointment and its context</u>

75. Mr Crowley-Sweet was appointed as the respondent's Chief Data Officer from 4 December 2017. The Chief Data Office ("the CDO division") was one of 5 divisions created as a result of a further restructuring of the Information Technology Directorate in the second half of 2017. The claimant in August 2017 took the view that the 2 core functions of the CSI Team (Asset Management and Performance Management) fell under different divisions. Asset Management fitted best in the "Technology Commercial and Strategy" division, but Performance Management fitted best under the CDO Division (p.1100).

76. In the new structure, Mrs Williams's role became that of Head of Data Governance and Strategy, reporting to Mr Crowley-Sweet. Three further roles were to be created at her level (Pay Band 8) in the CDO Division also reporting to Mr Crowley-Sweet. As at December 2017 those Band 8 roles were not in place so when Mr Crowley-Sweet took up his role the claimant reported directly to him.

77. Although Mr Crowley-Sweet did not officially start until December 2017 he was getting up to speed with the respondent and its business by November 2017. He was in touch with Mrs Williams and she was sending him information such as role profiles for the team members by 10 November 2017 (pp.1024-1025).

78. Mr Crowley-Sweet joined a call with Mrs Williams and her team on 20 November 2017 to introduce himself and to talk through the Digital, Data and Technology professionals pay framework (DDAT). That framework was introduced by the Treasury with the aim of identifying and providing enhanced pay and rewards for critical DDAT roles across the civil service. The aim was to improve recruitment and retention and reduce reliance on costly interim contractors. The respondent was aiming to align relevant role profiles with the DDAT framework. DDAT was particularly relevant to the roles in the CDO Division including the claimant and his team's.

79. In October 2017, Stephen Bagley, the Records Management Lead for the IT Directorate, had alerted Mrs Williams to the fact that some role profiles, including the claimant's, had not been updated when the respondent had carried out a regrading exercise. He undertook to "translate" the claimant's role profile onto the new layout so that it fitted with those already updated (p.944). He sent the new profile to Mrs Williams on 10 November 2017. The updated role profile had the job title "Lead Technology Asset Improvement Manager" rather than "CSI Team Leader" (p.1026). It appears to us that this was a separate "tidying up" process to bring the role profile into line with a new layout already used by the respondent following its re-grading exercise rather than aligning the claimant's role profile to the DDAT Framework which happened later.

80. During this period the claimant was awaiting the outcome of a request for additional staffing resource for his team, including an additional performance analyst at Pay Band 5/6. He had first submitted that request to Mrs Williams in July 2017 and reiterated and updated it in August 2017 (pp.1091-1101). He had chased her for a decision in September 2017 and was still awaiting a response by the time Mr Crowley-Sweet started in his role.

81. The claimant did continue to pursue the issue of the purpose of technology and the scope of the respondent's liabilities after the October ILG meeting. He let Mr Malone know on 9 November that he had bumped into Jim O'Sullivan, then Chief Executive of the respondent, who had suggested the claimant make an appointment with Mr O'Sullivan to discuss the "purpose" issue. It does not appear that meeting took place. It is not clear whether Mrs Williams was aware of this (p.1021). The claimant also met with Melanie Brookes, a lawyer with the respondent to pursue the issue of the respondent's liability if technology failed to prevent a serious road incident (p.1022-1023).

82. The claimant was the project sponsor for a project called TTAMS (Traffic Technology Asset Management Strategy) with the Project Identification Number (PIN) 551782 which had a budget of £300,000 for the financial year 2017-18. By October 2017 none of that budget had been spent. The claimant and his team had by November/December 2017 identified 3 projects which they wanted to carry out to develop work on Asset Management. They were a knowledge management feasibility study ("the KM project"); a tactical asset management project ("the TAM project"); and an analytical support project ("the AS project").

83. The claimant's intention was that the proposed projects would be undertaken under the Traffic Technology Operating Centre ("TOC") project for which the project sponsor was Matthew Bayliss, TOC Delivery Team Leader ("Mr Bayliss"). An engineering and environmental consultancy firm called WSP had been appointed to provide support and consultancy services in the delivery of the TOC project under a framework agreement. WSP's status as pre-existing suppliers meant that contracts for tasks under the TOC project would not have to go through a tendering stage once internal approvals had been obtained.

84. On 20 October 2017 the claimant wrote to Michael Oates (IT Assistant Finance Business Partner) ("Mr Oates") asking him to "distribute" £250,000 of the claimant's TAMMS budget (p.964-965). £200,000 was to be transferred to the TOC project to cover the budget for the 3 projects. Another £50,000 was to be transferred to the Asset Information Group ("AIG") to assist with the funding of their work which aligned with the CSI team's objectives. That would leave £50,000 on the TAMMS PIN to support what the claimant referred to as a new task which he and the team were developing and which they also anticipated would be carried out on the TOC project.

85. On 1 November Mr Oates confirmed that the IT division could only fund work done by AIG if that work had been approved by the IT Investment Decision Committee ("IDC"). That meant that the AIG work the claimant was proposing to fund from the TAMMS budget would have to go through the IT assurance and approval process.

86. These various strands – the re-structure, role profiles, resources, finances and projects continued throughout the period of "active" line management of the claimant by Mr Crowley-Sweet (i.e. from December 2017 until the start of the claimant's extended sickness absence on 13 March 2018). We deal with that period in the next section of our findings.

Events from December 2017 up to 13 March 2018 – from Mr Crowley-Sweet taking up his role as CDO to the start of the claimant's sickness absence

87. Rather than set out our findings of fact for this period as a chronological narrative we have set them out under headings related to the strands mentioned in the previous paragraph. That is because those various strands criss-cross chronologically. It makes more sense for us to follow each strand through to its conclusion. At the end of this section of our judgment we set out our findings about the working relationship between the claimant and Mr Crowley-Sweet during this period, including events surrounding the meeting with the ORR on 12 March 2018 and their discussions about the protected disclosures. First in this section we set

out our findings about the context for the events during this period. That includes our findings about what Mr Crowley-Sweet knew about the claimant and the protected disclosures.

The organisational context

88. Mr Crowley-Sweet started in his role as CDO on 4 December 2017 and became the claimant's line manager from that date. By way of overview, we find that in December and over Christmas Mr Crowley-Sweet was getting to grips with what the CDO Division was expected to deliver, the policies and practices it applied in delivering and how it fitted in with and how it was viewed by other parts of the respondent's organisation. Alongside that, the impending 2017-18 financial year end in March 2018 meant there was a need to review the division's finances to ensure they were on track. There was also a need to put together business cases for resource for the 2018-19 financial year.

89. When it comes to what Mr Crowley-Sweet knew about the claimant before he started line managing him, we find that he was aware from discussions with Mr Malone and Mrs Williams about the presentation the claimant had made to the ILG on October 2017. We find he was aware that the presentation had not gone well and that his view was that this had damaged the claimant's reputation (and by extension that of the CDO division). We accept his evidence that that damage was in his view due to the way the presentation had been made rather than the issues the claimant was seeking to raise. We also find that Mr Crowley-Sweet's view from discussions with Mr Malone was that the issue of asset management was something being dealt with by Nicola Bell and her division and was not a matter for the CDO Division (and by extension the claimant) to deal with. We do not accept that Mr Malone or Mrs Williams had marked out the claimant as "hard work" or a potential problem in those initial exchanges with Mr Crowley-Sweet.

90. More generally, we find that Mr Crowley-Sweet's view by January 2018 was that the CDO Division had ground to make up in persuading the respondent's senior management it was capable of fulfilling the central role in the organisation he envisaged it having. One aspect of that was the need to be more business-like in its approach to finance and HR matters. Another was in terms of improving delivery by focussing on the key priorities. We find his concerns related to the CDO Division as a whole. When it came to the claimant's team we find that Mr Crowley-Sweet was genuinely concerned that delays and caveats about reliability of performance data were undermining the respondent's executive team's faith in the performance reports being provided.

91. At the CDO management away day on the 18 January 2018 Mr Crowley-Sweet set out his vision of what he wanted the CDO Division to be and the challenges he felt had to be addressed to achieve that vision. He stressed the key role of good data and information management in informing business decisions and identifying risks. As the technical leadership for data and information for the respondent he said that the wider business was looking to the CDO for the vision, strategy and roadmap for how it all connected together. However, he warned that to earn the trust of the business to lead on this they needed to get some of the basics of running a business right. He highlighted the need to have Finance and HR

Management at the forefront of thinking. He said firefighting had to stop and that there should be focus on a few "big ticket" items and doing them properly rather than delivering a lot of things half done. He stressed the need for accountability, including holding each other to account as peers and the need for leadership (p.1404-1405).

92. By January 2018 Mr Crowley-Sweet was also setting in place the management structures for CDO including monthly, day-long CDO Leadership meetings and monthly 1:1 performance review meetings face to face with his line reports.

93. We find that Mr Crowley-Sweet's management style was very different to that of Mrs Williams and in particular to that of Julia Thorne. He was more likely than the claimant's previous managers to directly challenge his line reports when they did not meet his expectations. Mr Crowley-Sweet's written communication style was short and to the point. We find that was partly a reflection of his general management style, partly due to his dyslexia (which meant he kept written communication short) and partly a reflection of how busy he was and the fact that he was often sending emails from his phone rather than when at his desk.

94. This period was also a pressurised one for the claimant. He was adjusting to his third different line manager in a year, dealing with impact of the restructuring and proposed new role profiles. There was a meeting with ORR due in March 2018 to discuss the technology metric and pressure to deliver availability and performance reports in circumstances where the data on which those reports relied was flawed and unreliable. In addition, we find the claimant was still concerned about the issue of safety criticality and was pursuing this with colleagues in other teams, e.g. re-checking the position in terms of the respondent's duty of care/legal liability with the respondent's legal team on 11 January 2018, when he sent them a coroner's report relating to an incident on the M5 (pp.1383-1403).

Finances

95. By 15 December 2017 Mr Crowley-Sweet had reviewed the financial position for the CDO Division for 2017-18. He emailed Robert Greaves, Head of Strategy, Governance & Commercial to say he was "a little alarmed" by what he'd seen. The full year budget for 2017-2018 for his division (formerly held by the Information Management division) was £6.5m. There was forecasted spend of £4.7m across the division. That left £1.8m as a potential underspend.

96. Mr Crowley-Sweet was concerned that that money would not be spent on projects in 2017-2018. The respondent's approval process for projects involved a number of internal approval steps (including by the relevant IDC). After those approvals the respondent had to put the project out to tender (unless it was within the scope of a framework contract with a pre-existing supplier). Given that it was not long until the end of the financial year and that the next IT IDC was not until January 2018, Mr Crowley-Sweet doubted that any projects approved by the IDC in January 2018 could be procured until March 2018 leaving one month to deliver £1.8m worth of commitments.

97. We find Mr Crowley-Sweet was concerned about financial accountability including his own personal accountability as the ultimate budget holder for the CDO

division. This issue was a particular concern because the respondent operated on an “annual investment cycle”. That meant that the respondent was not permitted to carry any money over from one financial year to the next. If budget allocated to the CDO division was not going to be spent by the end of the financial year it would have to be returned to the respondent’s Central Finance team (“Central Finance”). It could then be re-allocated by Central Finance if another part of the respondent needed additional budget for 2017-18.

98. This meant it was important to be sure whether the apparent underspend in the CDO Division was an actual underspend. If it was not (because some or all of a project budget had in fact been spent or committed to a contract) the CDO division might be returning budget to Central Finance for re-allocation on the basis it was uncommitted when it had actually been spent. That might end up with the CDO division not having the budget to pay for contracted works. Mr Crowley-Sweet asked Mr Greaves to send him the contracts relating to a list of 10 projects where the position on spend against budget was not clear. They included 8 projects for which Mrs Williams was the project sponsor, one project sponsored by another manager and the claimant’s TTAMS project (PIN 551782) (p1284-1285).

99. Despite the claimant’s request to Mr Oates on 20 October 2017 to transfer budget from his TTAMS project budget, as at 15 December 2017 the TTAMS project budget still showed as the full £300,000 with no forecast spend against it. Mr Crowley-Sweet asked the claimant about this at a catch-up meeting on 20 December 2017. The claimant explained that he had asked for £250,000 of the budget to be transferred to the TOC project and to AIG and forwarded the 20 October 2017 email to Mr Crowley-Sweet.

100. On 21 December 2017 Mr Crowley-Sweet asked Mr Oates and Jennifer Blackwell of the finance team to clarify the position. He could not understand why the £300,000 was still showing up on a CDO Division project if it was actually going to be spent by a team outside his accountability as CDO. He was concerned about managing his division’s budget and expenditure if he could not be sure how much budget was actually uncommitted. He asked that the budget be adjusted if the moneys had been allocated elsewhere (p.1288-1289).

101. Mr Oates responded to Mr Crowley-Sweet on 29 December to say that budgets were set at the start of the financial year and not changed. He confirmed that the claimant was reporting a £0 full year forecast against his TTAMS project budget (p.1331). Mr Crowley-Sweet was not satisfied with that response and made clear to Mr Oates and Ms Blackwell that he needed more clarity about where the £300,000 from the TAMMS budget had been transferred to so that that there weren’t any “nasty surprises” at year end, i.e. being invoiced for work delivered against a project line that had no budget. The email exchange was copied to the claimant but it does not appear to us to criticise him (pp.1334-1337).

102. Mr Crowley-Sweet’s concern about financial management was reflected in his proposed agenda for the first CDO division senior management team away day in Leeds on 18 January 2018 (p.1338). In an email the day after that meeting he asked the senior management team to review their finance lines because he needed

to understand if there were any contractual obligations they had where the finances were not accounted for (p.1412).

103. The claimant, Mr Crowley-Sweet and Mr Oates had a further meeting on 29 January 2018. By 1 February 2018 Mr Smith had confirmed to the claimant that the 3 projects (discussed below) had not received the necessary approvals to proceed. The claimant set up a telephone meeting on 2 February 2018 to discuss the 3 projects and finances (p.1497). The claimant's case is that he was expecting that to be a 1:1 meeting but Mr Crowley-Sweet had asked Mr Oates and Ms Blackwell from the finance team to attend. At that meeting Mr Crowley-Sweet confirmed that the 3 projects would not be going ahead and that the £300,000 TAMMS budget would be returned to Central Finance. We find that Mr Crowley-Sweet accepted that the claimant had been allocated the TAMMS budget although it was not clear to him how the project fitted in with the claimant's duties. We find his genuine belief was that there was not sufficient time for the claimant to obtain the necessary permissions to allow the projects to be completed by the financial year end.

104. The claimant's case is that Mr Crowley-Sweet treated him with "disdain and contempt" during that meeting and that Mr Oates and Ms Blackwell had been invited to join the call to witness Mr Crowley-Sweet dressing him down. Mr Crowley-Sweet's evidence, which we prefer, is that he had invited the members of the finance team because their expertise was relevant to the matters to be discussed. There was no contemporaneous record of that meeting in the Bundle. We accept that Mr Crowley-Sweet did criticise the claimant and his team at that meeting for failings in financial and internal governance. That seems to us consistent with the email exchanges that precede it and the fact that the claimant and his team were required to undertake training on the end-to-end review process (p.1545) as an outcome from the meeting.

105. Although we accept Mr Crowley-Sweet was critical of the claimant we do not, however, accept that he spoke to the claimant with "disdain and contempt". We accept Mr Lewis's submission that the claimant had a propensity to be disproportionately impacted when he was challenged or criticised. The meeting on 2 February 2018 took place immediately after a terse exchange with Mr Crowley-Sweet about Mr Sheppard's impending paternity leave. We find that that context, together with the claimant's view that the 3 projects were being halted despite his having followed the internal governance processes as he understood them, led to his being disproportionately impacted by Mr Crowley-Sweet's holding him to account at that meeting.

106. During the Tribunal hearing the claimant confirmed in answer to the Judge's question that although detriment D6 appeared to quote Mr Crowley-Sweet saying that his team's resource requirement had been "made null" he was not suggesting Mr Crowley-Sweet had used that phrase in any meeting with him.

The 3 Projects

107. As at early December 2017 the claimant and his team understood that the 3 projects either had or were going to get the go-ahead. The KM project was the most advanced with the claimant and his team understanding that this would be carried out by WSP under the TOC framework contract. The other 2 projects were not as advanced but again the claimant and his team understood they would be undertaken

by WSP under the TOC framework contract. Scope of Work documents had been drafted for the 3 projects in November 2017 and on 19 December 2017 Mr Smith sent them to Laurelle Wellinger at WSP (p.1160).

108. Mr Smith met with WSP on 11 January 2018. By then Mr Crowley-Sweet had raised his concerns with the claimant about the financial position. The claimant had shared those issues with the team and on 8 January 2018 Mr Smith emailed the claimant in advance of meeting WSP to check "what we can and can't do" (p.1345). Mr Smith did not get the clarity he was hoping for and so focussed the discussion with WSP on the KM Project which he was more confident would be going ahead (p.1357).

109. On 23 January 2017 Ms Wellinger of WSP emailed Mr Smith explaining that there was a need to put a task order together to procure work under the TOC framework contract. She sent though a draft scope of task order relating to the KM project explaining she would add the other 2 tasks once they were approved (p.1452). Mr Smith confirmed in response that the other 2 tasks were either paused or awaiting approval. We find that at that point WSP understood that only the KM project was definitely proceeding, with the other 2 tasks awaiting (albeit anticipated to get) approval.

110. On 30 January 2018 the claimant emailed Mr Smith and Mr Simmonite (who were leading on the projects in his team) to say that he understood that they had the approvals for the projects and asking them to re-forward the appropriate emails so he could forward them to Mr Oates (p.1464). We find that request followed on from the meeting the claimant, Mr Oates and Mr Crowley-Sweet had had on the previous day to discuss finances.

111. Mr Smith responded on 31 January 2018 to say that he could not find a direct email providing approval only one from Mr Bayliss and that he was not sure they had officially approval through the IDC. The following day he emailed the claimant to confirm that none of the 3 projects had been put forward to IDC. It appears there was a backlog of business cases due to the new approvals process and the 3 projects had been caught up in the backlog. (p.1474).

112. That, we find, led to the claimant emailing Mr Crowley-Sweet to set up the meeting on the 2 February 2018 discussed above. In his invitation to that meeting the claimant explained that he wanted to discuss the tasks which he described as having been "in the pipeline for a while and the only communication has been positive but we have not had an official affirmative yet." He explained the work was required by the TOC project and had been earmarked as being delivered through it (p.1497).

113. We have set out our findings about that meeting at paras 103-106 above. After the meeting the claimant contacted WSP to tell them that they were no longer in a position to proceed with the 3 projects. He confirmed the position by email to WSP that afternoon. He also relayed the decision to Mr Bayliss and confirmed to Mr Crowley-Sweet and Ms Blackwell that there was no executed Task Order so any forecast spend was removed.

114. We find that the claimant found the decisions made at the 2 February 2018 meeting and the criticism of him and his team at that meeting difficult to deal with. That was both in terms of its impact on what he thought his work was going to be for the rest of the financial year and on a more personal level because he had to tell WSP that they were no longer going to be carrying out the planned work.

Role-profiles, priorities and team resource

115. During the first few months of his appointment, one of Mr Crowley-Sweet's priorities was to implement the re-structuring as it impacted on the CDO division. We find that from his point of view that meant he needed to ensure that the appropriate management structure was in place; that everyone in the division was on appropriate (DDAT where relevant) role profiles for the new structure; and that the work everyone was doing was furthering the CDO division's priorities. He was keen to show ILG and eternal stakeholders that the CDO Division could deliver. He was clear that to do that there needed to be focus on delivering a few things well rather than half-doing too many things and firefighting.

116. As we have already said, discussions about the claimant's team's profiles had been ongoing from before Mr Crowley-Sweet took up his role. On 24 November 2017, following a discussion with him, the claimant sent Mr Crowley-Sweet role profiles for the Performance Analyst Job Family. He sent 2 version of each-one as per the respondent's recent pay and grading review and one a DDAT version. (p.1048). Discussions about the role profiles continued in December 2017.

117. On 12 December 2017 the claimant emailed Mrs Williams and Mr Crowley-Sweet to say that (as discussed with Mrs Williams) the members of his team were not comfortable with an amalgamated role profile. Specifically, the Pay Band 6 members felt there was a difference in the skill sets and requirements of Mr Sheppard, who dealt with performance analysis and his colleagues dealing with asset management (p.1102). The claimant had therefore drawn up a "Lead Business Analyst – Asset Management" role profile. The claimant said that out of the two DDAT role profiles he would tend to lean more towards the Business Analyst side not the Performance Analyst.

118. Mr Crowley-Sweet responded on the same day explaining the role profiles were not intended to define objectives. He confirmed that "ultimately we are in the performance analysis space". He suggested that it was best if he and the claimant and Mrs Williams talk through the issues. There was no evidence of the claimant raising concerns about the role profiles beyond that email of 12 December 2017.

