EMPLOYMENT TRIBUNALS

Claimant: Miss J Cammish

Respondent: Secretary of State for Justice

Heard at: Manchester (in private) **On:** 16 March 2020
27 April 2020 (In Chambers)

Before: Employment Judge Holmes sitting alone

Representatives
For the claimant: In person
For the respondent: Mr J Hurd, counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that :

1. Save for the claims referred to as claim no 1, in so far as they relate to the alleged delay by Joanne Town in progressing the claimant's IAW application between August 2016 and August 2017, and claim no. 2 , in so far as they too relates to any alleged delay occasioned by Joanne Town in the initial decision upon the claimant's IAW application, the post -2017 allegations are struck out pursuant to rule 37(1)(a) of the 2013 rules of procedure on the grounds that they have no reasonable prospect of success.
2. The Tribunal is considering making a deposit order in respect of those remaining post – 2017 claims, on the grounds that they have little reasonable prospects of success.
3. The claimant , if she wishes the Tribunal to take into account her ability to pay, before making any deposit order shall by **3 August 2020** provide the Tribunal, and copy to the respondent, any financial information as to her assets, income liabilities and means.
4. If the respondent wishes to make any submissions in response to the claimant's financial information so supplied, or as to the particular terms of any deposit orders that the Tribunal is invited to make, it must make such submissions, in writing, copied to the claimant , by **10 August 2020.**
5. There be a further preliminary hearing on **14 September 2020 at 10.00 at Manchester Employment Tribunal , Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA ,** listed for one day, to consider:

a) whether or not it is reasonably arguable that the pre-2017 allegations formed part of an act extending over a period including any post-2017 allegations which are permitted to proceed after this preliminary hearing , or payment of any deposit(s) ordered;

b) In respect of any alleged discrimination or victimisation occurring before 21 March 2019, to consider whether or not it would be just and equitable to extend the time limit;

c) If the Tribunal has jurisdiction to consider the whole or part of the claim as set out in the original claim form, to consider the claimant's application to amend her claim to introduce the allegations set out in the further particulars;

d) To clarify any complaints that are permitted to go forward to a final hearing and to identify the issues in relation to those complaints;

e) To consider the time allocation ,case management , and timetable for the final hearing.

6. In the event that the claimant will seek to ask the Tribunal, in the alternative, to exercise its discretion to extend the time for presentation of any claims found to have been presented out of time, on the grounds that it would be just and equitable to do so, she is to make and serve upon the respondent (and bring three copies with her to the hearing) by **7 September 2020** a witness statement addressing in particular:

   The length of and reasons for the delay in presenting the claims;

   In particular, if the claimant is relying upon any health condition(s) which at any time or times affected her ability to present the claims, she should provide full details, and attach to the statement any relevant medical evidence in support of any such contention;

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

   The extent to which the respondent had co-operated with any requests for information;

   The promptness with which the claimant acted once she knew of the facts giving rise to the claims; and

   The steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action;

   and all other relevant facts that the claimant wishes the Tribunal to take into account in determining whether to grant any extension of time.

REASONS

1. At a preliminary hearing held on 12 November 2019 , the Tribunal ordered that there should be a further preliminary hearing, the purpose of which would be:

To consider whether or not the post-2017 allegations should be struck out on the ground that they have no reasonable prospect of success;

("the post-2017 allegations" means the allegations of victimisation set out at paragraph 17 of the previous case summary and at para. 12 below)

To consider whether or not it is reasonably arguable that the pre-2017 allegations formed part of an act extending over a period including the post-2017 allegations;

("the pre-2017 allegations means all the allegations set out in the original claim form, except for the post-2017 allegations)

In respect of any alleged discrimination or victimisation occurring before 21 March 2019, to consider whether or not it would be just and equitable to extend the time limit;

If the Tribunal has jurisdiction to consider the whole or part of the claim as set out in the original claim form, to consider the claimant's application to amend her claim to introduce the allegations set out in the further particulars;

2. Dependent upon the outcome, the Tribunal would then consider further case management.

3. The claimant appeared in person, and Mr Hurd of Counsel appeared for the respondent. There was a bundle prepared by the respondent, and the claimant too provided a bundle. It was agreed that the respondent should make submissions first, with the claimant making hers in reply.