119. It is not clear when the role profiles were finalised. The issue of transitioning to new role profiles was on the agenda for the CDO Leadership Team Meeting for 6 March 2018 (p.1542) so appears to have been ongoing then for the division as a whole. It is clear, however, that Mr Crowley-Sweet's view was that the claimant's role was a performance analyst one and that the "asset management business analyst" role was something which fell outside the CDO Division and did not reflect the claimant's role within the division. The role profile sent to the claimant following the absence management meeting on 21 November 2018 was a Principal Performance Analyst one (p.1691).

120. As we have noted above, the claimant in his August 2017 paper on recruitment and resourcing for the CSI team had taken the view that the 2 core functions of the CSI Team (Asset Management and Performance Management) fell under different divisions, with Performance Management fitting under the CDO Division but Asset Management fitting elsewhere (p.1100). We find that Mr Crowley-Sweet agreed. His view was that asset management did not fall within remit of the CDO Division. Where they differed was that Mr Crowley-Sweet's view was that the CSI Team was part of the CDO Division so its role was performance analysis and it was for someone else in another division (probably Nicola Bell's team) to deliver the asset management work. He wanted the team's role to change to fit the CDO Division's remit whereas the claimant wanted the division in which the team sat (or the asset management part of it) to change to fit the role.

121. On or around 19 January 2018 Mr Crowley-Sweet asked the claimant what the impact would be if he pulled the claimant's team off everything they were doing for the next 3 months. There was an issue with the respondent's ability to report accurately against KPI3 because of concerns about the reliability of the data on which the reporting was based.

122. The claimant confirmed on 19 January 2018 that only he and Mr Sheppard would be affected if required to "drop everything" to work on resolving the KPI3 issues. He indicated there would be some matters which would need to be held in abeyance. He did not suggest that this would put the team under undue stress or pressure from workload (p.1410). At that point the decision not to progress with the 3 projects had not been made. It appears to us that the claimant's view was that the remaining members of his team (Mr Smith and Mr Simmonite) would be progressing those projects while he and Mr Sheppard focussed on the KPI3 issue. That position had changed by 2 February 2018.

123. By 5 February 2018 the claimant had contacted Dave Clark ("Mr Clark") his trade union rep. by email referring to Mr Crowley-Sweet beginning to change the role of his team to a "pure analysis team" (p.1500). We do find that that reflects the position by 2 February 2018. By then the 3 projects were not going ahead and Mr Crowley Sweet had made it clear to the claimant that the focus of his team was on their performance analysis work. The claimant on 2 February 2018 sent Mr Crowley-Sweet a document showing what work the CSI Team did would not be done by the CSI team going forward and who would have responsibility for that work. Put simply, the performance analysis work would be done by the CSI Team but business analysis work would be done elsewhere. We do find that involved a change in the claimant's role and that of his team. We find that Mr Crowley-Sweet made the changes so that the team's objectives fitted with the objectives of the CDO division. There was no evidence of any discussion about whether those changes meant that some or all of the CSI Team should be placed in another division. There was also no evidence of the claimant's objectives (which included asset management objectives) being reviewed to reflect the changes.

124. By the time the claimant sent his email to Mr Clark, the claimant had a terse email exchange with Mr Crowley-Sweet about his team resource. The claimant had asked for extra resource for his team in July 2017 and had chased Mrs Williams about that in September and December 2017. On 11 December 2017 Mrs Williams

had responded to say she was discussing the revised CDO structure with Mr Crowley-Sweet, that she believed there were additional analyst posts captured but would let the claimant know when she had something more definitive (p.1086). There was no evidence he had raised the issue directly with Mr Crowley-Sweet.

125. On 1 February 2018 the claimant emailed Mr Crowley-Sweet to raise the resource risk arising from Mr Sheppard's potential absence on paternity leave in 3-4 weeks. The issue was that Mr Sheppard was the only performance analyst with certain skills in the team. Mr Crowley-Sweet responded the same day asking the claimant how he intended to manage the risk (p.1494). We find that approach consistent with Mr Crowley-Sweet's management style which was to expect managers to be proactive in findings solutions to issues rather than expecting him to provide them with those solutions.

126. We find the claimant found that response unsupportive. He responded on 2 February 2018 saying that "with all due respect" he had been raising the issue of team resourcing for the best part of the year, referring back to the business case he had put to Mrs Williams in summer 2017. Mr Crowley-Sweet responded in turn to say the claimant had misunderstood his email. He noted that for historic reasons the claimant had the resource he had and what he wanted to know was how he was going to manage the risk of Mr Sheppard's absence. He explicitly said he was not expecting the claimant to deliver to the same quality, time and budget but needed to know what trade offs between the 3 he intended to make and how he intended to communicate that to those with expectations of him. He stressed that the KPI3 control works task was his priority over everything else the claimant's team did and "if things need to stop then they stop". We find that Mr Crowley-Sweet's email was supportive to the extent it made clear that he was not expecting the claimant to deliver the same quality within the same timescales with reduced resources. However, the email also included criticism of the claimant, stating that he was responsible for recruiting and developing his team's capability. Mr Crowley-Sweet said that as analysis was the team's principal accountability, "perhaps some overdue conversations are needed between you and your team about the skills they need to develop" (p.1495).

127. When it came to recruitment more generally, Mr Crowley-Sweet's view was that the CDO Division was under-resourced if it was to fulfil the key role he saw for it. He was, however, hampered in terms of recruitment by the respondent's being tied to a 5 year pay bill cycle. That meant that the overall staff bill could not exceed what had been agreed at the start of the current cycle, then in its fourth year. Recruitment for new positions could only take place by reallocating staffing budget from unfilled vacancies elsewhere. Mr Crowley-Sweet did so to provide a budget to recruit the 3 new posts within the CDO Division at Pay Band 8 level (p.1714). Although he did not specifically say to the claimant that he could not recruit to cover Mr Sheppard's absence we do find that Mr Crowley-Sweet's priority in terms of recruitment at this point was to put in place the senior management structure of the CDO Division. Within the fixed pay bill that meant not filling or recruiting at less senior roles.

The working relationship between Mr Crowley-Sweet and the claimant

128. It is part of the claimant's case that Mr Crowley-Sweet side-lined him and failed to attend meetings with him.

129. Mr Crowley-Sweet was the claimant's direct line manager for some three months before the claimant went on extended sick leave. As we have already said above, during that period Mr Crowley-Sweet was immersed in getting to grips with the respondent and its organisation and with restructuring of the CDO division. We find he had very limited time to sit down and get to know the members of his division on a 1 to 1 basis. The claimant's face to face meetings with Mr Crowley-Sweet were in a group or team setting, with none taking the form of one-to-one catchups. We find they met in person on 3 occasions prior to the start of the claimant's sickness absence: once with Mr Smith, once with the claimant's team and once with the entire CDO division. We find they did have a few 1 to 1 catch-ups but they were by phone. There were no notes of most of those meetings. We accept that Mr Crowley-Sweet did not always attend meetings which the claimant was expecting him to attend and did not always give advance notice of his non-attendance. The most obvious example is his non-attendance at the ORR meeting on 12 March 2018 which we deal with below.

130. As we have said, we find that Mr Crowley-Sweet's management style was very different to that of Mrs Williams and even more different to that of Julia Thorne. He was demanding of his managers, expecting them to show leadership and a business-like approach to help him convince the ILG that the CDO Division could fulfil the crucial role which Mr Crowley-Sweet saw for it in the future of the organisation. He was also demanding of other teams, as reflected in the emails he sent to Ms Blackwell when the Finance Team were unable to provide the clarity he was seeking about budgets.

131. We find it is correct that Mr Crowley-Sweet would not expect the claimant to deputise for him in the way that Ms Thorne had done. That was due, we find, to the senior level at which Mr Crowley-Sweet was operating compared to Ms Thorne and indeed Mrs Williams. He was making decisions about the future structure of the organisation and dealing with high level matters such as setting in place framework contracts for the organisation.

132. We do also find that Crowley-Sweet was not consultative in the way that he implemented the changes he wanted to make. An obvious example of that is the changes to the claimant's roles dealt with in the previous section of our Judgment. We find that reflected Mr Crowley-Sweet's approach to management rather than treatment specifically applied to the claimant and his team. We accept his evidence that he welcomed challenge from colleagues but find that he would not proactively consult on matters where he was clear of the steps he felt needed taking to achieve his aims.

133. In terms of the working relationship between the claimant and Mr Crowley-Sweet, we find that it started out in a cordial manner as reflected in the exchanges of emails at the start of December 2020. Although there were few meetings, there were significant email exchanges relating to finances and to projects. We find that

Mr Crowley-Sweet was complimentary of the claimant's work where he thought that was warranted, e.g. in relation to his taking the lead on KPI3 data assurance issues on 24 January 2018 (p.1431). He also ensured that work was highlighted at the ILG meeting on 7 February 2018 and reported the work of the claimant and his team had been "massively congratulated" (p.1516).

134. We find that from the claimant's point of view the relationship between Mr Crowley-Sweet and the claimant began to significantly deteriorate at the start of February when Mr Crowley-Sweet made the decisions relating to funding and the three projects which we have detailed above. By 2 February 2018 from the claimant's point of view the relationship had worsened sufficiently for him to contact his trade union rep Mr Clark. By that time the claimant and Mr Crowley-Sweet had also had the exchange regarding Mr Shepherd's paternity leave which we find the claimant experienced as deeply unsupportive.

135. The claimant and Mr Clark discussed the situation with Miss Clayton at some point around 8 February 2018 (p.1526). We find the initial contact was an informal one and there were no notes. The claimant's email to Miss Clayton following the initial contact said he was experiencing high stress and "accordingly great fear". In those circumstance we are surprised that Miss Clayton did not make a note of their discussion. We find that the claimant raised his concerns about Mr Crowley-Sweet's approach and the fact that he was making a lot of changes. Miss Clayton advised that the claimant should raise his concerns with Mr Crowley-Sweet. Miss Clayton also rang Mr Crowley-Sweet to advise him of their conversation and advise him that the claimant was in her view "particularly sensitive". We do not accept that the claimant had given Miss Clayton consent to pass on his concerns to Mr Crowley-Sweet.

136. The claimant did decide to approach Mr Crowley-Sweet about his concerns. Neither the claimant nor Mr Crowley-Sweet dealt with that meeting in any detail in their evidence. It is not clear exactly when it took place beyond it being at some point in mid-February 2018 following the discussion with Miss Clayton. Doing the best with the evidence we heard we find that the claimant said he was worried his face did not fit and that Mr Crowley-Sweet attempted to reassure him on that point. On balance we find he sought to do so by reference to the plans he had for the CDO Division and the role he saw for the claimant within it.

137. Mr Crowley-Sweet accepted that he did probably say that the plan of action which the claimant had produced for RIS was irrelevant and inactionable. We find that reflected his view that the claimant was trying to do something which was not something within his role and responsibilities. We find that Mr Crowley-Sweet was concerned that the claimant was getting distracted from the key deliverable of his role which he saw as focussed on data analysis and performance analysis.

138. When it comes to the protected disclosures, we find that Mr Crowley-Sweet was aware of them and that they had come up in discussions between him and the claimant at their meetings. There was no evidence that the claimant sought to pursue the matters via Mr Crowley-Sweet, for example by asking him to escalate it to the senior leadership team or by raising any kind of formal grievance in relation to those matters. In the document dated 2 February drafted by the claimant setting out

what work the Team would do in future, the work in relation to the purpose of technology is said to be something which the senior leadership team would need to take on. We find that that was Mr Crowley's view i.e. that the claimant had raised the matters to senior management and it was now something for the senior leadership team of the respondent to deal with rather than for the claimant given his position within the CDO division. We find that that was a reasonable approach for Mr Crowley-Sweet to take.

139. We do find that the claimant found Mr Crowley-Sweet's management style far less conducive than that of Julia Thorne (and to a lesser extent that of Mrs Williams). We have no doubt that the claimant genuinely felt he was being treated unfairly by Mr Crowley-Sweet when changes were made to his roles, responsibilities, project and budget. We accept that Mr Crowley-Sweet's behaviour had a genuine impact on the claimant. We do accept Mr Lewis' submission that the claimant could be oversensitive to criticism. The claimant at various points referred to Mr Crowley-Sweet being "dismissive" and treating him with "contempt" or "scoffing" at his ideas. . We do not accept objectively that was the case. We do accept that Mr Crowley-Sweet had a very robust style of management which could be demanding. Equally, however, he was willing to praise what he saw as good work. We have already cited the praise he offered to the claimant's work on the KPI3 data assurance work. He also suggested to the claimant that he put forward that work when Mrs Williams was asking for items for the Town Hall meeting at which work by the team could be highlighted and lauded.

140. The claimant himself also accepted that Mr Crowley-Sweet lauded the work that he had done in relation to the metrics at the meeting with the ORR liaison team in the person of Leonie MacKenize in the lead up to the ORR meeting on 12 March 2019. To the extent that there was any inconsistency in his behaviour, we find that that reflected Mr Crowley-Sweet's approach of challenging his managers while being very careful to promote his team and its work to stakeholders, whether senior internal stakeholders like ILG or external stakeholders like the ORR.

141. It was suggested that the decision by Mr Crowley-Sweet that Fay Judge of the respondent's HR team should carry out the claimant's end of year performance review was another example of his side-lining the claimant. We accept that this was unusual, in that the usual practice was for a line manager to carry out the review. Mr Crowley-Sweet's evidence on this issue was not wholly clear. He suggested it would "not be nice" for him to carry out the end of year review – a reference, as we understand it, to the fact that by late February/early March 2018 when the decision was taken (p.1587) he was aware of tensions between him and the claimant. He then appeared to change position and say that the reason for the decision was that he had not been the claimant's line manager for enough of the year to make it sensible for him to carry out the review. We accept that may have played a small part in the decision. On balance, however, we find that Mr Crowley-Sweet was aware of the tensions between him and the claimant and that was the main reason why he decided it would be preferable for Ms Judge to carry out the end of year review. In doing so he may well have taken into account Miss Clayton's view that the claimant was "particularly sensitive".

142. The claimant suggested that Mr Crowley-Sweet throughout his period of line management sought to undermine and belittle him. We do not find that accords with the evidence. The claimant in particular suggested that Mr Crowley-Sweet's failure to attend the meeting with the ORR on 12 March 2018 was another act of seeking to undermine him. We do not accept that is the case.

143. Mr Crowley-Sweet had been working with the claimant on the presentation prior to the meeting itself. We accept Mr Crowley-Sweet's evidence that at midnight or around then on the night before the meeting he had received communications regarding procurement framework contracts which he needed to deal with as a matter of urgency. He had to make the decision whether to deal with those matters first thing the following morning or attend the meeting with the claimant. We accept his evidence that he was confident the claimant would be able to manage the meeting particularly given the preparation that they had done together, the fact that Leonie MacKenzie was attending and that there were no senior ORR management attending. He made a judgment call to prioritise the other calls on his time. We do accept that it would have been preferable if he had been able to give the claimant notice that he would not be attending. We do not however find that the non-attendance was a specific and deliberate attempt to undermine the claimant. As we have said, we find that Mr Crowley-sweet was particularly concerned with how the respondent (and in particular his division) was viewed by senior and external stakeholders. He had told Leonie MacKenzie in advance of the meeting that the claimant had a way forward in relation to the issues to be discussed. We find it wholly implausible that he would have jeopardised a meeting with the ORR for the sake of undermining or humiliating the claimant. We find instead that he took the view that the claimant was perfectly capable of dealing with the meeting in his absence, which is why he felt confident in not attending.

<u>The respondent's Attendance management policy and Redeployment policy</u>

144. The next section deals with events during the claimant's sickness absence. Relevant extracts from the respondent's Attendance management policy were in the Bundle at pp.141-180. It deals with matters such as sick notes, sick pay and the ability to refer an employee with their consent to OH. The key points of relevance to our judgment are as follows:

- Sick pay entitlement was 6 months full pay and 6 months half pay but with provision for up to 40 days additional sick pay at full pay where an employee had exhausted their entitlement but fell ill again after returning to work (10.2.6) or at the lower of half pay or ill-health retirement pension rate where the employee was a member of the Civil Service Pension Scheme and the Scheme Medical Adviser had advised the respondent that there was a reasonable prospect of the employee returning to work and had expressly approved a further period of paid sick leave (10.2.7)

- A line manager must hold an Informal Review Meeting when an employee's sickness absence reached 5 working days in a rolling 12 month period (10.3.1)

- A line manager must hold a Formal Review Meeting once an employee's absence was long term sickness absence, defined as a continuous period of 21 calendar days (10.3.5)

- If an individual was continuously absent for up to 3 months they would be invited to a further formal review meeting. If the manager believed they could no longer support the absence, they should consider the case and consult HR regarding whether it was appropriate to refer the case to a Decision Officer to consider dismissal (10.3.6). A line manager must hold meetings at 6, 9 and 12 months and consult HR to consider what further action is necessary if the absence reached 12 months (10.3.7)

- Where the long term absence procedure had been followed and the employee had not returned to the full duties of their post on a regular and sustained basis within a reasonable time (and occupational health advice suggested that this would remain the case for the foreseeable future), no further reasonable adjustments can be made, and there had been no opportunities for redeployment into suitable alternative employment, the individual's employment may be terminated on the grounds of their ill health (10.3.8).

145. The Policy was supplemented by an Attendance Procedure, Guidance and Q & A document. Section 10.3 (p) explains what should happen if it is deemed unlikely that an individual would be able to return to full duties of their post within reasonable time:

- Advice will be sought from OH as to what adjustments could be made to the post to allow the individual to return to work and support them in regular attendance (which may include accepting a greater (but reasonable) level of absence as a result of a disability). Highways England will give full consideration as to whether the adjustments are feasible and reasonable for implementation and will confirm the outcome in writing to the individual.

- If reasonable adjustments cannot be made to the post, consideration will be given as to whether any suitable alternative employment exists into which the individual could be redeployed. The individual must meet the basic requirements of the post and be able to achieve an acceptable standard of performance, with a degree of training, within a reasonable time frame.

146. Section 10.3 (k) indicates some of the kinds of support which could be considered at a Formal Review Meeting to help the individual return to work including:

- "a temporary or permanent change in the individual's duties. Of course this depends on the availability of more suitable alternative work; and

- whether special aids or equipment can be provided;

- whether there are particular barriers to return."

147. The respondent's redeployment policy, guidance and FAQ set out the process where an employee needed to be redeployed (pp.192-203). It applied to displacement due to a role disappearing but also to "traffic officers who are medically unfit to do their role". Under the policy a redeployee received priority for any vacancies they were matched to. If matched, an interview was a "mandatory requirement". Redeployees that reasonably demonstrated the essential criteria for the position at interview, or could do so with reasonable training, had to be offered the position subject to a trial period. Where there was more than one redeployee applying for a vacancy, the candidates were competitively assessed against each other.

148. Although not specified in the policies, Miss Clayton's evidence was that the respondent's policy was to use its OH provider to provide counselling and therapy services rather than privately fund such services.

<u>Events from 13 March 2018 until 5 September 2018 – the start of the claimant's period of sickness absence to the first absence meeting</u>

149. The claimant had experienced a panic attack in March 2018 and by 12 March 2018 had begun to experience twitches and shaking of his right arm and upper body. We heard little direct evidence about what happened on the 12 March 2018. However, based on that evidence, the phone records and the claimant's text messages on 13 March 2018 (pp.1624-1625) we find that the claimant spoke to Mr Crowley-Sweet on the 12 March and either then or the following morning told him that he was going to see his GP. On 13 March the claimant texted Mr Crowley-Sweet to confirm that the GP had signed him off sick and sent in his first fit note. In a follow up text he thanked Mr Crowley-Sweet "for your understanding yesterday". We find on balance that the claimant had been in a distressed state when he rang Mr Crowley-Sweet on 12 March 2018.

150. The claimant's first fit note dated 13 March 2018 signed him off until 27 March 2018 due to "Anxiety NOS [i.e. not otherwise specified] and stress". The claimant provided 2 further fit notes each for a fortnight signing him off until 23 April 2018. Both gave "anxiety" as the reason for absence. The claimant's covering email for the fit note dated 9 April 2018 said that his return to work should be on 24 April 2018 (p.1626). However, the claimant then sent a further sick note in for a further two weeks on 24 April 2018. Mr Crowley-Sweet replied the following day (page 1630) thanking him and confirming he had updated the system to reflect the claimant's situation. On 8 May 2018 the claimant sent a further fit note signing him off from 4 May until 6 June 2018. The next fit note was sent on 8 June 2018 and signed the claimant off until 29 June 2018. On 2 July 2018 a further sick note was sent signing the claimant off until 3 August 2018. The reason for absence was given as anxiety.

151. The claimant and Mr Crowley-Sweet had agreed at the start of the claimant's absence that they would keep in regular contact. The claimant in his cross-examination evidence agreed that was a perfectly reasonable approach. The detrimental treatment relating to the sickness absence management policy is said to have been from July 2018 onwards (D14). The claimant did not suggest that prior to

then there was any issue with Mr Crowley-Sweet being his point of contact with the respondent.

152. It is clear that in practice there were difficulties in maintaining the contact that had been agreed. There was a dispute between the claimant and Mr Crowley-Sweet about whose fault that was. From the phone records we saw and the evidence we heard we find that arose from a combination of factors.

153. One factor was that Mr Crowley-Sweet was not always available when the claimant tried to ring him. We find that was a function of how busy Mr Crowley-Sweet was. The other was that the claimant was by June/July experiencing more pronounced symptoms of what would subsequently be diagnosed as FND. In addition to the twitches and shaking mentioned above, those symptoms included slurring his words and stuttering. Those symptoms were understandably causing the claimant significant distress, exacerbated by the fact that at the time there was no medical explanation for them. That was adding to the anxiety he already felt. He was clear in his mind that the root cause was work-related stress. That meant that he did not have his work phone on and also did not regularly access his work email account (including his work-related g-mail account) except when he felt strong enough to do so. That meant that when Mr Crowley-Sweet did attempt to contact the claimant he was not always contactable.

154. There were some calls in the period up to the start of July 2018 but not many. The final call on 2 July 2018 triggered the claimant's symptoms leading to him not being able to speak during parts of the call (p.1625). We find based on Mr Crowley-Sweet's subsequent email exchange with Ms Judge that the claimant during that call said for the first time that his absence was due to work-related stress. Mr Crowley-Sweet tried to explore with him which aspects of the work he found stressful with a view to identifying adjustments the respondent could make. The claimant in his email of 10 August 2018 said this felt like an "inquisition" and we accept he found it very difficult to discuss the causes of his work-related stress with Mr Crowley-Sweet given that he was central to that stress. We find it plausible that Mr Crowley-Sweet was not the most sensitive in his approach to discussing these issues but find that his intention was to find a solution to enable the claimant to return to work.

155. It does not appear to us that the claimant attempted to contact Mr Crowley-Sweet for the rest of July. He was finding it increasingly difficult to speak to him. Instead, he contacted Mr Clark, his union rep, who in turn raised concerns with the respondent that not enough was being done to support the claimant back to work. It seems to us probable that contact was with Fay Judge, then Head of HR, who raised the issue with Mr Crowley-Sweet.

156. On 25 July 2018 Mr Crowley-Sweet emailed the claimant. He said he had been trying to get in touch with him for several weeks but "I left voice messages and text messages to call and none have been return [sic]". The email asked the claimant to "please contact [Mr Crowley-Sweet] immediately so we can discuss your current situation [sic]" (page 1635). We find it likely that Ms Judge had prompted Mr Crowley-Sweet to act after Mr Clark contacted her.

157. The claimant did not respond and on 31 July 2018 Mr Crowley-Sweet emailed the claimant again. He said he had still not had any replies to emails or phone calls

and asked him to “please contact me so we can discuss your current situation” (p.1636).

158. The claimant did not respond to that email directly but on 2 August 2018 sent a further sick note continuing through September (page 1637).

159. Mr Crowley-Sweet responded later that same morning saying that he had:

> “Phoned and emailed several times to arrange meetings to discuss your return to work and have had zero replies.
>
> At the same time am getting frustration raised by your union representation that we are not supporting your return to work.
>
> I only hear from you when you want to advise another sick is due and seem to be unable to contact you at any other time. This is against the agreement we had at the onset of this becoming a long-term sickness are us maintaining regular contact [sic].”

160. Mr Crowley-Sweet informed the claimant that he had written a letter to request a face to face meeting and “am conscious had an annual leave booked for August” (sic). He asked the claimant to advise him of any annual leave or travelling constraints he had so that he could organise appropriate logistics.

161. The claimant responded to Mr Crowley-Sweet by email on 10 August 2018 (p.1639). He pointed out that “as Mr Crowley-Sweet was aware” he was currently signed off due to anxiety and stress caused by work. He explained that unless he switched on his work phone to make contact it was not active or monitored and that included the email address. The claimant said he only received Mr Crowley-Sweet’s email because he was concerned his last sick note may not have got through, so he had checked in. He went on to explain the great effort it took for him to make a call to work because of his condition, with effects lasting following each call. He said it was not conducive or productive to continually put himself through that, especially when most of the calls went unanswered. He referred to the call on 2 July 2018 as being particularly difficult, feeling less like a discussion and more of an interrogation and having triggered a panic attack which lasted for a considerable time. The claimant said that it took some effort to respond to Mr Crowley-Sweet’s email of 2 August 2018 and that it had led to an increase in the severity of his symptoms. He said he would deactivate his phone after sending his email but would endeavour to check it the following week. He agreed that as Mr Crowley-Sweet had planned to be away during the end of August a meeting in Manchester during September 2018 would be appropriate.

162. We find Mr Crowley-Sweet sought Ms Judge’s advice on the claimant’s email and she advised inviting the claimant to a formal review meeting so they could discuss what could be done to alleviate the claimant’s symptoms so he could return to work and referring the claimant to OH. That was given he had been absent for several months and his symptoms didn’t seem to be getting any better. Her view was that the respondent needed to “push a little more” to make progress on a return to work. She tasked Miss Clayton with assisting Mr Crowley-Sweet in managing the claimant’s absence. Mr Crowley-Sweet acknowledged to Ms Judge that the

symptoms had progressively worsened since the claimant's absence. He noted that none of the doctor's notes had cited "work-related" reasons and that the "work-related" cause was first alleged during the 2 July phone call. He denied that that that phone call had been an "inquisition" as the claimant alleged and said that that related to him asking the claimant what part of the work he found stressful and where the claimant's head was about reasonable adjustments that the respondent could make to alleviate the issues (pp.1644-1645).

163. On 14 August 2018 Mr Crowley-Sweet sent a letter (signed on his behalf by his PA) inviting the claimant to a sickness absence Review Meeting on 6 September 2018 at Manchester Piccadilly Gate. The letter confirmed that the claimant could choose to be accompanied by a work colleague or trade union representative and that Ms Clayton would attend as HR representative and notetaker. The letter acknowledged that the claimant may wish to discuss with his GP what the appropriate way forward was and that at the meeting the claimant would need to let Mr Crowley-Sweet know what his decision was in relation to returning to work. The letter warned the claimant that if he was unable to return to work within a reasonable timeframe, the respondent would have to consider his dismissal (pages 1641-1642).

164. We accept that the claimant's email of 10 August 2018 accurately recorded the effect on him of the communications from Mr Crowley-Sweet. The claimant in cross-examination accepted it was perhaps not Mr Crowley-Sweet's purpose that the communications have those effects. We find that was not his purpose.

Events from 6-26 September 2018 - the First Sickness Absence meeting, follow up actions and the first Occupational Health Report

165. The first sickness absence meeting took place on 6 September 2018 as arranged. It had been moved to a neutral venue at the claimant's request. The claimant was accompanied by Mr Clark. Miss Clayton took notes of the meeting which were circulated for agreement and approved by Mr Clark and Mr Crowley-Sweet (pp.1670-1671). The claimant did not either directly or through Mr Clark challenge the notes as being inaccurate. Based on those notes and the evidence we heard we find that the meeting was led by Mr Crowley-Sweet. He explained that the purpose was to open dialogue with a view to discussing any support that the respondent could offer the claimant back into the workplace.

166. The claimant confirmed he was absent from the workplace due to anxiety and stress and that he was on medication to help him with that. He gave the starting date of his absence as 28 March 2018 which we find was a mistake. The claimant said he was unable to stipulate the medication he was currently on but confirmed that his GP was aware. Mr Crowley-Sweet asked whether the claimant believed his current sickness was related to his previous sickness absence. The claimant said that they were related but felt very different.

167. The claimant confirmed that he had contacted PAM (the respondent's employee assistance programme) but that because he had had counselling previously PAM had refused further sessions for him. The claimant confirmed he hadn't brought that issue to anybody's attention. Mr Crowley-Sweet suggested that if the claimant had brought the matter to his attention he could have intervened and dealt with it. The claimant agreed that an OH referral would be made.

168. The issue of the communication difficulties which we set out at paras 152-154 was discussed. The claimant explained that he did not regularly monitor the g-mail account he had set up and pointed out that he had attempted to call Mr Crowley-Sweet on a number of occasions but that it went to answerphone 9 times out of 10. He acknowledged that Mr Crowley-Sweet was busy. Mr Crowley-Sweet in turn acknowledged that his diary commitments were not helpful but suggested that regular diarised calls should be set up so that he could make sure of contacting and communicating with the claimant. It was agreed that fortnightly calls would be set up on days and at times which took into account Mr Clark's working pattern and the claimant's childcare and other needs. Mr Clark was included in those calls at the claimant's request because on occasion he found it difficult to communicate as a result of his symptoms. Mr Crowley-Sweet asked for the claimant's personal mobile in case there were issues with locating his number on the respondent's system, and the claimant provided that.

169. There was a discussion about the claimant's return to work. Mr Crowley-Sweet referred to the claimant's comment at their February 2018 meeting that he was worried whether his face fitted in the organisation. Mr Crowley-Sweet reassured the claimant on that point and empathised with the claimant's condition, disclosing that he had himself in the past experienced mental health issues. Mr Crowley-Sweet told the claimant that he needed the claimant to be in the driving seat in terms of how he wanted things to be moved forward and would support him with this because he wanted him to return to work happy, doing what he did well.

170. Mr Clark raised the possibility of the claimant returning to work in an alternative role. Mr Crowley-Sweet's view was that the right thing to do was to explore the reasons for the claimant's absence and what the claimant needed to return to his role rather than just moving him to another job. Mr Clark suggested a return to a role in asset delivery but Mr Crowley-Sweet confirmed he did not believe that would be an option for the claimant given that it was an intense and demanding environment, an assessment with which we find the claimant agreed.

171. Mr Crowley-Sweet noted that the claimant had had a very similar sick absence before and raised concerns that there might be a pattern. There was an initial discussion about the triggers of his stress and anxiety and the claimant said "work". Mr Crowley-Sweet asked him whether that related to certain element of work and the claimant said that it was dealing with certain things. We find that the claimant did not feel able to specify the work-related triggers during that meeting. We find he would have found it very difficult to raise specific concerns about Mr Crowley-Sweet's involvement in the process at that meeting even with Mr Clark present. As we understand it, the claimant does not suggest that he raised the protected disclosures at that meeting or suggested his absence was linked to what he saw as the failures of the respondent to address the matters raised in the protected disclosures.

172. We find that the claimant found the meeting a stressful and difficult experience, triggering some of his symptoms. The claimant's case is that the absence management process was applied in a "punitive and interrogatory" manner and that keeping in touch meetings were "confrontational and at times hostile" (para 177 of his witness statement). We do not find that the first absence management

review can be characterised in those terms. We find Mr Crowley-Sweet's approach was supportive, focussed on getting the claimant back to work and making sure that the claimant could voice his opinions and "be heard".

173. Mr Crowley-Sweet made some suggestions in terms of steps which could be taken to support the claimant back to work such as providing coaching or mentoring. He tried to establish what aspects of the claimant's work he enjoyed. In the absence of the claimant clarifying what specific triggers there were for his symptoms we do not find there was anything else he could obviously do at that point. Mr Clark confirmed the meeting had been productive and believed that they had gone as far as it could have done that day.

174. We do find that Mr Crowley-Sweet did not appreciate at that meeting the extent to which the claimant saw the triggers as being linked to Mr Crowley-Sweet's decisions and management of him. We also find that Mr Crowley-Sweet did not appreciate the severity of the claimant's symptoms and the extent to which it was a challenge for the claimant to even be present at that meeting.

175. The actions from the meeting were for Mr Crowley-Sweet to instigate the Occupational Health referral and to set up the agreed bi-weekly calls with the claimant and Mr Clark. The calls were set up for Thursdays at noon, the first being on 27 September 2018. The OH appointment was set for 26 September 2018.

176. In the meantime, on 15 September 2018 the claimant sent a further sick note signing him off until 5 October 2018 for "anxiety/stress at work". That was the first fit note to refer to "stress at work" (p.1667).

177. The OH report was sent to Mr Crowley-Sweet on 26 September 2018 (pp.1677-1678). It recorded that the claimant had had a relapse in his mental health issues which he reported was triggered by unresolved and ongoing perceived work-related issues from the last period he was off work. It noted that the claimant was under the care of his GP who had restarted him on antidepressant medication and referred him for CBT. It reported that the claimant had been referred for talking therapies and was currently self-funding counselling sessions. The claimant reported his mood being flat with good and bad days. He reported he was anxious about work; his concentration levels were lowered; he was only able to focus for short periods; he did not like crowds and had to push himself to do things. There were also details of the physical symptoms the clamant was experiencing due to his mental health including struggling to walk; struggling to speak and having a lisp. The OH adviser confirmed that the claimant struggled to converse freely during her session with him, although he engaged through the consultation. She recorded a debilitating impact on his ability to engage in normal daily activities.

178. Under "Current Issues" the Occupational Health adviser stated that, "Following the information provided, in my opinion there are no other underlying medical conditions relating to this period of sickness absence". At that point the claimant had not been diagnosed with FND.

179. Under the heading "management advice", the OH adviser advised that from her assessment the claimant was not fit for work in any capacity. She said that "no restrictions, adjustments or management action has been identified today to

facilitate or expedite a return to work in any capacity currently". She advised she was unable to anticipate a return to work date but that it was unlikely the claimant would be fit to return to work in any capacity for a further 2 or 3 months until his symptoms had significantly improved and until he had undergone further sessions of counselling. The adviser went on to say that while she did not feel that the claimant was fit for work in any capacity at the moment, resolving the work issues would be an essential part of restoring his resilience and she had encouraged his engagement in that process. She recommended, if operationally feasible, to possibly expedite the claimant's return to work "that you look into the potential of a change in role". Her opinion was that returning to work while the issues remain unresolved was likely to undermine the effectiveness of any self-help or coping strategies that had been adopted.

180. The report advised that management remain in contact with the claimant and request further OH advice at the time when the claimant was planning to start back to work so that progress in relation to the health problems identified could be reviewed. That review would include a review of the claimant's response to treatment which in turn would enable OH to offer additional advice in relation to his fitness for work, his capabilities and his future prospects. OH could also advise in relation to a suitable return to work plan.

181. The report concluded by saying that in most cases mental health conditions are treated by an individual's GP and would not require specialist (psychiatric) help. It advised that many cases are mild and that four out of five people with depression will get completely better without any help in about six to eight months. It noted that in severe cases recovery could be protracted and treatment might be required for many months. It also advised that there was a tendency for mental health conditions to recur with a roughly 50/50 chance of having a further episode after the first one.

182. The Occupational Health report does not specify what the specific triggers at work or the "unresolved issues" are in any detail. There is no mention of Mr Crowley-Sweet's involvement being part of the problem.

183. The respondent accepts that from the date of this OH report the claimant was a disabled person by reason of anxiety and that the respondent also had knowledge of that disability.

<u>Events from 27 September 2018 to 20 November 2018 – the summary of issues document and the lead up to the second absence management meeting</u>

184. The claimant, Mr Crowley-Sweet and Mr Clark had their first fortnightly telephone catch-up on 27 September 2018. They agreed 3 action points. The first was that Mr Crowley-Sweet would send the claimant the OH report, which he did on that same day (page 1676). The second was that the claimant and Mr Clark would create a document outlining the work triggers. The third was that Mr Crowley-Sweet would set up a 3 month visit to discuss that document to determine future options. We find those actions reflected the management advice given in the OH report. It does not appear that there was at that point any discussion of the OH recommendation that the respondent look into whether a change of role would be operationally feasible.

The "Summary of Issues" document

185. The document compiled by the claimant setting out the work triggers was headed "Summary of issues" (p.1651-1658). It consisted of an introductory section, a "general Issues" and "specific issues" section and a "Conclusions" section with 9 bullet points, a number of which set out specific steps the claimant required of the respondent to enable him to return to work.

186. In the introductory section the claimant referenced the difficulty for him in setting out his issues in the document and explaining that was the reason for the delay in providing it. He discussed his 2 periods of stress anxiety absence, acknowledging that some issues were common to both but saying that the events leading to the mental fatigue and failure were different. He stated that by November 2017 he had made a full recovery, albeit his mental resilience levels were "apparently not as they were". He said the respondent had not put any measures in place following his return to work and that all the issues and concerns prior to that first absence still existed prior to the second absence.

187. He referred to his "operating in a deteriorating work environment" prior to his second absence. We find the document clearly made the link between that and his line management by Mrs Williams and Mr Crowley-Sweet. The claimant in that introductory section contrasted the supportive line management of Ms Thorne with Mrs Williams "largely ignoring" him so that he felt he was working in a "vacuum. He said that from that "vacuum" he was transferred to be directly managed by Mr Crowley-Sweet who "created a working environment that was highly critical, adopting management strategies that seemed designed to alienate, disrupt and erode self-confidence".

188. The "general issues" section consisted of 11 bullet points. They highlighted what the claimant saw as a conflict between the duties he had been tasked with and his obligations under the IET Code (an extract from which he annexed to the document).

189. A number of the bullet points in the "general issues" section related to concerns about the claimant's relationship with Mr Crowley-Sweet. He described Mr Crowley-Sweet's manner as being "largely confrontational and directed" and stated that Mr Crowley-Sweet had not shown much interest in understanding "what his team and I were undertaking and why". He stated that Mr Crowley-Sweet had required a complete overhaul of the roles in his team with the requirements of his team being changed fundamentally with no acknowledgement of that change. He referred to being "severely criticised" in early 2018 by Mr Crowley-Sweet in relation to the team members be had recruited.

190. The document then went on to deal with the specific issue of the budget and projects. Having summarised the facts as he saw them the claimant said that Mr Crowley-Sweet had "advised that our forecast requirement had been made null and demanded that we reacquire our funds for the current financial year" and had "registered his disdain and displeasure in this in what I felt was an unprofessional manner (as he did so in front of others and whom I felt he had invited to our discussion especially for this purpose)". We find that was a reference to the meeting involving finance team members on 2 February 2018. The claimant went on to say

that "I fear/feel that the convoluted way this has been administered was specifically done to discredit and demotivate my team and I".

191. The document then went on to deal with two specific "key areas of concern".

192. The first key area of concern was the smart motorway metric. The claimant reported that he had raised concerns about this in spring 2017 to the Chief Analyst, i.e. Mr Elderkin but that his response was to ask, "who am I to question my superiors?". The claimant said that in raising his concerns he was simply complying with his obligations under the IET Rules, specifically paragraph 6 of the Code of Conduct which says that IET members are expected to report to their employers any suspected wrongdoing **or dangers they identify in connection with the member's professional activities**".

193. The second key area of concern related to the technology scorecard/technology availability/safety risks. The claimant set out his understanding that as Delivery Manager responsible for the technology metric he held a requirement under the Highways England licence to "develop a technology metric for March 2018" and to do so employing asset management practices. In summary, he reiterated his position in the protected disclosures, i.e. that there was a need for the respondent to be clear about the purpose of technology. The document made clear that the claimant's view was that technology should be regarded as safety critical. He acknowledged that when he raised the issue with the Health and Safety and Legal teams, they had advised him that technology was not employed for reasons of safety. The claimant said his view was that this was not consistent with what the Transport Select Committee transcripts had said and the fact that operation of smart motorways is dependent on technology to operate. He said that "safety and technology are used quite frivolously in politically expedient ways" and that he perceived a "large disconnect and an attitude of 'wilful blindness' in the use of technology and the balance of a safety between the road user and the maintainer". He referred to the stress caused by his being the person accountable without recourse to manage that accountability and with senior management unwilling to assist in the management and rectification of that event. He did acknowledge that "arguably it may be said that this situation is not as I perceive it, however there has been a similar reticence to engage with me or my team to clarify this scope creating a toxic working environment and significant stress/anxiety".

194. Discussing events in February 2018, the claimant said that his stress and concern that he could not derive something that would acknowledge appropriately the safety concerns raised as the deadline for the metric in March 2018 came nearer. He presented his paper again to Mr Crowley-Sweet and, according to the claimant, he said "what do you/I expect? As they are just your concerns on a page". The claimant said this left him in little doubt what Mr Crowley-Sweet thought of him or his ability to perform his role. He says that Mr Crowley-Sweet asked him to arrange a meeting with the Strategy and Planning Directorate Lead for RIS1, which he did. In that meeting he said that Mr Crowley-Sweet advised the Planning Directorate that the claimant had a good plan for going forward. The claimant said that this was the same plan he had previously criticised and rubbished privately.

195. In his conclusion section the claimant said that there was a distinct lack of management engagement; that not enough time had been allocated to him to allow him to present his concerns nor validate or otherwise deal with the resulting issues; none of those issues had been resolved leaving him in a position where he felt vulnerable and potentially open to prosecution personally under health and safety legislation "if I went back into this role and a safety event occurred".

196. He then set out conditions he felt necessary to enable him to return to work. If relation to the concerns he had raised, the claimant said that if those were not valid "senior management need to express this unequivocally". Senior management needed to inform the claimant and the business that "they do not consider the issues I have raised above as a significant risk, and this has to be documented". Mr Clark added a suggestion that a GG104 risk analysis should take place.

197. In terms of his personal position, the claimant said that following the advice in the OH report dated 26 September 2018, he needed to be assigned new roles with clear goals and responsibilities agreed such that there was a "safer" working environment for him. Those roles, he said, needed to be risk assessed and he needed to understand exactly his position in taking up the role following his return to health. Having set these goals, the claimant needed clear regular support through agreed one-to-one sessions to evaluate his performance and understand his position, and he needed assurances that his career path "is secure within the organisation".

198. We find the document reflects the claimant's written witness statement in terms of using heightened language to describe events (his oral evidence was much more measured). However, we do find the document accurately reflected the claimant's genuine perception of events at that time. We have set out in our findings of fact why we do not entirely agree with that perception, particularly when it comes to the reasons for Mr Crowley-Sweet's actions. The conclusions section of the "Summary of Issues" does not expressly refer to removal of Mr Crowley-Sweet as line manager being a pre-condition for a return to work. However, it seems to us on a fair reading of the document that it was very clear that interacting with Mr Crowley-Sweet was a specific trigger for the claimant's stress and anxiety and that the claimant was asking to be moved to a more supportive line manager.

Events in the lead up to the second absence management meeting on 21 November

199. The fortnightly calls which were due to happen on 11 October and 25 October 2018 did not happen. The claimant suggested that Mr Crowley-Sweet did not initiate the call on 11 October. He did try and ring the claimant on 25 October but the claimant (and Mr Clark) were on leave. The next call was due to be on 8 November. It is not clear whether it took place or not and, if it did, what was discussed.

200. The claimant was not comfortable sending the Summary of Issues document direct to Mr Crowley-Sweet because he was identified as one of the triggers of his work-related stress. Mr Clark shared that document with Miss Clayton on the morning of 8 November 2018 and reported to the claimant that he had a "long chat" with her (p.1686). There were no notes of that "long chat" nor did we have any evidence from Mr Clark. Miss Clayton did not refer to that chat in her witness statement. It is not clear what discussions they may have had about Mr Crowley-

Sweet's continued involvement at this point. On balance we find it must have formed at least part of the subject matter of the "long chat" given its prominence in the Summary of Issues document.

201. Miss Clayton's oral evidence was that throughout the process, the impression she formed from discussions with Mr Clark was that he was happy for Mr Crowley-Sweet to continue to be involved in the process. On the limited evidence we have, it does seem that Mr Clark was more positive about Mr Crowley-Sweet's involvement and there was no evidence that he specifically asked that he not continue to be involved. We accept that the claimant does not appear to have objected to Mr Crowley-Sweet's involvement at the absence meetings. Set against that is the contents of the Summary of Issues which we find made it clear Mr Crowley-Sweet was part of the problem; the fact that claimant had already raised the impact Mr Crowley-Sweet's management was having on him with Miss Clayton in the strongest terms in February 2018; and that Miss Clayton had been copied into the claimant's email of 10 August 2018 which set out in very clear terms the impact the absence management process was having on the claimant. We find that taken together that information made it clear by 8 November 2018 both that Mr Crowley-Sweet's continued involvement was one of the barriers to resolving the claimant's issues and that it would have been extremely difficult for the claimant to challenge Mr Crowley-Sweet's involvement at the meetings themselves. We accept that Mr Clark may have given a more mixed message but find that the claimant's own position as set out in writing was very clear and Miss Clayton should have given his views precedence over what Mr Clark was telling her. We formed the impression that the friendly working relationship between Miss Clayton and Mr Clark in their respective HR and Union rep capacities may at times have meant Mr Clark did not represent the claimant's views as forcefully as might have otherwise been the case.

202. It is not clear at what point the Summary of Issues document was passed to Mr Crowley-Sweet. The next absence meeting took place on 21 November 2018. The invitation letter was in standard letter form. It confirmed the meeting would be conducted by Mr Crowley-Sweet and that Miss Clayton would be dialling in and acting as notetaker and HR Representative.

Events from 21 November 2018 to 1 April 2019 – the second absence meeting, second OH report and meeting between the claimant, Mr Clark and Miss Clayton

203. Miss Clayton did not in fact attend the meeting on 21 November 2018, although her written witness statement said she did. As a result, there were no notes of that meeting. Instead, Mr Crowley-Sweet emailed the claimant and Mr Clark a summary of points discussed and action points (pp.1691-1692).

204. The claimant's Summary of Issues document was discussed. Mr Crowley-Sweet's note grouped the triggers into 4 areas, namely:

"1) historic line management relationship with Victoria Williams

2) perceived accountabilities for technology assets

3) lack of financial investment

4) working relationship with current line manager (for clarity the current line manager is myself)".

205. The claimant in cross examination accepted that was an accurate summary of the triggers (although he disagreed with the use of "perceived" in issue 2). There was then a discussion of steps to be taken to address each of these. We find that Mr Crowley-Sweet sought to reassure the claimant that these issues either had been or were being addressed through the changes to the CDO Division. It was agreed that he would send the claimant a number of documents as evidence of that – the numbering below corresponding to the number of the trigger each was seeking to address:

1) an organisational chart showing that Mrs Williams was no longer the claimant's line manager

2) copies of the claimant's DDAT aligned role profile and those of his proposed line managers to clarify responsibilities

3) copies of the approved 2018/19 business cases and 2019/20 finances showing increased investment in the CDO Division (although Mr Crowley-Sweet acknowledged those finances were not guaranteed)

4) copies of the paper showing continued investment into head count and illustrating the Pay Band 8 role that would act as the claimant's line manager in future (i.e. showing Mr Crowley-Sweet would not be his line manager).

206. Mr Crowley-Sweet attached those documents to his email summarising the meeting.

207. It was also agreed at the meeting that the claimant would define the role and responsibility he felt suited his return to work should the documents provided not be sufficient in creating the work environment he needed. Mr Crowley-Sweet made clear that the respondent could not invent roles to suit the claimant. The note also records that he told the claimant that should the claimant seek a more suitable role then "he would be subject to all the standard application processes." There was a dispute about whether Mr Crowley-Sweet said that any interview for an alternative role would be a "light touch" interview. On balance we find he did not refer to a "light touch interview" at this meeting and the claimant came away with the impression that he would have to undergo a full interview process if he wanted to be redeployed.

208. We find that Mr Crowley-Sweet did at that meeting make it clear to the claimant that the claimant did not have the potential personal liability referred to in the Summary of Issues. Mr Crowley-Sweet's view was that if anyone had such individual liability it was the Chief Engineer.

209. The claimant asked for copies of his pay slips since his absence and Mr Crowley-Sweet asked Miss Clayton to organise that for him. He also asked her to advise on a suggestion by Mr Clark that the respondent adjust its policy on sick pay

(presumably by maintaining the claimant on full pay) given that the respondent had now learned that the absence was due to work related stress.

210. Mr Crowley-Sweet's view was that the meeting was a positive one. We find that he was genuinely of the view that the changes he was making to the CDO Division and the reassurance about his personal liability would contribute significantly to enabling the claimant's eventual return to work. The claimant acknowledged in cross examination that there had been some progress at the meeting. However, he felt that Mr Crowley-Sweet had dismissed his "Summary of Issues" document without properly engaging with it. We find that Mr Crowley-Sweet's focus was on taking practical steps to move forward but the claimant felt that he could not do that until there had been a greater engagement with and acknowledgment of the issues in the Summary of Issues. We do find that Mr Crowley-Sweet thought some of the claimant's allegations were "unfounded" (p.1778). We accept that he was not of the view that the claimant was making false allegations but did feel that the claimant was mistaken about some of his concerns, specifically his potential personal liability.

211. The next meeting was due to be on 11 December 2018. That did not take place because the claimant had not been able to complete the "roles and responsibilities" document envisaged at the 21 November meeting. In addition to the symptoms he was continuing to experience, a close family member died suddenly in December 2018. That left him unable to engage with matters.

212. The claimant's case was allocated to an HR Caseworker. Mr Crowley-Sweet attempted to move things froward by asking the caseworker to get the claimant to provide a written response in the absence of a meeting being able to take place until January 2019. That caseworker then left. Mr Crowley-Sweet's PA emailed the claimant on his behalf on 17 January 2019 because no one had dialled in to the fortnightly calls. Mr Crowley-Sweet asked whether the claimant needed the calls to take place at a different time and said the calls were important and needed to go ahead.

213. Miss Clayton spoke to the claimant on 28 January 2019 when he called her to indicate he was not in a position to restart the calls with Mr Crowley-Sweet and asked for a different point of contact (p.1826). He also said he wanted third party validation of his role and confirmation of his accountabilities. Miss Clayton was not clear what he meant by that. It appears that around this time Miss Clayton was also speaking to Mr Clark but we have no notes of those meetings nor clear evidence about what was discussed.

214. Mr Crowley-Sweet chased Miss Clayton for an update at the end of February 2019. She said she would check with the caseworker dealing with the case. The claimant was continuing to provide sick notes to Mr Crowley-Sweet and Miss Clayton. Miss Clayton attempted to contact the claimant around 13 March 2019 to obtain his consent for a second OH referral but did not receive a response. The next interaction was between Miss Clayton and Mr Clark in the claimant's absence. There were no notes of that meeting, but the outcome was a meeting on 28 March 2019 attended by the claimant, Mr Clark and Miss Clayton but not Mr Crowley-Sweet. We find that Mr Crowley-Sweet's absence was at the claimant's request.

215. Miss Clayton's sent an email summary of the points discussed on 3 April 2019 (p.1803). The claimant set out points of clarification in an email which he drafted at the time but did not send to Miss Clayton until 27 May 2019 (p.2105). Miss Clayton responded as part of the notes of the 2 July meeting (p.1826). Taking into account those exchanges and the witness evidence we find that at that meeting the claimant did ask that he liaise with Miss Clayton rather than Mr Crowley-Sweet but that Miss Clayton confirmed that Mr Crowley-Sweet would need to continue to be the point of contact.

216. The claimant confirmed he was still taking medication and attending counselling sessions which he had arranged and was funding himself. We find there was a suggestion by Miss Clayton that counselling could be provided via OH but the claimant confirmed he would prefer to continue with the sessions he had arranged. There was no discussion at this meeting of the respondent funding those session.

217. The claimant made it clear he would not be able to return to his substantive post and there was some discussion of redeployment. We find that Miss Clayton confirmed that in order to be redeployed the claimant would have to be fit for work. On balance we find that it was at this meeting that there was discussion of a "light touch interview" (not necessarily in those terms) with Miss Clayton explaining the mandatory non-competitive interview required under the respondent's redeployment policy and would be fully supported to do so. We accept the claimant felt he would be unable to deal with an interview process.

218. We find that both Miss Clayton and Mr Clark sought to reassure the claimant about his role and future line management and it was agreed that a further OH report would be obtained.

<u>Events from 1 April 2019 to 1 July 2019 – the second OH report</u>

219. The second OH appointment took place by phone on 1 April 2019. By this point an HR caseworker called Carl Duze was dealing with the claimant's case although the claimant had not been made aware of this. The report sent to Carl Duze on the same day (p.1801) noted the claimant had worsening symptoms and was on increased medication but with no significant effect. It confirmed that the claimant was accessing private talking therapy and was also on the waiting list for further therapy of a different kind after NHS intervention in 2018.

220. The OH report noted that the claimant reported severe and significant signs of anxiety and low mood, was likely to meet the definition of a disabled person under the Equality Act 2010 and that he would require further intervention in order to resume a level of wellbeing consistent with a return to work. It advised that the claimant was unfit for work and that his sickness absence record was unlikely to improve until his condition was "optimally treated". It suggested the respondent "may wish to take this into account when managing his sickness absence and ascertain what can be done to support him in this respect." It was not possible to predict a return to work because that would depend on his response to treatment and therapy. A further review in 8 weeks' time was recommended.

221. On 3 April Miss Clayton sent Mr Crowley-Sweet a copy of her email note of the meeting on 28 March. He responded on 25 April chasing for the outcome of the

OH report. Miss Clayton responded a few days later to say that the respondent had had a number of questions on the back of the report and that she would chase the Mr Duze to see if those questions had been answered. On 3 May Mr Crowley-Sweet received a further sick note from the claimant and emailed Miss Clayton to express frustration that the process was taking so many months and to ask who he needed to put pressure on to get some answers (p.1805).

222. On 27 May 2019 the claimant sent Miss Clayton his points of clarification email relating to the 28 March meeting. He re-sent it on 4 June 2019. He raised in it for the first time the fact that his pay since October 2018 had been erratic and inconsistent. We accept Mr Crowley-Sweet's evidence that this was because he had mistakenly failed to mark the claimant's absence as "Long term" on the Oracle sickness absence system which led to the claimant being overpaid sick pay.

223. The claimant acknowledged in his email that he had been provided with payslips but said they did not make sense to him. He did not explain what he wanted of Miss Clayton in relation to that issue nor was there any suggestion in his email that Mr Crowley-Sweet was responsible for the situation.

224. The claimant also asked for a copy of the second OH report which Mr Duze sent him on 31 May. On 3 June 2019 Mr Crowley-Sweet sent the claimant a letter inviting him to a third Formal Review Meeting on 2 July 2019 (p.1813).

Events from 2 July 2019 to 18 September 2019

225. The meeting on 2 July 2019 was attended by the claimant, Mr Crowley-Sweet, Miss Clayton and Mr Clark. The claimant did not fully accept the accuracy of the minutes of the meeting sent to him for approval on 31 July 2019 and set out corrections in his letter of 19 August 2019 (p.1852-1854). It is clear that they had different perspectives on what had been discussed but there was relatively little difference on the substance of the discussion. The context for the discussions was that the claimant had confirmed that his condition had not improved and Mr Crowley-Sweet expressed concern that the steps taken following the meeting in November 2018 to address the triggers identified by the claimant had not led to any improvement in the claimant's condition.

226. The discussions at the meeting focussed on 3 issues. The central one was the issue of redeployment. We find that by this point the claimant was firmly of the view that only a clean break with a move to a different role would facilitate his return to work. However, he did not feel that with his current condition would enable him to undergo a full recruitment interview process which is what he understood would be required for a redeployment. He explained that was why he had not provided the roles and responsibilities document envisaged at the November 2018 meeting discussed at that meeting. Although Mr Crowley-Sweet made it clear that the respondent could not just place the claimant in a role it was made clear at this meeting that any interview would be a light touch interview to ensure that the claimant had the right skill set and capabilities to carry out any role he was redeployed into. We find that reflects the respondent's redeployment policy. As we have said, we find that Miss Clayton had said that to the claimant at their meeting in March 2019 but do not accept that this had been made clear at any of the meetings prior to that. Miss Clayton confirmed that to be redeployed the claimant would have

to be certified as fit for work by his GP. It was agreed that he would complete a "skills matrix" so that the respondent could identify possible job matches. The claimant expressed concern about being able to complete the matrix in the week he was given to do so. Mr Crowley-Sweet expressed concern that if the claimant was not fit enough to complete the matrix the claimant was not fit enough to return to work. We find that a reasonable view for him to take.

227. The second issue discussed was the claimant's medical condition and treatment. The claimant confirmed he was not currently fit for work. Miss Clayton asked the claimant whether he was on any medication and whether he had received any further treatment. We find the claimant responded with a form of words which he said his GP had instructed him to use, namely that the claimant was "following the course of treatment prescribed and that his GP was practice was managing [his] pharmacological requirements". As Miss Clayton acknowledged at the meeting, it was the claimant's right to decide whether to share any information about his treatment, but it is not clear to us why the claimant was reluctant to share the information with the respondent at the meeting given it could inform their decisions and identify support they could provide. That related particularly to the suggestion made by the claimant that the respondent fund private medical treatment. The claimant also confirmed he was on a waiting list to get an assessment to identify what treatment he could have going forward. We find the claimant did raise the possibility of the respondent funding private treatment to speed up the assessment process.

228. The third issue was the barriers to returning to work. The claimant said that he still felt that he would be culpable and accountable for safety issues. Mr. Clark intervened to say that the matter had been discussed and it had been established and clearly outlined to the claimant that he would not be liable. Mr Crowley-Sweet told the claimant he believed he had acted reasonably in relation to the claimant and although he could not support with historical line management issues he had recruited a new line manager so that the claimant would not be under Mr Crowley-Sweet's direct line management (though he would still be in his CDO Division unless redeployed). Mr. Clark confirmed that the claimant could potentially return to his current role because Mr Crowley-Sweet had provided assurances around roles and responsibilities. Miss Clayton reiterated (in response to the claimant's email of 27 May) that although the claimant had requested a different point of contact, given the meetings were going well and that Mr Clark was supportive of Mr Crowley-Sweet's continued involvement she felt that it was preferable for Mr Crowley-Sweet to continue to be involved. Mr Clark confirmed that procedurally he could not fault Mr Crowley-Sweet's support and commitment. It seems to us that at this point Mr Clark's views were not aligned with that of the claimant. The meeting ended because the claimant expressed the need to terminate the call because he was struggling with his symptoms.

229. A number of action points were agreed including in relation to resolving issues with the claimant's pay and professional membership subscription. The primary action point was for the claimant to complete the skills matrix which Miss Clayton sent him immediately after the meeting.

230. The claimant sent Miss Clayton the completed skills matrix on 10 July 2019. In his covering email he repeated his request that Mr Crowley-Sweet not be part of any of the contact he was having with the respondent. He made it clear that his position was that Mr Crowley-Sweet's attitude and management style had greatly contributed to his condition and his involvement was not conducive to his recovery (p.1827).

231. Miss Clayton responded the following day to acknowledge receipt but confirm that the claimant could not be considered for redeployment until his GP had confirmed he was fit for work. She confirmed once again that Mr Crowley-Sweet would continue to be involved in the absence management process. We find that she had a further discussion with Mr Clark in which he voiced support for that continued involvement to avoid risking delaying the process. Miss Clayton's own view from attending the absence meetings was that Mr Crowley-Sweet was not behaving in the "confrontational" and "antagonistic" way suggested by the claimant. We think that objectively that was the case but we find surprising that given the claimant's repeated re-statement of his position Miss Clayton appeared not to appreciate that regardless of the objective position, Mr Crowley-Sweet's continued involvement was causing the claimant significant distress and was a barrier to making progress.

232. The decision to persist with Mr Crowley-Sweet's involvement seems to us all the more surprising given that by July 2019, as Miss Clayton reported in her email, a new line manager for the claimant, Jon Drea, had been appointed. Miss Clayton did suggest that if the claimant thought it would find it beneficial, they could look to have him present with Mr Crowley-Sweet at any future meetings.

233. The notes of the meeting were not sent to the claimant until 31 July 2019. He was given a week or so to set out any disagreement. He was unhappy about that as he made clear in his holding email on 8 August 2019. As we have said, he sent corrections to the minutes on 19 August 2019. In that letter he also said that in terms of what environment might enable him to return to work, a position within ITS group, research or innovations may be appropriate to his skill set. He acknowledged his GP would need to confirm he was fit to work to undertake a position.

234. In that letter the claimant suggested as reasonable adjustments:

- provision of private medical care so that his treatment could be expedited (he was still on the appropriate NHS waiting list) and/or

- the respondent paying for the treatment he was receiving from his therapist with whom he had have built up a bond of trust.

235. Mr Crowley-Sweet suggested he had not received that letter. There was no explanation for why it would not have been received by the respondent given that it was sent to the correct address. On balance we find it was received by the respondent.

236. On 23 August 2019 the claimant was diagnosed with "Functional Neurological Disorder" by Dr Talbot, a consultant neurologist (pp.1857-1858). The respondent accepts that the claimant was a disabled person by reason of FND from that date

but says that it did not have knowledge of that disability until November or December 2020 when Dr Talbot's letter was disclosed as part of these proceedings. Throughout his absence the claimant continued to send fit notes, usually for a 4-8 week periods. There was no suggestion that any referred to FND specifically, instead they gave anxiety (and latterly anxiety and stress) as the reason for absence.

237. It appears there was a further discussion between Miss Clayton, Mr Clark and the claimant in early September. The possibility of the claimant applying for ill-health retirement had been raised in the letter from Mr Crowley-Sweet on 31 July 2019 and it appears that the claimant sought information about how to apply. Miss Clayton provided that information on 11 September 2019.

238. On 23 August 2019 Mr Crowley-Sweet sent the claimant a letter inviting him to a long-term absence "options meeting" on the 18 September 2019. The letter referred to the possibility of dismissal if the claimant was not fit to return to work and to the alternative of applying for ill-health retirement (p.1855-1856). The claimant did not receive that letter but Mr Clark made him aware of the meeting. The claimant emailed on 11 September to check whether the meeting was to go ahead. He asked whether he would receive an update on the matters discussed at the 2 July meeting including the skills matrix and pay and professional fee issues. He also requested that if he was required to respond to any points those be provided in advance of the meeting so he could respond in writing (p.1861).

<u>Events from 18 September 2019 until 19 February 2020 – fourth absence meeting and third Occupational Health report</u>

239. The meeting on 18 September 2019 was attended by the claimant, Mr Crowley-Sweet, Miss Clayton and Mr Clark. The notes were not sent to the claimant until 11 December 2019. It appears that was because the note and covering letter were awaiting sign off by Mr Crowley-Sweet. In brief, the claimant at the meeting confirmed that his condition had not improved. He confirmed that the outcome of the last referral to Dr Taylor was that his condition had neurological impacts but was not neurological in causation. We find he did not specifically refer to the FND diagnosis at the meeting.

240. When it came to redeployment the claimant had indicated he was not interested in alternative roles below Pay Band 7 which Miss Clayton pointed out limited the opportunities. In addition, the claimant confirmed that it was unlikely the GP would sign him as being fit for work when his current fit note expired on 23 September 2019. The outcome of the meeting was twofold. First, the claimant indicated that he was interested in applying for ill-health retirement. Miss Clayton took steps to start that process, including setting up a further OH assessment for the claimant on 9 October 2019 and arranging for the claimant to be provided with an ill-health retirement pension quote. The second outcome was that the claimant's case would be referred to a Decision Officer to decide whether his employment should continue given the length of sickness absence and the lack of any prognosis for return to work. The process for that was for Mr Crowley-Sweet to prepare a report of the absence management process for submission to the Decision Officer.

241. Mr Clark emailed Miss Clayton and Mr Crowley-Sweet on 26 September 2019 to confirm that the claimant had decided to apply for ill-health retirement. He also confirmed he was handing over the claimant's case to Jonathan Reade because, as we understand it, Mr Clark was due to retire. The claimant confirmed on 16 October 2019 that his GP was processing the form required to apply for ill-health retirement. He asked for the OH report which Miss Clayton sent him on 29 October 2019.

242. That OH report dated 9 October (p.1872) confirmed that the claimant was too unwell to consider a return to work within the foreseeable future. It described the claimant's symptoms as severe with a mental health assessment indicating severe levels of depression and severe levels of anxiety. There was no specific mention of the FND diagnosis.

243. The report recorded that the claimant's symptoms of stress and anxiety appeared to have been triggered solely by work-related issues, with no other personal contributory factors having been identified. The claimant indicated that his GP had altered and changed his medications and that he had been referred to Neurology for further investigations into his acute symptoms of stress. The claimant reported that there had been no underlying neurological abnormalities detected and he was awaiting the results of an MRI scan. A decision about whether there was a need to make a further change to his medication would be made once the results of the scan were known based on the advice of his psychiatric nurse. The claimant confirmed that he had completed various counselling sessions and that he was privately funding weekly counselling support. He had completed taking therapy arranged through the NHS and had had two sessions with a psychiatric nurse. In terms of management advice, the report confirmed that the claimant's symptoms did not appear to have improved since his absence from work. It did not suggest there were any adjustments which could be made by the respondent to assist the claimant.

244. The claimant's case had been taken over by a new senior HR caseworker, Rachel Hague. In December she contacted Mr Crowley-Sweet to confirm that she would assist him in preparing the report for the Decision Officer in the New Year. As she pointed out, that would only be required if the claimant's application for ill-health retirement was unsuccessful.

245. By the New Year, the claimant's case was being dealt with by another senior HR Caseworker, Tracey Potter. She wrote to the claimant on 3 February 2020 to report that the Pension Scheme Adviser, Health Management Limited, had refused his application for ill-health retirement (p.1889). As the claimant accepted, Mr Crowley-Sweet had no say in that decision.

246. On 7 February 2020 the claimant supplied a further fit note signing him off until 1 May 2020 by reason of "work related stress and anxiety".

<u>19 February 2020 onwards</u>

247. On 19 February 2020 the claimant started early conciliation through ACAS. The early conciliation certificate was issued on 19 March 2020.

248. Jason Bedford had been appointed as the Decision Officer and the claimant had been invited to a formal absence capability meeting on 2 April 2020. However, on 23 March 2020 that was postponed. We find that was due to the COVID pandemic. The respondent had decided that any meetings of a formal meeting which could result in a dismissal should be postponed (p.1900). By that time Jonathan Drea was the claimant's line manager but Mr Crowley-Sweet continued to be involved in the absence process.

249. On 18 April 2020 the claimant presented his claim to the Tribunal.

250. On 19 November 2020 the claimant's second application for ill health retirement was declined. On 19 May 2021 the claimant had an initial discussion with Jonathan Drea. We find that discussion was cordial and that Mr Drea confirmed that the claimant should send his sick notes to him rather than Mr Crowley-Sweet from then on. It was agreed that a further OH referral would be carried out (p.1949). The OH Report dated 2 June 2021 advised the claimant was not fit for work in any capacity due to his symptoms. It confirmed that the claimant was waiting for support for FND and was on a waiting list which might take up to 18 months.

251. The claimant and Mr Drea discussed that report on 16 June 2021. In terms of adjustments, the claimant suggested that only speeding up FND support through private healthcare could help. Mr Drea raised the possibility of alternative roles but the claimant said that he could not answer that question until he was better (p.1953).

252. There were further Occupational Health reports on 3 November 2021, 29 June 2022 and 7 July 2022. At the time of the Hearing the claimant remained unfit for work.

Findings relevant to the time limit issue

253. We find that the claimant had the benefit of trade union advice from February 2018 at the latest. There was evidence that he took legal advice but in relation to a potential personal injury claim rather than an employment law claim. On 12 April 2019 Manners Pimblett solicitors made a subject access request to the respondent on behalf of the claimant. On 9 July 2019 that firm wrote a further letter confirming they were instructed by the claimant in connection with a claim for compensation. In cross examination the claimant accepted he could have issued a Tribunal claim at that point but wanted to understand what his options were.

254. In terms of the impact of the claimant's disabilities on his ability to bring proceedings, we accept that the evidence showed the claimant's condition deteriorated from the point when he went off sick on 13 March 2018. There were times when he was able to deal with complex matters (such as putting together the Summary of Issues) but they took a lot of time and effort for him. At times his condition was such that he was not able to engage with the issues in this case because they were the cause of his stress and exacerbated his symptoms. The involvement of solicitors on his behalf in April 2019 show that he was at certain points able to instruct advisers in relation to legal issues due to the fluctuating nature of his symptoms.

Findings relevant to the issue of disability

255. We find that the claimant began experiencing symptoms of shaking, tremors and difficulty speaking from shortly before he began his extended absence on 13 March 2018. We accept his evidence that although the effects fluctuated, by the beginning he was no longer able to carry out some of the activities he had done previously, such as swimming. He experienced "freezing" when he was unable to move. We find that he also from around that time experiencing what might be termed less physical symptoms including low mood, difficulty concentrating and being anxious when in crowds. We accept that there was a more than minor or trivial effect on his ability to socialise, concentrate and exercise from March 2018 onwards. The OH report from 26 September 2018 confirmed those symptoms were persisting.

Relevant Law

Detriment for making a protected disclosure

256. The respondent concedes that the claimant made protected disclosures. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) of the Employment Rights Act 1996 ("the ERA") which reads as follows:

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

257. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

258. **Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA** confirmed that in deciding whether detriment was on the grounds of whistleblowing the test is whether the protected disclosure materially (in the sense of more than trivially) influences the respondent's treatment of the claimant.

259. A whistleblower's conduct and their protected disclosure may be properly separable in the context of a detriment claim **Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941, CA.**

260. The right to bring a claim to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

261. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**

> **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see <u>London Borough of Harrow v. Knight</u> [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

<u>The claims under the Equality Act 2010</u>

262. The claimant brings claims of various forms of disability discrimination under the Equality Act 2010 ("the EqA"). There is a dispute about from what date the claimant was a disabled person for the purposes of s.6 of the EqA by reason of (i) anxiety and (ii) FND and from what date the respondent had actual or constructive knowledge of each disability.

The definition of disability in s.6 EqA

263. S 6 of the EqA, so far as is relevant, provides:

> **"(1) A person (P) has a disability if-**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **..."**

264. Section 212(2) of the EqA provides that an effect is substantial if it is more than minor or trivial.

265. There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause (see **Walker v SITA Information Networking Computing Ltd EAT 0097/12**).

266. Paragraph 2 of Schedule 1 to the EqA sets out the definition of "long-term" in this context. It provides:

> **"(1) The effect of an impairment is long-term if –**
>
> > **(a) it has lasted for at least 12 months,**
> >
> > **(b) it is likely to last for at least 12 months,**
> >
> > **(c) it is likely to last for the rest of the life of the person affected.**

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

267. The term "likely" in this context means something that "could well happen", and is not synonymous with an event that is probable: see **SCA Packaging Ltd v Boyle [2009] ICR 1056**. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the EqA is to be assessed as at the time of the alleged contravention: see **McDougall v Richmond Adult Community College [2008] ICR 431**.

268. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the EqA.

269. The Secretary of State's Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf gives guidance to help a Tribunal decide whether an impairment has a substantial effect on normal day to day activities.

Discrimination arising from disability (s.15 EqA)

270. Section 15 of the EqA states that:

> **(1) A person (A) discriminates against a disabled person (B) if--**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

271. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, i.e. (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in the EqA (**Gallop v Newport City Council [2014] I.R.L.R. 211**).

272. Appendix 1 to the EHRC Employment Code states that 'there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause' — para 7.

273. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

- the disability had the consequence of 'something';
- the claimant was treated unfavourably because of that 'something'.

In **Basildon** the EAT said it does not matter in which order the tribunal approaches these two steps.

274. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

- First, the tribunal has to identify whether the claimant was treated unfavourably and by whom.
- It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.
- The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

275. "Unfavourable treatment" is not defined in the EqA. Paragraph 5.7 of the EHRC Code explains that it means "the disabled person must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

276. For a s.15 claim to succeed the 'something arising in consequence of the disability' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**).

277. A claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. In **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT** the EAT confirmed that a s.15 claim can succeed where the disability has a significant influence on, or was an effective cause of, the unfavourable treatment.

278. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

279. The Equality and Human Rights Commission's Code of Practice on Employment ("the Code"). sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

280. A failure to make a reasonable adjustment will make it very difficult for the employer to argue that unfavourable treatment was nonetheless justified. The converse is not necessarily true. Just because an employer has implemented reasonable adjustments does not guarantee that unfavourable treatment of the claimant will be justified, e.g. if the particular adjustment is unrelated to the unfavourable treatment complained of or only goes part way towards dealing with the matter.

281. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment
- that he or she is disabled and that the employer had actual or constructive knowledge of this
- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

282. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or
- that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments (ss.20-21 EqA)

283. Section 39(5) of the EqA provides that a duty to make reasonable adjustments applies to an employer.

284. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)

285. Section 20(3) provides as follows:-

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

286. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate), and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

287. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the EHRC Code provides considerable assistance. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

288. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the EqA defines "substantial" as being "more than minor or trivial".

289. The duty does not apply if the respondent did not (nor could reasonably be expected to know) both that the disabled person has a disability and that they are likely to be placed at a substantial disadvantage by the provision, criterion or practice (Schedule 9 Para 20 of the EqA).

290. We accept that a delay would disadvantage a non-disabled person but find that the disadvantage to the claimant was substantial in comparison because of the nature of his disability.

291. The case of **Croft Vets Limited and others v Butcher [2013] UKEAT 0430/12** provides an example of a case where the EAT upheld a Tribunal's decision that the employer had not failed to make reasonable adjustments by failing to pay for the employee to have private psychiatric services and counselling. The issue in that case was not the payment of private medical treatment in general but, rather, payment for a specific form of support to enable the employee to return to work and cope with the difficulties she had been experiencing at work.

Indirect discrimination (s.19 EqA)

292. S.19 EqA provides that:

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

293. S.19(2) of the EqA sets out the four elements of an indirect discrimination complaint

> "**(2) …a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> (d) **A cannot show it to be a proportionate means of achieving a legitimate aim."**

294. The case law sets out the following relevant principles:

a. Although section 136 of the EqA provides for a reversal of the burden of proof in discrimination cases, the onus is still on the claimant to prove facts from which a Tribunal could conclude that discrimination may have occurred. In the context of an indirect discrimination claim, before there can be any reversal of the burden of proof it would have to be established that:

   I. There was a PCP;

   II. That it disadvantaged [those sharing the claimant's religion or belief] generally; and

III. That what was a disadvantage to the general created a particular disadvantage to the individual who is claiming. Only then is the employer required to justify the PCP (**Dziedziak v Future Electronics Limited [2012] Eq LR 543**).

b. When it comes to proving particular disadvantage it is not necessary for the claimant to prove his case by provision of relevant statistics. Those, if they exist, will be important material but the claimant's own evidence or evidence of others sharing his relevant protected characteristic, or both, might suffice (**Games v University of Kent [2015] IRLR 202, paragraph 41**).

c. In assessing whether a PCP puts a relevant group at a particular disadvantage it is important to select the correct pool. The pool should be that which suitably tests the particular discrimination complained of and is a matter of logic. In general the pool should consist of the group which the PCP affects, or would affect either positively or negatively, while excluding workers not affected by it (**Essop & Others v Home Office, UK Border Agency & Others [2017] IRLR 558**, citing Sedley LJ's remarks in **Grundy v British Airways [2008] IRLR 74** and **paragraph 4.18 of the Equality and Human Rights Commission's Code of Practice on Employment**).

d. It is not permissible for a claimant to subdivide the relevant protected group in pursuing their claim (**University of Manchester v Jones [1993] IRLR 218**).

e. It is clear from section 19(2)(c) that the particular disadvantage to the relevant group must be shared by the individual bringing the claim. That is clear from the reference in that subsection to "that" disadvantage.

Disability related harassment (s.26 EqA)

295. The definition of harassment appears in section 26 of the EqA which so far as material reads as follows:

> **"(1) 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…**

> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken 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.”**

296. In **Grant v HM Land Registry [2011] EWCA Civ 769** Elias LJ stressed the importance of the objective element in 26(4)(c) and warned that Tribunals must not “cheapen the significance” of the words used in 26(1): “They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

297. The Equality and Human Rights Commission gives more detail on the factors relevant in deciding whether conduct has the effect referred to in s.26(1)(b) at paragraph 7.18 of the Code:

> “7.18 In deciding whether conduct had that effect, each of the following must be taken into account:
>
> a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
>
> b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker’s health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.
>
> b) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.”

<u>Time limits under the Equality Act 2010</u>

298. Section 123 of the EqA provides that proceedings on a complaint of breach of the EqA may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable (section 123(1)(a) and (b) respectively).

299. Subsection 123(3) provides that for the purposes of this section conduct extending over a period of time is to be treated as done at the end of that period, and the failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(1) and (b) respectively).

300. In the absence of evidence to the contrary s.123(4) says that a person is to be taken to decide to a failure to do something either:

> "(a) when that person does an act inconsistent with doing it; or
>
> (b) if the person does no inconsistent act, on the expiry of the period in which that person might reasonably have been expected to do it."

301. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, the Court of Appeal said that when the claim is a failure to do something i.e. to comply with a duty under section 20 to make reasonable adjustments, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.

302. **Kingston-upon-Hull City Council v Matuzowicz [2009] ICR 1170 CA** confirms that the date by which the employer might reasonably have been expected to comply with a duty should be determined in the light of the facts as they would reasonably have appeared to the claimant including in that case what the claimant was told by the employer.

303. If the discrimination claim under the EqA is out of time the Tribunal may extend time if it thinks it just and equitable to do so. That discretion is a wide one. Nonetheless the grant of an extension of time should be the exception rather than the rule - **Robertson v Bexley Community Centre [2003] IRLR 434 CA**. Unlike section 33 of the Limitation Act 1980, the EqA does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision so as to interpret it as if it contained such a list.

304. Although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of that 1980 Act (see **British Coal Corporation v Keeble [1997] IRLR 336**), the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account (**Southwark London Borough Council v Afolabi [2003] ICR 800**). That said, as the court in **Morgan** made clear, matters which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of and the reasons for the delay; and

(b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh).

305. In **Morgan** the Court of Appeal also considered a submission that the Tribunal had made an error of law by failing to place a burden on the claimant in that case to satisfy the Tribunal that it was just and equitable to extend time in her favour. The respondent in **Morgan** submitted that in the absence of any explanation from the claimant as to why she did not bring her claim in time and an evidential basis for that explanation, the Tribunal could not properly conclude it was just and equitable to extend time. The Court of Appeal in **Morgan** rejected that argument. It said there was no justification for reading into the language of the EqA any requirement that the Tribunal must be satisfied that there was a good reason for the delay let alone that time cannot be extended in the absence of an explanation for a delay. The most that could be said was that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard.

306. In **Morgan** the Court of Appeal also agreed with the EAT that there was no obligation on a Tribunal to infer that there was no acceptable reason for the delay or even if there was no acceptable reason that that would inevitable mean the time should not be extended.

Time Limits for the Protected Disclosure detriment claims

307. The time limit for a claim of having been subjected to a detriment for because of a protected disclosure appears in s.48(3) ERA:

> **(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal,**
>
> **(a) before the end of the period of three months beginning with the act or failure to act to which the complaint relates or, where there is a series of similar acts or failures the last of them, or**
>
> **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**

308. Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint within time, and, if not, secondly whether it was presented within such further period as is reasonable.

309. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, Court of Appeal**).

310. Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488 EAT**.

311. The fact an internal appeal process is continuing and even where that internal process is delayed for a reason is not in itself a sufficient reason to justify a finding

that it was not reasonably practicable to present a complaint within the statutory time period (**Palmer above).**

312. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Failure to comply with the ACAS Code on Disciplinary and Grievance procedures

313. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A") gives the Tribunal a power to adjust compensation where there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Compensation can be increased where it is just and equitable but by no more than 25%.

Discussion and Conclusions

314. We now apply the relevant law to the findings of fact we have made. We have used the issues identified in the List of Issues as the framework for our discussion and conclusions.

Protected Interest Disclosure Detriments

315. We deal first with the protected interest disclosure detriments alleged against Mrs Williams (DV1 in the List of Issues). We have decided that the best way to set out our conclusions is to set out for each alleged detriment whether it occurred as alleged (List of Issues 3(a)) and, if so, whether it was on the ground that the claimant made one or more protected disclosures (List of Issues 4).

With regard to Vicky Williams:

(a) [18(a)] **("DV1") -** Lack of support between February 2017 and December 2017. The individual detriments which were also all evidence of the lack of support alleged by C were:

   i. At an ILG meeting on 3 October 2017 when Vicky Williams neglected to support C, concluding his time with a curt dismissal when C presented PD1b whereas the next agenda item raised by another member of her team was advocated and championed; and

   ii. Failing to answer or attend regular scheduled catch-up meetings or calls;

316. When it comes to the October ILG meeting, we did not find that Ms Williams brought the claimant's agenda item to a close with a "curt dismissal" or that she "advocated and championed" the next agenda item. We did find that she moved on from the claimant's agenda item and sought to re-energise the meeting after his item had fallen flat. In deciding whether that is a detriment we have reminded ourselves of the test in **Shamoon**. Mr Lewis submitted that it could not be a detriment for Mrs

Williams to "put the claimant out of his misery" when he was struggling. We accept, however, that a reasonable employee might have felt, as the claimant did, disappointed in not being able to continue with his agenda item even where he was struggling to get his point across. We find that Mrs Williams's actions amounted to a detriment.

317. We do not, however, find that the detriment was materially influenced by the claimant's protected disclosures. We accept that the claimant's item agenda was about (and was in itself) a protected disclosure. Applying **Kong** we find that does not necessarily lead to the conclusion that the disclosure was the ground for any detriment. It was the context for Mrs Williams's action, but we do not accept that that in itself was enough to make it a material influence on anything Mrs Williams did in relation to it. We find that Mrs Williams acted as she did because the claimant's presentation had fallen flat and he had lost some of his audience. She was seeking to spare the claimant's blushes to some extent but was also very conscious of her position acting up as chair of the ILG in front of senior colleagues. She was anxious to show she could chair the meeting effectively in Mr Malone's absence. We find she would have acted in the same way regardless of whether the claimant's presentation was a protected disclosure.

318. We do not accept the suggestion that Mrs Williams's actions were in some way part of an attempt by the respondent to "silence" or "put the claimant back in his box". We accept Mr Lewis's submission that that is not consistent with his having been invited by Mr Malone to present to the ILG and, having made a presentation amounting to a protected disclosure at the September meeting, being invited back to make another presentation at the October ILG.

319. When it comes to failing to answer the claimant's calls or attend meetings, we did find that Mrs Williams did on occasion fail to answer calls or attend meetings arranged with the claimant. That was not the case in relation to all the meetings. We do find that this amounted to a detriment. Although we accept Mrs Williams did on at least some occasions let the claimant know she would need to postpone and/or suggest alternatives we do find this amounted to a detriment. We do think a reasonable employee might find it a disadvantage for their manager to postpone pre-arranged meetings even where an explanation was given. We do think that the disadvantage might be minor but do not think it was an "unjustified sense of grievance". It did amount to a detriment.

320. We do not find that the detriment was materially influenced by the claimant's protected disclosures. Mrs Williams also cancelled meetings with other line reports. There was no suggestion they had made protected disclosures. She postponed meetings before the first protected disclosure was made on 21 April 2017 (p.586). We find that Mrs Williams was overstretched as a manager which is what led to her postponing meetings and being unable to take calls from the claimant and other line reports.

321. The two specific detriments discussed above were said to be evidence of a broader lack of support by Mrs Williams during the period when she line-managed the claimant. There were no other specific examples relied on. We did find that the claimant did not have as close a working relationship with Mrs Williams as he had

with Ms Thorne. Beyond the specific detriments discussed above, there was no specific evidence of a general lack of support for the claimant from Mrs Williams. We accept the claimant may have perceived her as less supportive in contrast to his working relationship with Ms Thorne but do not find that a reasonable employee would have perceived their working relationship as a disadvantage. Mrs Williams did discuss with the claimant the need to focus on what she saw as the priorities for his role but that did not prevent her from facilitating getting his item on the ILG agenda via Mr Malone and attempting to provide him with guidance with his presentation at the meeting with Mr Smith.

322. If we are wrong about that, and there was a general lack of support on Mrs Williams's part amounting to a detriment, we do not find that the claimant's protected disclosures materially influenced that. We have already explained above why we said that in relation to the specific detriments. We find that any lack of support on Mrs Williams's part was due to her being overstretched. The claimant's inability to explain matters in a simple and succinct way for a busy manager may also have contributed to her inability to support him on more detailed issues. Neither factor was materially influenced by the claimant's protected disclosures.

323. The claim that Mrs Williams subjected the claimant to detriment(s) on the ground of making protected disclosures fails.

<u>With regards to Mr Crowley-Sweet</u>

324. When it comes to the detriments alleged against Mr Crowley-Sweet, we agree with Mr Lewis's submission (para 12 of his written submissions) that the alleged detriments in the List of Issues at times overlapped and/or were not always clearly set out. We have found it helpful in setting out our conclusions to adopt the practice of grouping related detriments used by Mr Lewis in his submissions. We have made one change to his approach which is to include allegation D1 within the group of detriments relating to side-lining and general management rather than dealing with is separately. We have also decided to deal first with the group of allegations relating to investigating or responding to the protected disclosures (D7 and D12) since those conclusions inform our decisions on the other detriments.

<u>Detriments relating to responding to and failing to investigate the protected disclosures (D7 and D12)</u>

Telling C that his concerns raised in his Agreed Protected Disclosures would be dismissed but then lauding the same when the subject was brought up in front of others at the critical meeting in March 2018, [18g] ***("D7")***

"Continued and persistent failure to investigate" the Agreed Protected Disclosures properly or at all by "passing the buck" in respect of who was responsible for addressing C's concerns and failing to escalate the concerns to senior management and/or those with "remit" to deal with the same [18(l)] ***("D12")***

325. We accept Mr Crowley-Sweet was aware of the protected disclosures and the fact that the claimant had presented them to ILG in autumn 2017. We found that Mr Crowley-Sweet's view was that the issues raised by the claimant had been dealt with at the ILG and that it was now for senior leadership to take them forward if

they wanted to. We do not accept that the allegation in D7 is made out. We do not find that Mr Crowley-Sweet "dismissed" the concerns in the protected disclosures. The closest matters came to that, we find, was Mr Crowley-Sweet at the meeting in early February 2018 confirming that the matters raised in the papers were not the claimant's core responsibilities. We do not find that to amount to his "dismissing" the concerns, but of confirming that it was not the claimant's responsibility to address them. We do not find that detriment established.

326. We accept that Mr Crowley-Sweet did praise the work that the claimant was doing to Leonie MacKenzie in the meeting they had in the run-up to the ORR meeting on 12 March 2018. We do not find that Mr Crowley-Sweet praising the claimant's work to Ms MacKenzie could amount to a detriment.

327. To the extent that the detriment is said to be what the claimant felt to be inconsistency of treatment in 1 to 1 meetings and in meetings with stakeholders, it seems to us that that was an aspect of Mr Crowley-Sweet seeking to promote the work of his division and to repair the reputation of the claimant with senior internal stakeholders, which Mr Crowley-Sweet saw as having been damaged by his presentation to ILG in autumn 2017. We do not think that amounts to a detriment.

328. If we are wrong and there was a detriment as alleged, we find that the claimant having made protected disclosures was not a material influence on Mr Crowley-Sweet's behaviour. As we have said in relation to other detriments, we find that his focus was on promoting the work of his team, repairing any damage to its reputation from past issues and ensuring that it achieved what he saw as the CDO Division's role within the organisation. Any detriment was not because of the protected disclosures.

329. We find the same applies to detriment D12. We accept Mr Lewis' submission that at no point did the claimant seek to pursue the protected disclosures with Mr Crowley-Sweet. The position so far as Mr Crowley-Sweet was concerned was that the claimant had raised his concerns at the ILG meeting so senior leadership was aware. It was then a question of that senior leadership deciding what action was appropriate. The claimant appeared to himself acknowledge that that was the correct course of action in the document he prepared in early February 2018 setting what his team's objectives would be going forward (p.1483). That said, the claimant did not suggest that any point he raised a formal grievance in relation to this matter nor was there any evidence that he sought to forcefully pursue it with Mr Crowley-Sweet.

330. In those circumstances we do not think that a reasonable employee would have regarded the failure to investigate the matter as being a disadvantage. In the circumstances we find that this detriment is not made out and the claim fails.

Detriments relating to finances and projects (D2, D3, D6, D8, D9a)

"Overturning" C's team's "project permissions and management" in or around February 2018, disrupting and derailing C's projects leading to C feeling undermined [18(c)] ***("D2")***

In December 2017 and/or January 2018 ignoring C's "applications for additional financial resource" for projects which were central to C being able to fulfil his duties and to execute a solution to the concerns he had identified in his Agreed Protected Disclosures [18(d)] ***("D3")***

Treating C "unfairly and with disdain and contempt", particularly in January 2018 when he advised C that C's "team's resource requirement (provided in Summer 2017) had been made null and denied it was provided" [18(g)] ***("D6")***

*Asking C to meet with him on a 1-2-1 basis to discuss re-administration and finance of C's projects and then asking others to join the meeting causing the Claimant to feel he was being "targeted" to bring him to account [18g] ("**D8**")*

Denying / disallowing the final financial approval stating that C's team could not spend the money needed, in the course of a group discussion thereby humiliating C in front of those present and blaming him for the project "failures" [18(h)] ***("D9a")***

331. Mr Crowley-Smith did return the £300,000 budget TAMMS project budget for 2017-18 to Central Finance. We find that he did so because he genuinely believed that it would not be possible to spend that budget by the end of the financial year because the claimant did not have the necessary approvals in place to progress the 3 projects. He reached that decision after discussions with the claimant and members of the finance team. We do not think it is accurate to characterise that as ignoring an application for resources (D3) because no such "application" was made. We accept that the claimant was disappointed at the removal of the budget and its impact on the team's ability to progress the 3 projects, but we do not accept that a reasonable employee would have seen that as a disadvantage. That was particularly given that by 2 February 2018 when the decision was made the claimant was aware from Mr Smith's email of 1 February 2018 that none of the projects had been put forward to IDC because of a backlog. If we are wrong and the decision to remove the budget was a detriment, we find it was not influenced by the claimant's protected disclosures. The reason Mr Crowley-Sweet reached his decision was because he needed to comply with the respondent's financial internal governance processes. He reached the same decision in relation to budgets held by other managers who had not made the protected disclosures.

332. Although detriment **D6** refers to January 2018, it appears to us to focus on the meeting on 2 February 2018. That is the meeting at which the claimant in his witness statement said Mr Crowley-Sweet treated him with "disdain and contempt". We found that although Mr Crowley-Sweet criticised the claimant and his team at that meeting for his handling of finance and internal governance he did not treat him with "disdain and contempt". The treatment alleged in D6 did not occur as alleged and the claim relating to that allegation fails. To the extent that the reference to the claimant's team requirements being made "null and void" is meant to refer to the decisions to remove the claimant's team budget we have set out our conclusions on that issue in dealing with **D3** above.

333. We also found that when Mr Crowley-Sweet asked the finance team colleagues, Mr Oates and Ms Blackwell, to join that meeting he did not do so to "target" the claimant (**D8**) or to "humiliate him in front of those present" (D9(a)). We

find that Mr Crowley-Sweet asked them to attend because he was still unclear about the budget and finance position and felt their input might be needed at the meeting the claimant had requested. We do not find that a manager asking finance colleagues to join a meeting to discuss finance matters would be viewed by a reasonable employee as a disadvantage. D8 fails because there was no detriment. If we are wrong about that, we find that Mr Crowley-Sweet's decision to involve finance colleagues was in no way influenced by the protected disclosures.

334. We have considered whether Mr Crowley-Sweet's criticising the claimant and his team for failings in financial and project governance in front of those finance team members amounted to a detriment even if he did not do so in a "disdainful" or "contemptuous" way. We accept that a manager is entitled to hold their line reports to account. However, we have decided a reasonable employee would find being criticised for failings in front of peers (especially when expecting a one-to-one meeting) a disadvantage. We do find that the allegation **D9(a)** is made out to the extent that it was a detriment to criticise the claimant in a group discussion. We do not find that that detriment was in any way because of the claimant's protected disclosures. We do not find that Mr Crowley-Sweet had them in mind at all. Instead, he was concerned and holding the claimant and his team to account for the sorts of internal governance failures which he was concerned would damage the CDO division's reputation in the eyes of senior management. We find his approach was to hold his line reports accountable and to do so in a direct way. He would have done the same with any of his managers in the same position as the claimant who had not made protected disclosures.

335. When it comes to detriment D2 we find the wording of the D2 does not accurately reflect what happened. The position as at 2 February 2018 was that none of the 3 projects had obtained the necessary "project permissions" to proceed. Mr Smith confirmed on 1 February 2018 that none had IDC approval at that point. There were no permissions to "overturn". We found that as at 23 January 2018, WSP was aware that at least 2 of the projects awaited approval. There was, at best, an expectation on the claimant's part that the projects were going to go ahead, probably under the auspices of Mr Bayliss' TOC project. Mr Crowley-Sweet's genuinely held view was that since IDC had not yet approved the projects there was no time to go through the remaining approval steps so that the contracts relating to the projects would be delivered in 2017-2018.

336. In those circumstances we do not accept that a reasonable employee would have seen the decision to stop the 3 projects as a disadvantage. It was inextricably linked with the decision to remove the budget, which we have found was a decision Mr Crowley-Sweet reached because he needed to comply with the respondent's financial internal governance processes. We do not find that the claimant's having, as a result, to tell WSP the work would not be going ahead meant this was a detriment. A reasonable employee would not have seen that as a disadvantage, particularly in circumstances where there had been only 1-2 tentative discussions with WSP who themselves understood 2 out of 3 projects were still awaiting approval. This was not a case where any of the projects were half way through being delivered when they were stopped.

337. If we are wrong, and the alleged detriment in D2 is made out, we find that it was not influenced by the claimant's protected disclosures. We find that Mr Crowley-Sweet's decision was one based on the need to comply with the respondent's internal governance rules and his genuinely held view that the claimant would not be able to complete the remaining approval steps so that the contracts relating to the projects would be delivered in 2017-2018. Even if he was wrong in that view (because the contracts could have been let to WSP using the TOC framework agreement) any detriment relating to stopping the project was not influenced by the claimant's protected disclosures. For the avoidance of doubt, we do not accept the allegation made by the claimant in his statement that the decision was "contrived with the specific purpose of discrediting and undermining me" (para 122).

Detriment relating to changing roles (D5)

Unilaterally changing C's role (and the roles of C's team), in February 2018, when C was told to stop work (email dated 8 February 2018) on "Asset Management" and instead focus on "Data" [18(f)] ***("D5")***

338. We find that Mr Crowley-Sweet had by 2 February 2018 changed the work the claimant and his team was doing. That was in 2 ways. First, from 19 January 2018 by asking them to "drop everything" to prioritise the work needed on the KPI3 data assurance work. Second, by 2 February 2018 making it clear that the team's role would focus on performance analysis and would not be carrying out business analysis/asset management work. We find that change was made unilaterally by Mr Crowley-Sweet, if by that the claimant's case is that there was little if any consultation or discussion with him prior to the change being made. There had been discussion of role profiles but there was no evidence that Mr Crowley-Sweet sat down with the claimant to discuss why the changes were being made. We accept that a line manager is entitled to set a line report's priorities. In this case, however, the change in priorities meant a part of the claimant's role (that relating to asset management) disappeared. The claimant's objectives had reflected the fact that asset management was part of his role so this was a significant change for him. We do accept that there is something in Mr Lewis's submission that the claimant wanted to focus on the business analyst part of his role because he found that more conducive. We do not think that makes the unilateral change of role any less of a detriment, however. We find this was a detriment.

339. We do not accept, however, that the decision to change the claimant's role (and that of his team) was materially influenced by his protected disclosures. We find instead that Mr Crowley-Sweet's focus was on ensuring that his CDO division delivered its remit in a way that was effective and won the trust of ILG and external stakeholders. To achieve that the division needed to focus on its tasks and not get distracted by tasks which were allocated to (or best done by) others. His view was that the business analysis tasks were not within his division's responsibilities. We do find that the way this was implemented was forceful and failed to take into account the time and energy the claimant had already invested in the asset management work. What we are deciding is not whether the decision was a fair one or handled well but whether it was materially influenced by the claimant's protected disclosures. We find it was not and the claim arising from this allegation fails.

Detriments relating to sidelining and general management (D1, D4, D9b, D10 and D11).

Failure, without providing any notice, to attend meetings with C in January 2018 (his first team meeting), in February 2018 (with Mark Austin's team) and the meeting on 12 March 2018 (the final meeting to discuss his Agreed Protected Disclosures [18(b)] ***("D1")***

Failing to "discuss the needs" of C and C's team with C in a "collaborative" manner and thereby "side-lining" the team, between December 2017 and March 2018 including an initial team meeting in January 2018 [18(e)] ***("D4")***

Treating C "inconsistently", particularly with regard to a "plan of action" (Roads Investment Strategy), submitted by C in August/September 2016 and in February 2018 by stating they were "irrelevant and inactionable" yet lauding the same proposals later that month to key stakeholders [18(i)] ***("D9b")***

Generally side-lining, ignoring and belittling C, between December 2017 and March 2018 [18(j)] for example by not providing C with access to the level of correspondence and confidences that he had previously been privy to when under his previous division and reporting structure from his appointment in 2014; ***("D10");***

Causing "excessive work-related stress" [18(k)] ***("D11")***

340. We find that all of these allegations arise from Mr Crowley-Sweet's management style. We find that the most convenient approach is to take them as a group.

341. In relation to all of them, what we find is that the claimant found Mr Crowley-Sweet's management style to be inimical, particularly when compared to the far more collaborative management approach of Julia Thorne. We do not accept, as alleged in detriment D10, that Mr Crowley-Sweet deliberately ignored or belittled the claimant. We do accept that Mr Crowley-Sweet's management style and his level of seniority meant that the claimant was not given access to the same level of correspondence and confidence as he had been when managed by Ms Thorne, and we also accept that Mr Crowley-Sweet's approach was far less collaborative than Ms Thorne's approach. We also accept that Mr Crowley-Sweet did not attend meetings with the claimant and his team when invited to do so. We accept that a reasonable employee would view those actions as a disadvantage and find that the detriments are made out in relation to allegations D1, D4 and D10.

342. When it comes to allegation D9b there is, it seems to us, an overlap with allegation D7 dealt with above. We find that Mr Crowley-Sweet did tell the claimant that his plan in relation to RIS was irrelevant and inactionable. We find he did praise his work to Ms MacKenzie in the lead up to the ORR meeting in March 2018. We have explained in relation to D7 why we did not find such apparent inconsistency of treatment to be a detriment.

343. When it comes to allegation D11 of causing excessive work-related stress, we find that detriment is not made out. We do accept that the claimant did

experience a great deal of stress as a result of the changes made to his role and responsibility and due to Mr Crowley-Sweet’s more demanding management style. It does not seem to us that Mr Crowley-Sweet set out to cause excessive work-related stress by increasing the claimant's workload. His actions, if anything, sought to focus and limit the claimant's workload. A specific example of that is the exchange relating to Mr Sheppard’s paternity leave on 1/2 February where Mr Crowley-Sweet made clear that he was not expecting the claimant to deliver to the same quality and timescales with more limited resources. In relation to D11, therefore, we do not find the detriment made out.

344. In relation to those detriments which we have found are made out, we are satisfied that the claimant's protected disclosures were not a material influence on them. We do not accept the underlying case being made by the claimant, which is that Mr Crowley-Sweet was in some way penalising him for making the protected disclosures. We are satisfied that the reason for Mr Crowley-Sweet’s behaviour was his focus on making the DCO Division into a more business-like and focussed division to fulfil his vision of its role within the organisation. That meant that on occasion he would challenge managers in a way which previous line managers might not have done. We also find that when it came to his failure to attend meetings, that was simply a function of the amount of work that he was undertaking and the number of meetings he had at senior level during this time. It was nothing to do with the protected disclosures.

345. We should make it clear that we are not suggesting that Mr Crowley-Sweet’s approach to matters, including the lack of consultation when there was a change of role, is necessarily a laudable approach to management. What we do find is that that approach was consistent in relation to the claimant and in relation to others. Whether it was the right or wrong approach we find that it had nothing to do with the protected disclosures.

<u>Detriments relating to the claimant’s sickness absence</u>

*Causing or permitting C’s pay to be “erratic” and failing to provide C with clarity in respect of his pay [18(m)] (“**D13**”)*

*Since around July 2018, applying R’s absence management policy in a punitive and interrogatory manner, and in a meeting on 21 November 2018, telling C that to secure redeployment he must formally apply for vacant roles, disregarding OH advice [18(n)] (“**D14**”);*

Insisting that C continue to meet with DCS on 6 September 2018, 27 September 2018, 21 November 2018 and 2 July 2019 despite C expressly stating on numerous occasions (10 August 2018, November 2018, March 2019, 27 May 2019, 2 July 2019, 10 July 2019, 17 August 2019 and 11 September 2019) that DCS’s attendance exacerbated C’s ill-health [18(o)] ***(“D15”);***

*The indefinite postponement of C’s “final absence management” meeting on 2 April 2020 and failure to make further contact [18(p)] (“**D16**”).*

346. The issue of the claimant's pay being "erratic and inconsistent" (**D13**) was first raised in his email to Miss Clayton on 27 May 2019. Mr Crowley-Sweet accepted in his evidence that he had made an error by not marking the claimant's absence as "long term" on the Oracle system, resulting in an overpayment. We find that was a genuine error on his part. We do not believe that Mr Crowley-Sweet was aware of the error at the time and the evidence showed that he attempted to assist the claimant in clarifying the error, e.g. by tasking Miss Clayton with providing the claimant with payslips when he requested them at the November 2018 meeting. We accept that this resulted in a detriment but do not find it was materially influenced by the Protected Disclosures.

347. We do not accept the allegation that the absence management policy was applied in a "punitive and interrogatory manner" (**D14**). We do accept that Mr Crowley-Sweet did send the claimant emails on 25 July 2018 and 2 August 2018 which were in abrupt terms. We also accept that Mr Crowley-Sweet during the process was seeking to ask questions of the claimant about the triggers for his absence. We find that he was doing so because he was seeking to find solutions for those issues. We do not find that this amounted to conducting the absence management process in a "punitive and interrogatory manner" in the way suggested by the claimant. We do not find that detriment made out.

348. The second part of **D14** refers to the respondent telling the claimant on 21 November 2018 that to secure redeployment he must formally apply for vacant roles disregarding Occupational Health advice. That, we find, refers to the OH report from 26 September 2018 (pages 1673/1674) which had stated that, "if operational feasible to possibly expediting Mr Frazer's return to work that you look into the potential of a change of role". The OH report did not make any specific provision suggesting that any redeployment should be without prior interview. The redeployment policy which the respondent had provided for a mandatory interview but also that redeployment could only take place when someone was fit for work. We did accept that Mr Crowley-Sweet did not, at the 21 November 2018 meeting, refer to a "light touch" interview and do accept that the claimant came away thinking that he would have to undergo a full interview process. That was subsequently clarified, we have found, by Ms Clayton on 28 March 2019. We do not find that a reasonable employee would take the view that the respondent applying its standard redeployment process would amount to a detriment. In those circumstances claim D14 fails. If we are wrong about that and the failure to offer a redeployment without any kind of interview was a detriment, we are satisfied that the claimant's protected disclosures did not materially influence Mr Crowley-Sweet's decision. We find that throughout the absence management process, the claimant's protected disclosures were not a material influence on Mr Crowley-Sweet's decisions and behaviour.

349. When it comes to detriment **D15** we find that Mr Crowley-Sweet's continued involvement in the absence management process was a cause of stress and distress to the claimant. Mr Crowley-Sweet was aware of that at the latest by the second absence meeting on 21 November 2018. We have found that the respondent's HR team was aware of that by 8 November 2018 when Miss Clayton discussed the Summary of Issues with Mr Clark. In those circumstances, we do find that a reasonable employee would view Mr Crowley-Sweet's continued involvement in the absence management process after 21 November 2018 as a detriment.

However, we do not find that the claimant was subjected to that detriment because of the protected disclosures. Mr Crowley-Sweet persisted in his involvement because he saw it as his role as the claimant's line manager under the absence management policy. We find that the protected disclosures were not a material influence (or in his mind at all) when making decisions about the absence management process.

350. We find that it was not Mr Crowley-Sweet's decision to postpone the "final absence management meeting" which was due to take place on 2 April 2020 **(D16)**. The decision was a decision of the respondent as an organisation to adopt a policy of not going ahead with formal meetings until the position in relation to the COVID lockdown had been clarified. We also accept Mr Lewis's submission that postponing the meeting and not reinstating it could not be regarded as a detriment given that it was to decide whether the claimant's employment should be ended. If we are wrong about those points we find that the protected disclosures were not a material influence on the decision to postpone – as we say it was a function of an organisation-wide policy in relation to such formal meetings.

Summary of conclusions on the claimant's whistleblowing detriment claims

351. In summary, although we found that the respondent did subject the claimant to some of the detriments alleged, none of the detriments were because of the claimant making protected disclosures.

352. Given our decision, the issue of the time limits for bringing any claims of protected disclosures does not arise.

Disability related harassment

353. We next deal with the claimant's claims of disability related harassment. These are set out at paragraphs 5, 6 and 7 in the List of Issues. The alleged acts of unwanted conduct are set out at 5(a) and (b):

> a. *The Claimant felt harassed … when his requests to cease meeting with Davin Crowley-Sweet were refused on the basis that the Respondent felt that the meetings were 'productive' and 'conducive in trying to move, matters forward' and he had to continue to meet with him. The Claimant made this representation through his union representative in November 2018. If the Union representative had not made prior to, it was indeed specifically requested in a meeting with Toni Clayton in March 2019 and reaffirmed in an email regarding the same on 27 May 2019. These requests were also made on the following dates: 7 November 2018, and 10 July 2019." [29];*
>
> b. *With regard to C's sickness absence, on 25 July 2018 DCS emailing C asking that C contacts him 'immediately' notwithstanding that C was too unwell to work and had complied with the sickness policy and then on 2 August 2018, stating 'I only hear from you when you want to advise another sick is due [sic]" [29]*

5(a) – Mr Crowley-Sweet's continued involvement

354. In relation to Mr Crowley-Sweet's continued involvement, we do find that this amounted to unwanted conduct. We are conscious that Mr Clark may have been giving mixed messages to Ms Clayton about Mr Crowley-Sweet's continued involvement, but it seems to us clear from the direct communications from the claimant to Ms Clayton, and indeed his summary of issues document, that Mr Crowley-Sweet's continued involvement was unwanted. We do not think that the claimant's failure to raise objections in the meetings themselves means the conduct was not unwanted. As we explain in our findings, we can quite easily understand why it would have been extremely difficult for the claimant to raise his objection in the meetings themselves.

355. We are certainly of the view that Mr Crowley-Sweet did not have a harassing purpose in continuing to be involved in the meetings.

356. We do find that the claimant found Mr Crowley-Sweet's continued involvement to have a harassing effect in the sense that he found it intimidating. We have very carefully considered whether it was reasonable for Mr Crowley-Sweet's continued involvement to have that effect. Taking into account Mr Clark's positive feedback at the various meetings and our assessment of Mr Crowley-Sweet's behaviour based on the evidence we heard, we take the view that objectively he was at all the meetings attempting to resolve the issues with the claimant. We do think that he genuinely did not comprehend the impact his continued involvement was having on the claimant. As we said in our findings, we do not accept the claimant's case that the meetings were carried out in an antagonistic or otherwise punitive manner.

357. On balance we have decided that it was not reasonable for Mr Crowley-Sweet's conduct to have the harassing effect experienced by the claimant. The claim of harassment in relation to Mr Crowley-Sweet's continued involvement fails on that basis.

358. If we are wrong about that then we would have decided that the claim failed because any unwanted conduct was not "disability related". We accept that the context for the behaviour was an absence management process. We do not think that that in itself is sufficient to make Mr Crowley-Sweet's continued involvement "disability related" conduct.

5(b) Wording of emails from Mr Crowley-Sweet on 25 July and 2 August 2018

359. In relation to 5b, we accept that sending the emails to the claimant in the terms in which they were written was unwanted conduct. We accept that the claimant did find them to have a harassing effect in the sense of being intimidating. We are mindful of the case law such as **Grant** warning about not cheapening the words used in the definition of a harassing effect. We accept that the claimant did perceive the emails as having a harassment effect but do not think it was reasonable for them to have that effect. We accept they were somewhat abrupt but the use of the word "immediately", for example, was ameliorated by the use of "please" elsewhere in the email.

360. On balance, therefore, we find that the emails did not have the harassing effect contended for. Nor do we accept that Mr Crowley-Sweet had any harassing purpose in sending them. The claimant in cross-examination accepted that was perhaps not his purpose or intent.

361. The claim of harassment therefore fails.

362. As with 5a, had we found that the conduct did have a harassing purpose or effect we would have found that the claim failed because it was not disability related. The reasons for that are the same as in relation to 5a.

Disability

Was the claimant disabled by reason of anxiety, and if so from when?

363. The respondent accepts that the claimant was a disabled person by reason of anxiety from 26 September 2018. That is the date of the first OH report. Ms Gould submitted that the claimant was a disabled person by reason of anxiety by or shortly after his second extended period of sickness absence began on 13 March 2018. As she pointed, out, the claimant had previously been absent for an extended period of around 6 months due to mental health issues in 2016-17, returning to work in February 2017.

364. We find that from the beginning of his second period of absence the claimant experienced effects on his day-to-day activities which were more than minor trivial. We have found it a difficult question to what extent those effects should be attributable to anxiety and which to FND. We find on balance that the symptoms of low mood, lack of concentration and anxiety about crowds which had an effect on his ability to socialise, articulate issues in writing or in speech were effects of the anxiety whereas the more physical symptoms such as shaking, tremors and freezing and their obvious effects on his day to day activities were more likely effects of the FND. In relation to the impairment of anxiety we find, for the avoidance of doubt, that those "non-physical" symptoms were sufficient in themselves to result in a more than minor or trivial effect on the claimant's day to day activities. The central question is at what point those effects were long term and whether that was before 26 September 2018. We did not hear evidence about the effects on the claimant during his period of absence in 2016-2017 which was due to "stress" rather than "anxiety". We note that the claimant appeared to suggest that he might be in a position to return to work when his fit note expired on 24 April 2018. We find that by the start of 8 May 2018, when the claimant was instead signed off for a further 4 weeks, that it could well happen that the effects of the anxiety on the claimant would last for 12 months or (even if the effects ceased) that they would recur. That likelihood of recurrence was supported by the claimant having had a previous extended period of absence for mental health issues.

365. We find the claimant was a disabled person by reason of anxiety from 8 May 2018.

Was the respondent aware or was it reasonably expected to be aware of the claimant's anxiety prior to 26 September 2018?

366. The respondent accepted that it had actual knowledge of the claimant's being a disabled person by reason of anxiety from the 26 September 2018 OH report. We find that the respondent had constructive knowledge of that from the slightly earlier absence meeting on 6 September 2018 at the latest. At that meeting, Mr Crowley-Sweet himself made the link between the claimant's previous absence with his current absence and suggested there was a pattern. By then the respondent was also aware of the degree of impact of the anxiety on the claimant by virtue of his email to Mr Crowley-Sweet on the 10 August 2018 and his inability to speak during parts of the 2 July call. We find that by that meeting the respondent ought reasonably to have known that the more than minor and trivial effects of anxiety on the claimant could well last for 12 months or recur.

Was the claimant disabled by reason of FND prior to 23 August 2019?

367. The claimant was not diagnosed with FND until 23 August 2019. However, we find he was experiencing the effects of FND (in terms of the "Physical" symptoms as we have described them) from the start of his absence in March 2018. It seems to us that means the impairment was likely in place a significant time before the diagnosis. There was no evidence that the claimant had experienced any similar effects during his previous period of sickness absence. In terms of whether the effects were long term or not we find that they were long term (or that it was clear that they were likely to be) at the latest by the second OH Report on 1 April 2019. By that time the claimant had been experiencing them for 12 months. We find the claimant was a disabled person by reason of FND from that date. We do not find that the absence of a diagnosis until some months later is inconsistent with the impairment already in fact being in existence before then as evidenced by its effects.

Was the respondent aware, or could it reasonably have been expected to be aware, of the claimant's FND prior to 23 December 2020?

368. We have found on balance that the claimant was a disabled person by reason of FND by 1 April 2019. The condition was not diagnosed until 23 August 2019 so the claimant did not have a name for the impairment until then. There was nothing in the first OH report dated 26 September 2018 to suggest that there was an impairment other than anxiety giving rise to the effects on the claimant's day to day activities. The 1 April 2019 report makes reference to physical effects but does not suggest any underlying condition other than anxiety. We have considered whether it could be said that the respondent ought reasonably to have known that the claimant was a disabled person by reason of the effects of the FND when the claimant did not himself know about the impairment until 23 August 2019. The claimant did not refer to the FND diagnosis at the meeting on 18 September 2019. The OH report dated 9 October 2019 does refer to the claimant undergoing an MRI but reports the claimant saying that there are "no underlying neurological abnormalities". There were no further OH reports until after the respondent accepts it had knowledge of the FND diagnosis through the disclosure process in November/December 2020. Taking all those matters together we find that the respondent could not reasonably be expected to be aware that the claimant was a disabled person by reason of FND (as opposed to anxiety) before November/December 2020.

Reasonable Adjustments

Did the respondent apply the PCP as follows to the claimant:

> *"Applying the absence management procedure (and not considering redeployment without competitive processes or in accordance with the Occupation Health recommendations)" [24]*

369. We agree with Mr Lewis's submissions that the reasonable adjustment claims were not very clearly articulated in the particulars of claim and (consequently) in the List of Issues and that there was a degree of circularity in the claim that the disadvantage arising from the application of the PCP (consisting of applying the respondent's absence management procedure) was the claimant being subjected to that procedure.

370. Having taken into account Ms Gould's submissions and the particulars of claim we understand the case being put to be:

- That the respondent failed to make an adjustment to the requirement in the absence management policy that the absence management procedure be carried out by the employee's line manager, requiring the claimant to continue to meet with Mr Crowley-Sweet (para 24(b) of the particulars of claim and 15(b) of the List of Issues). ("The Line Manager claim")

- That the respondent failed to make an adjustment to its policy (confirmed by Miss Clayton in evidence) of not funding private treatment or counselling but instead providing services through its OH provider (para 24(c) of the particulars of claim and 15(c) of the List of Issues). ("the Funding Claim").

- That the respondent failed to make adjustments to its absence management and redeployment procedures to enable the claimant to change role (including by removing the requirement that a redeployee complete a skills matrix and mandatory interview) (paras 24(a), (b) of the particulars of claim and 15(a), (d), (e), (f) and (g) of the List of Issues) ("the Change of Role claims").

371. We do not believe there is any unfairness to the respondent in our adopting that approach given that is the approach Mr Lewis took in his submissions.

372. We have found that the respondent did not have actual or constructive knowledge that the claimant was a disabled person by reason of FND until after the Tribunal claim was brought. These claims therefore relate to the claimant being a disabled person by reason of anxiety.

The Line Manager Claim

373. We find that the respondent did apply a PCP of the claimant's absence management being managed by his line manager, Mr Crowley-Sweet. We find the requirement for the employees line manager to conduct the absence management was what the claimant's absence management procedure required.

374. We find that that requirement did place the claimant at a substantial disadvantage in comparison to a person who did not share his disability because Mr Crowley-Street was one of the causes of the claimant's anxiety and attending meetings with him caused the claimant stress and distress such that, on occasion, he was unable to speak or continue to participate in meetings. That was one of the barriers to the claimant being able to make headway towards a return to work.

375. We find the respondent did have actual knowledge of the substantial disadvantage by 8 November 2018 when Mr Clark shared the claimant's "Summary of Issues" with Miss Clayton. That document identified Mr Crowley-Sweet as one of the triggers of the claimant's issues. As we have explained earlier, we do not find that the more positive feedback being provided by Mr Clark negated the contents in that Summary, particularly when taken in conjunction with the claimant's email of 10 August 2018 and (going further back) Miss Clayton's knowledge of the concerns the claimant had had with Mr Crowley-Sweet in February 2018. If we are wrong about the respondent having knowledge of the substantial disadvantage by November 2018 we find that it had it at the latest by July 2019 when the claimant reiterated his clear request that Mr Crowley-Sweet not continue to be involved.

376. As we have made clear when considering the detriment claim, it is our view that objectively, we do not think that Mr Crowley-Sweet's behaviour in the meetings was objectionable. Nonetheless his presence at the meetings did cause a substantial disadvantage to the claimant because of the stress it caused and the symptoms it triggered.

377. We find it would have been a reasonable adjustment for the attendance management procedure to have been led either by HR or by another manager. We do not accept that replacing Mr Crowley-Sweet in the process would have the significant impact on continuity suggested by the respondent. He had only been the claimant's line manager for a short period of time (so short he suggested this was one reason for his not conducting his performance review). To the extent that there would need to be discussion of matters of which Mr Crowley-Sweet had knowledge to move things forward (e.g. future roles, responsibilities or divisional structure) that was something which he could have been consulted about by whichever manager conducted the attendance meetings. We find the failure to replace Mr Crowley-Sweet's role in the process particularly difficult to understand from July 2019 when Mr Drea was appointed as the claimant's line manager. He had no historic issues with the claimant and was at a more junior level than Mr Crowley-Sweet so would be likely to have more time to spare to prioritise the claimant's return to work.

378. This claim succeeds in relation to the failure to make a reasonable adjustment to the PCP by replacing Mr Crowley-Sweet as the absence manager from 8 November 2018.

379. We set out our findings on time limits in relation to this claim below.

<u>The Funding Claim</u>

380. We find this claim relates to the funding of two different treatments/medical services. The first was to pay privately for an assessment of the cause of the claimant's apparent neurological symptoms. The claimant was on an NHS waiting

list for assessment but that was leading to delays. The second form of treatment was paying for the counselling which the claimant was self-funding. We find that the claimant raised the possibility of the respondent funding these treatments at the meeting on 2 July 2019 and in his letter to Mr Crowley-Sweet dated 19 August 2019 (pages 1852-1854).

381. We find, based on Miss Clayton's evidence, that the respondent did have as part of its attendance management procedure a policy of not privately funding treatment but instead of only providing treatment via its OH service provider.

382. We find the application of that PCP did substantially disadvantage the claimant compared to those not sharing his disability of anxiety. In relation to the assessment being paid for privately, we find that the delay in waiting for an NHS assessment of the potential treatment required caused the claimant a substantial disadvantage by prolonging his period without such treatment. That in itself exacerbated the claimant's symptoms arising from his anxiety.

383. When it comes to the requirement for counselling to be provided by the respondent's OH service, we find that that also put the claimant at a substantial disadvantage compared to a person not sharing his disability. The effect of that requirement was that the claimant had either to continue to bear the cost of paying the therapist himself or to begin therapy with an OH provided therapist. Based on the evidence, we find that the claimant had made clear to the respondent that he had established a bond with the counsellor for whom he was privately paying. Switching to the OH provided counsellor would mean starting afresh. We find that having to go through the issues which were causing him anxiety from scratch with a second person would cause the claimant substantial disadvantage compared to a person who was not disabled by reason of anxiety.

384. When it comes to paying for an assessment to avoid delay, we find that the respondent was aware that the claimant was on an NHS waiting list for an assessment from the OH Report on 1 April 2019. We find that by 2 July 2019 when the assessment still had not taken place it knew there was a delay. Given what it already knew about the claimant's anxiety and its symptoms we find that by 2 July 2019 it ought reasonably to have known that there was a substantial disadvantage to the claimant of not paying to speed up that assessment. If we are wrong about that we find it had constructive knowledge by the latest by 19 August 2019 (or a few days later when the claimant's letter of that date was received).

385. When it comes to funding the claimant's private therapy we find that the respondent was aware from the OH report on 26 September 2018 that the claimant was privately funding a therapist. It was aware from Miss Clayton's conversation with the claimant and Mr Clark on 28 March 2019 that he would prefer to continue with his own therapist rather than starting afresh with and OH therapist. We find that the respondent knew, or ought reasonably to have known of the substantial disadvantage by that date. If we are wrong about that then we find it had the necessary knowledge at the latest by 19 August 2019 (or a few days later when the letter was received) when the claimant made clear in his letter he had built up with a bond with the counsellor he was privately funding in his letter to Mr Crowley-Sweet.

386. When it comes to whether it was a reasonable adjustment to fund the two kinds of treatment, we find the position is different for each. In relation to funding the assessment it seems to us that there was a great deal of uncertainty about the extent to which paying for an assessment would assist in identifying appropriate treatment and about what the assessment would consist of. The cost of a privately funding assessment was potentially open-ended given the lack of information the respondent had about the claimant's current treatment and the number or kinds of tests or procedures that an assessment might consist of. That was due in part to the claimant being seemingly reluctant to share information about his then treatment at the meeting on 2 July 2019. There was no certainty that paying for a private assessment would lead to any concrete results which would assist the claimant. We do also take into account Mr Lewis submission that the respondent is a publicly funded body. In those circumstances, given the uncertainty about the extent to which a privately funded assessment would assist in identifying treatment for the claimant, we have decided that it was not a reasonable adjustment for the respondent to pay for that assessment.

387. We reach a different conclusion, however, in relation to the funding of the claimant's counselling. In this case, there was evidence that the claimant's counselling was making a positive contribution to recovery. Allowing him to continue that process rather than requiring him to start afresh would, we find, assist the claimant in continuing to address the issues which had led to his sickness absence and, thereby, contribute to a potential return to work. In contrast, requiring the claimant to start again and revisit the incidents which he would presumably already have gone through with his privately funded counsellor would, we find, be more likely to set the claimant back. It was clear throughout the case that reliving the events which led to his sickness absence was distressing for the claimant. Requiring him to do so in the context of fresh counselling would have the same effect.

388. In contrast to paying for the private assessment, it seems to us that the cost of paying for privately funded counselling could be clearly defined and quantified. Again, we accept Mr Lewis' point that the employer in this case is a publicly funded body. However, it is a significant organisation and the cost of paying for privately funded counselling would need to be set against the cost of it having a valuable employee unable to return to work. We are not in a position to say that privately funding the counselling the claimant was already having would have resulted necessarily in his being able to return to work by itself, but we do find that paying for it would have been a reasonable adjustment in this case.

389. This claim succeeds in relation to the failure to make a reasonable adjustment to the PCP by funding the claimant's therapy from 28 March 2019.

390. We set out our findings on time limits in relation to this claim below.

<u>The Change of Role claims</u>

391. This claim relates to the alleged failure to make the following adjustments:

- *change the claimant's role, as recommended in an occupational health report dated 26.09.18 [24(a)].*

- *consider redeployment "at all" until it was raised by the claimant at a meeting on 2 July 2019 and, thereafter, not properly [25(a)].*
- *provide the claimant with any vacancy lists or information about possible suitable roles [25(b)].*
- *The claimant being told during the meeting in November 2018 that the respondent would only allow redeployment following successful formal recruitment processes which the claimant "would not be able to undertake due to his condition" [25(c)].*
- *Disapply a requirement for the claimant to complete a skills matrix, which was then not used or referred to by the respondent [25(d)].*

392. We accept that the respondent applied a PCP of requiring that to be redeployed an employee would have to be fit for work and had to undergo a mandatory interview. We find that that "mandatory interview" was not a full competitive interview or a formal recruitment process. We accept that instead it was a mandatory interview to see whether the claimant fitted a vacancy to which they were potentially matched. It does not seem to us that that is the same as a "successful formal recruitment process".

393. We did not find the way that this part of the claim was drafted very helpful. As we understand it, the thrust of the reasonable adjustment claim is that there should have been an adjustment by the claimant being allowed to change roles without undergoing either a matching process (requiring the skills matrix) or undergoing the mandatory interview. Being as fair as we can to the claimant, we understand the case to be that the substantial disadvantage claimed was that the claimant would not be able to (or would find it much more difficult to) undergo the processes of completing a skills matrix and completion of a mandatory interview than someone not disabled because of anxiety. Instead, as we understand it the claimant's case is that he should have been slotted into a different role (not in the CDO Division) because that would enable him to recover and therefore be fit for work.

394. Although we can accept that requiring an employee who is disabled by reason of anxiety to undergo even a "light touch" mandatory interview and to complete a skills matrix would put them at a substantial disadvantage compared to a person not disabled by reason of anxiety, we do not accept that the suggested adjustments were reasonable. First of all, it seems to us that it would be in practice very difficult for the respondent to identify and match a role for the claimant without his completing some kind of skills matrix or other document that would assist in matching him to a vacant role. The claimant had made it clear that he was not interested in roles below pay band 7 and it seems to us that any role to which the claimant would have been matched would have involved a degree of management responsibility and also (given the nature of the respondent's activities) a requirement for technical skill or knowledge. We cannot see in practice how the respondent could simply slot the claimant into a role without some kind of assessment of his skills and capabilities. We do not think that the possibility of creating a role for the claimant was a reasonable adjustment.

395. On the evidence we heard, the respondent had a fixed budget when it came to staffing and was under resourced. In those circumstances, we do not think it would have been reasonable to create a role for the claimant which was not already required by the respondent's structure and activities.

396. We also find that it would not be reasonable for the claimant to be slotted into a new role until the respondent was satisfied that he was fit for work. The respondent as the claimant's employer had an obligation to him to ensure that he was fit for work before he was put into what would (given his seniority) be a potentially stressful situation. Although Mr Crowley-Sweet's management was one element or one of the triggers for the claimant's issues, it was clear from his summary of issues that it was not the only one. Those other issues relating to the culture and approach of the organisation would still remain in place even if the claimant had moved from Mr Crowley-Sweet's division. Taking all those matters together, we are not satisfied that these change of role adjustments were reasonable.

397. We also find as a matter of fact that the respondent did take steps to consider seeking to redeploy the claimant. From the meeting in November 2018 Mr Crowley-Sweet had asked the claimant to define the environment which would make it safe for him to return. It was made clear that the respondent could not create a role for the claimant, but we do not find that it was suggested at that point that no change to his role was possible. The requirement to complete the skills matrix in itself we find was evidence that the respondent was seeking to consider whether redeployment was possible. On the claimant's own case there was discussion at the November meeting of the interview process which would apply. As we have said, we do not accept that abandoning any matching process would amount to a reasonable adjustment.

398. We therefore find that the change of role reasonable adjustment claims fail.

Indirect Discrimination

399. The indirect discrimination claim was not forcefully pursued by Ms Gould in her submissions. We did not hear evidence to establish that the respondent's attendance management policy caused a particular disadvantage to disabled persons in comparison with non-disabled people.

400. For the respondent, Mr Lewis accept that the PCP was applied in the sense that the respondent operated its attendance management policy. He submitted there were aspects of the policy which were more helpful to disabled people than other people in that it provided for adjustments to be made to enable them to return to work.

401. We have found that this claim was not well pleaded. As we understand it, the case being made is that disabled employees are more likely to be absent for long periods of time and therefore more likely to be subjected to the attendance process and, ultimately, to dismissal is they are not capable of returning to work. We can understand the logic of that, but it does not seem to us necessarily to follow that because someone is off long-term (i.e. more than 21 days, as defined in the respondent's attendance management policy) they would necessarily be a disabled

person. Length of time of absence does not necessarily equate to being a disabled person because there is also a need to establish the impact of any impairment on the individual.

402. We do not, therefore, accept that the claimant has established that the PCP applied did cause a particular disadvantage to disabled people. If we are wrong about that then we would have accepted the respondent's argument that the policy was objectively justified. The legitimate aim of managing attendance and redeployment to ensure that it could properly provide services and was required to do so as a public sector organization seems to us to be a clearly legitimate one (and indeed a common purpose of such attendance management policies). The policy was, it seems to us, proportionate in that it provided for adjustments to be made to accommodate a disabled person's return to work (even potentially in alternative roles). Even if the claimant had established that the PCP caused a particular disadvantage to disabled people which he shared, we would have found that this claim failed by reason of the objective justification being made out.

Section 15

Did the respondent subject the claimant to "unfavourable treatment" in relation to any of the same seven matters set out above at para 15(a)-(g) [26]

403. The claimant's case is that the "something arising" from his disability was his inability to attend work. We accept that element of the s.15 claim is made out. The alleged acts of unfavourable treatment are said to be the same things which amounted to reasonable adjustments. In this section we have used the same groupings and headings as we used in discussing the reasonable adjustments claims.

404. When it comes to the "Line manager" claim, we find that Mr Crowley-Sweet's continued involvement as attendance manager was unfavourable treatment. However, we do not find that his continued involvement was "because of" the claimant's inability to attend work. It was because he was the claimant's line manager.

405. When it comes to the "funding claims" again we do not find that any failures were "because of" the claimant's inability to work. That was the context for the decisions but not the reason for it.

406. When it comes to the "change of roles" claims we do accept that the claimant's inability to work was a significant influence on the respondent not changing the claimant's role (List of Issues 15(a)). We do not accept that any of the other matters under this grouping were "because of" the claimant's inability to work.

407. When it comes to 15(a) we find that the respondent's failure to change his role was objectively justified. Our reasons reflect those we gave in finding this was not a reasonable adjustment and we do not repeat them in full here. In brief, we accept that any change of role had to be a proportionate means of achieving the respondent's aim of managing attendance and redeployment to ensure that it could properly provide the services and work required of it. That meant that the change of role had to result in the claimant being in a role which was sustainable in terms of

his ability to cope with it and effective in the sense of his contributing in that role to the effective delivery of services. Creating a role for him or slotting him in to a role without assessment of his ability to fulfil it in terms of both his skills and fitness to work would not achieve that.

408. For the reasons given above, the s.15 claims all fail.

ACAS uplift

*Is this a claim to which the ACAS Code of Practice on Disciplinary and Grievance Procedures ("**Code of Practice**") applies?*

If so, has there been a breach of the ACAS Code of Practice by the respondent [33]? If so, would it be just and equitable to apply any uplift to any award (if any were to be made)? If so, by what amount should any uplift made set at (up to a maximum potential amount of 25%)?

409. We found the claimant did not raise a grievance. We do not find it was unreasonable behaviour on the claimant's part not to raise a grievance given the extensive ongoing discussions as part of the absence management procedure. Equally, we find no failure to comply on the respondent's part.

Jurisdiction – Time Limits

Are any of the successful claims presented out of time?

410. When it comes to the "Line manager" reasonable adjustment claim, we find that the failure to replace Mr Crowley-Sweet as the manager dealing with the claimant's attendance management process was a continuing act up to and beyond the presentation date of the Tribunal claim. It was the continuing application of the PCP rather than a one-off act with continuing consequences. That claim was brought in time.

411. The position in relation to the "funding" reasonable adjustment claim is different. We find that given the request made on 19 August 2019 the claimant could have expected the respondent to make a decision in relation to that adjustment at the next absence management meeting which took place on 18 September 2019. The omission to make the adjustment at that point started the time limit of three months running. The claim in relation to the failure to make reasonable adjustments was presented on 18 April 2020, ACAS early conciliation having been started on 19 February 2020. Given that we find that time started to run from 18 September 2019, we find that the claim in relation to that failure should have been made by 17 December 2019. That means the claim was around four months out of time. We also take into account that at this time the claimant was continuing to seek to resolve matters through work and had at that meeting on 18 September decided to consider whether to apply for ill health retirement. There were other processes ongoing which could either resolve matters and/or which were providing a drain on his energies, therefore.

412. We have considered whether it is just and equitable to extend time to allow that claim to be brought. We accept that the claimant's disabilities and their effect

on his ability to address the issues arising from work provide an explanation for the delay in proceeding with a claim.

413. When it comes to the relative prejudice to the respondent and the claimant of allowing or not allowing the claim, we find there would be a significant prejudice to the claimant if he was not allowed to proceed with a claim which we have found to have merit. We do not think that the evidential prejudice which applies to earlier events in this case apply with the same force to the sickness absence process. The meetings involved in the absence management process were documented and there is surrounding evidence in the form of OH reports and email communications. We take into account that we are dealing with matters which happened a number of years before the Tribunal hearing and that there was some impact on witnesses' recollections. However, the meetings involved in the absence management process were documented and there is surrounding evidence in the form of OH reports and email communications. Taking matters in the round we have decided that it would be just and equitable to allow this claim to proceed.

414. For the avoidance of doubt, if we are wrong that the "Line manager" claim was brought in time, we would have found it was just and equitable to extent time to allow it to be brought for the same reasons.

The victimisation and unlawful deduction claims

415. Ms Gould confirmed during submissions that the claimant was withdrawing the claims of victimisation in breach of section 27 of the Equality Act 2010 and of unauthorised deductions from wages and we have dismissed those claims in our Judgment.

Summary of conclusions

416. We would reiterate wholeheartedly Mr Lewis' statement in his submissions that this is a very sad case. We have a great deal of sympathy for the claimant and his family given the evident and distressing impact of his disabilities on him.

417. However, we have to reach our decision based on the evidence and applying the relevant law to that evidence. Having done so, our conclusions are that the only claims which succeed are the two claims of failures to make reasonable adjustments at 24(b) and (c).

418. All the claimant's other claims fail and are dismissed.

Next Steps

419. The case will be listed for a remedy hearing to decide the appropriate compensation for the claimant's successful claims.

Employment Judge McDonald

Date 1 September 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

1 September 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX – LIST OF ISSUES

AGREED LIST OF ISSUES

Numerical references in square brackets below, are, unless otherwise indicated, to paragraph numbers in the Amended Particulars of Claim

In general, in what follows, summaries are provided – the reader, ultimately, will have to review the relevant paragraphs of the Amended Particulars of Claim for the detailed position

<u>Protected Disclosure Detriment</u>

Disclosure

1. R accepts that C made qualifying protected disclosures on the following dates:

   (a) On 21 April 2017 when C submitted two documents titled "Defining the Purpose of Traffic Technology" and "Background to the Purpose" to Tony Malone, Victoria Williams and James Findlay ("**PD1a**"); and

   (b) On 5 September 2017 and 3 October 2017 in a presentation to the Information Leadership Group ("**PD1b**"),

   together the "**Agreed Protected Disclosures**".

2. C does not rely on any further protected disclosures for the purposes of his claim.

Detriment

3. As a result of the Agreed Protected Disclosures, can C establish that R "subjected" C to any of the following alleged matters and, if so, that they amounted to a "detriment" within the meaning of section 47B ERA, "detriment" under Section 47B ERA being defined as "any act, or deliberate failure to act":

   With regard to <u>Vicky Williams</u>:

   (a) [18(a)] **("DV1") -** Lack of support between February 2017 and December 2017. The individual detriments which were also all evidence of the lack of support alleged by C were:

      i. At an ILG meeting on 3 October 2017 when Vicky Williams neglected to support C, concluding his time with a curt dismissal when C presented PD1b whereas the next agenda item raised by another member of her team was advocated and championed; and

ii. Failing to answer or attend regular scheduled catch-up meetings or calls;

(c) With regard to Davin Crowley-Sweet, between December 2017 and December 2019, and as a consequence of making the Agreed Protected Disclosures, the individual detriments alleged by C which occurred as a result were:

i. Failure, without providing any notice, to attend meetings with C in January 2018 (his first team meeting), in February 2018 (with Mark Austin's team) and the meeting on 12 March 2018 (the final meeting to discuss his Agreed Protected Disclosures [18(b)] **("D1")**

ii. "Overturning" C's team's "project permissions and management" in or around February 2018, disrupting and derailing C's projects leading to C feeling undermined [18(c)] **("D2")**

iii. In December 2017 and/or January 2018 ignoring C's "applications for additional financial resource" for projects which were central to C being able to fulfil his duties and to execute a solution to the concerns he had identified in his Agreed Protected Disclosures [18(d)] **("D3")**

iv. Failing to "discuss the needs" of C and C's team with C in a "collaborative" manner and thereby "side-lining" the team, between December 2017 and March 2018 including an initial team meeting in January 2018 [18(e)] **("D4")**

v. Unilaterally changing C's role (and the roles of C's team), in February 2018,when C was told to stop work (email dated 8 February 2018) on "Asset Management" and instead focus on "Data" [18(f)] **("D5")**

vi. Treating C "unfairly and with disdain and contempt", particularly in January 2018 when he advised C that C's "team's resource requirement (provided in Summer 2017) had been made null and denied it was provided" [18(g)] **("D6")**

vii. Telling C that his concerns raised in his Agreed Protected Disclosures would be dismissed but then lauding the same when the subject was brought up in front of others at the critical meeting in March 2018, [18g] **("D7")**

viii. Asking C to meet with him on a 1-2-1 basis to discuss re-administration and finance of C's projects and then asking others to join the meeting causing the Claimant to feel he was being "targeted" to bring him to account [18g] ("**D8**")

ix. Denying / disallowing the final financial approval stating that C's team could not spend the money needed, in the course of a group

discussion thereby humiliating C in front of those present and blaming him for the project "failures" [18(h)] **("D9a")**

x. Treating C "inconsistently", particularly with regard to a "plan of action" (Roads Investment Strategy), submitted by C in August/September 2016 and in February 2018 by stating they were "irrelevant and inactionable" yet lauding the same proposals later that month to key stakeholders [18(i)] **("D9b")**

xi. Generally side-lining, ignoring and belittling C, between December 2017 and March 2018 [18(j)] for example by not providing C with access to the level of correspondence and confidences that he had previously been privy to when under his previous division and reporting structure from his appointment in 2014; **("D10")**

xii. Causing "excessive work-related stress" [18(k)] **("D11")**

xiii. "Continued and persistent failure to investigate" the Agreed Protected Disclosures properly or at all by "passing the buck" in respect of who was responsible for addressing C's concerns and failing to escalate the concerns to senior management and/or those with "remit" to deal with the same [18(l)] **("D12")**

xiv. Causing or permitting C's pay to be "erratic" and failing to provide C with clarity in respect of his pay [18(m)] **("D13")**

xv. Since around July 2018, applying R's absence management policy in a punitive and interrogatory manner, and in a meeting on 21 November 2018, telling C that to secure redeployment he must formally apply for vacant roles, disregarding OH advice [18(n)] ("**D14**");

xvi. Insisting that C continue to meet with DCS on 6 September 2018, 27 September 2018, 21 November 2018 and 2 July 2019 despite C expressly stating on numerous occasions (10 August 2018, November 2018, March 2019, 27 May 2019, 2 July 2019, 10 July 2019, 17 August 2019 and 11 September 2019) that DCS's attendance exacerbated C's ill-health [18(o)] **("D15")**;

xvii. The indefinite postponement of C's "final absence management" meeting on 2 April 2020 and failure to make further contact [18(p)] (**"D16**").

Causation

4. If so, did R subject C to any such detriment "on the ground" that C made one or more protected disclosures?

<u>Victimisation</u>

C intends to withdraw this claim.

Harassment

Conduct

5. With the regard to any of matters set out in the extract below, did R engage in "unwanted conduct" (within the meaning of section 26 EA):

   a. The Claimant felt harassed … when his requests to cease meeting with Davin Crowley-Sweet were refused on the basis that the Respondent felt that the meetings were '*productive*' and '*conducive in trying to move, matters forward*' and he had to continue to meet with him. The Claimant made this representation through his union representative in November 2018. If the Union representative had not made prior to, it was indeed specifically requested in a meeting with Toni Clayton in March 2019 and reaffirmed in an email regarding the same on 27 May 2019. These requests were also made on the following dates: 7 November 2018, and 10 July 2019.." [29];

   b. *With regard to C's sickness absence, on 25 July 2018 DCS emailing C asking that C contacts him 'immediately' notwithstanding that C was too unwell to work and had complied with the sickness policy and then on 2 August 2018, stating 'I only hear from you when you want to advise another sick is due [sic]"* [29]

   [NB The Claimant alleges further harassment and will make an application to the Tribunal on the first day of the Final Hearing. Conduct to be inserted here if accepted by the Tribunal]

Related to a protected characteristic

6. If so, was that conduct "related" to the disability (within the meaning of section 26 EA)?

Purpose or Effect

7. If so, did that conduct have either the statutory purpose or effect set out in section 26 EA?

Disability

8. It is admitted that C was disabled (i) in relation to anxiety from October 2018 and (ii) in relation to functional neurological disorder **("FND")** from August 2019. No other admissions are made in relation to disability status.

9. It is admitted that R had knowledge that C was disabled (i) in relation to anxiety from the occupational health report dated 26 September 2018 and (ii) in relation to FND following the disclosure of C's medical records in the course of these proceedings on 23 December 2020. No other admissions are made by

R. C had periods of sickness absence from 2016 with stress at work and/or anxiety.

10. It is C's case that C was disabled and R had knowledge of his disability of anxiety from October 2016 when he was unfit for work and submitted a sick note stating anxiety and stress [4, 21]. Thereafter he was absent from work until he returned on 11 November 2016. He was then absent from work from 22 November 2016 until 6 February 2017 and again from March 2018 to date.

11. Was R aware, or was it reasonably expected to be aware of C's (i) anxiety prior to 26 September 2018, and (ii) C's FND prior to 23 December 2020?

Reasonable Adjustments

PCP

12. Did the following amount to a provision, criterion or practice **("PCP")** applied by R (within the meaning of section 20 EA):

    "Applying the absence management procedure (and not considering redeployment without competitive processes or in accordance with the Occupation Health recommendations)" [24]

Disadvantage

13. If so, did that PCP put C at a "substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled (within the meaning of section 20 EA), on the basis that C:

    "was subjected to the absence management procedure and was disciplined pursuant to the policy which could end in his dismissal" [24]

14. If so, did R have actual or constructive knowledge at the relevant times regarding:

    a) the substantial disadvantage; and

    b) C's disability?

Steps

15. If R was under the relevant duty, did R take such steps as it was reasonable to have to take to avoid the disadvantage? Specifically, did R fail to take the following steps:

    (a) change C's role, as recommended in an occupational health report dated 26.09.18 [24(a)]

    (b) Make a change to its absence management procedure as it applied to C (in particular, C alleges Toni Clayton is responsible for this alleged failure)

so that C did not have to meet with Mr Crowley-Sweet at C's "absence meetings (or otherwise)" [24(b)]

(c) Funding "private [medical] treatment to aid [C] in his recovery" (C alleges requests made on 27 May 2019, 2 July 2019 and 17 August 2019) [24(c)]

(d) consider redeployment "at all" until it was raised by C at a meeting on 2 July 2019 and, thereafter, not properly [25(a)]

(e) provide C with any vacancy lists or information about possible suitable roles [25(b)]

(f) C being told during the meeting in November 2018 that R would only allow redeployment following successful formal recruitment processes which C "would not be able to undertake due to his condition" [25(c)]

(g) Disapply a requirement for C to complete a skills matrix, which was then not used or referred to by R [25(d)]

<u>Indirect Discrimination</u>

PCP

16. Did the following amount to a PCP applied by R to C (within the meaning of section 19 EA):

"[R's] sickness absence policy" [27]

Disadvantage

17. If so, did R apply or would R have applied any such PCP to persons with whom C does not share the protected characteristic (within the meaning of section 19(2) EA)?

18. If so, did any such PCP put, or would it put, persons with whom C did share the characteristic at a "particular disadvantage" when compared with persons with whom C does not share it (within the meaning of section 19(2) EA)? C relies on the followed alleged disadvantages:

(a) "…persons in the group are likely to be on long term sickness absence and are therefore at a group disadvantage in that there is a requirement to maintain attendance at work in order not to suffer disciplinary proceedings and ultimately dismissal" [27(a)]

(b) "There is a requirement for consistent attendance" [27(b)]

(c) "The operation of the triggers in the sickness absence policy result in disciplinary proceedings and ultimately dismissal" [27(c)]

19. If so, did any such PCP put, or would it put, C at the same "particular disadvantage" (within the meaning of section 19(2) EA)? C alleges that he was on the basis that he was "subjected to the absence management procedure and was disciplined pursuant to the policy which could end in his dismissal" [27].

Justification

20. If so, can R show it to be a proportionate means of achieving a legitimate aim (within the meaning of section 19(3) EA)? The Respondent relies upon the legitimate aim of its ability to manage attendance and redeployment to ensure that is can properly provide the services and work it is required to do as a public sector organisation.

Section 15

Treatment

21. Did R subject C to "unfavourable treatment" in relation to any of the same seven matters set out above at para 15(a)-(g) [26].

Causation

22. If so, did R do so because of "something arising" from C's disability (within the meaning of section 15 EA)? N.B. C asserts that that "something arising" was C's "inability to attend work" [26].

Justification

23. If so, can R show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies upon the legitimate aim of its ability to manage attendance and redeployment to ensure that is can properly provide the services and work it is required to do as a public sector organisation.

Direct Discrimination

24. This complaint has already been dismissed, upon withdrawal.

Personal Injury

25. An expert medical report will be obtained should the matter proceed to a remedy hearing.

Unlawful Deductions

26. C intends to withdraw this claim.

ACAS uplift

27. Is this a claim to which the ACAS Code of Practice on Disciplinary and Grievance Procedures ("**Code of Practice**") applies?

28. If so, has there been a breach of the ACAS Code of Practice by R [33]? If so, would it be just and equitable to apply any uplift to any award (if any were to be made)? If so, by what amount should any uplift made set at (up to a maximum potential amount of 25%)?

    C relies on the following: "The Respondent has not followed the ACAS code of practice as it failed to deal with any of the Claimant's protected disclosures as a grievance and has failed to correspond with the Claimant in a reasonable and timely manner during the absence management procedure."

<u>Jurisdiction</u>

29. Are any of the claims/complaints presented out of time and/or should time be extended in order for the ET to have the necessary jurisdiction (having regard to section 123 EA and 48 ERA)?

16 August 2022