4. There were two bundles before the Tribunal, one from each party. References to page numbers will accordingly be prefaced by either "C" or "R" depending upon which bundle is being referred to. There was also a Chronology , produced by the respondent, which cross referenced documents in the respondent's bundle.

5. The parties made their submissions, which took most of the day, and the claimant , towards the end of the day was finding the hearing stressful , so the Tribunal concluded the hearing. As the claimant was basing much of her case upon the outcome of a grievance, which was not contained in either bundle, the Employment Judge considered that this should be available to the Tribunal before it concluded its deliberations, and accordingly judgment was reserved.

6. The respondent provided the Tribunal with further material on 19 March 2020. This comprised of a copy of the claimant's grievance , the grievance outcome, and grievance appeal of 2016, together with further submissions in a two page letter dated 18 March 2020. The claimant , in reply, for she refers to the respondent's further submissions, sent in her final submissions on 31 March 2020, and attached to that email a witness statement of Joanne Town dated 19 April 2016. On 27 April 2020 the Tribunal held deliberations in Chambers, and this reserved judgment is now promulgated.

7. The Employment Judge apologises to the parties for the delay in promulgation of this judgment, occasioned, in part, by the limitations upon access to judicial premises and resources resulting from the Covid – 19 pandemic, and in part by the volume of material which the Tribunal has considered it necessary to consider in determining the application.

The claims.

8. To summarise her claims, the Tribunal adopts and repeats the summary in the previous preliminary hearing, as follows. The claimant began employment with the respondent in 2007 as an administrative officer in the Leeds Combined Court. For many years she has lived with chronic fatigue syndrome (CFS). She has had a number of periods of sickness absence, including a 19-month absence ending on 16 March 2017. Her claim form relates a long history of failures to make adjustments for her CFS, and other bad treatment including increasingly escalating attendance management warnings. She raised a grievance in September 2015, but it took until 17 August 2016 for her to be notified of the outcome. The grievance was upheld in part. She returned to work on 16 March 2017 at Huddersfield County Court, where she still works.

9. Because of the length of her sickness absences, the claimant exhausted her sick pay entitlement. In order to obtain some redress for the failings identified in the grievance outcome she applied for an "industrial injuries award". Her application repeatedly went missing, as she puts it, but was eventually acknowledged in August 2017. Her application was unsuccessful, as was her appeal. The whole industrial injuries application process was beset with delays and the claimant says she constantly had to chase for progress. It is the claimant's belief that the delays were part of a deliberate strategy of "containment" on the respondent's part: they knew that the claimant was out of time to bring an Employment Tribunal claim , and wished to avoid the cost of granting an industrial injuries award. They therefore dragged out the process and ensured it was kept in-house, by arranging for the same decision-maker (Julie Collins) to consider both the initial application and appeal. Eventually, the claimant received the unfavourable appeal outcome on 3 May 2019.

10. In the previous preliminary hearing the Employment Judge clarified with the claimant the legal basis of her claims. He divided her complaints into four categories:

    1.The disability discrimination about which she had complained in her September 2015 grievance ("the original discrimination");

    2.Failures in connection with the handling of her grievance and appeal about the original discrimination;

    3.Continuing consequences of the original discrimination;

    4.Alleged failures since the grievance outcome to provide the claimant with a remedy for the original discrimination, whether deliberately (as part of the alleged containment strategy) or otherwise.

11. The claimant confirmed that everything that happened from the grievance outcome fell into the latter two categories. She did not suggest that the failures were because she was disabled, or because of something arising in consequence of her disability, or put her at a disadvantage as a disabled person.

12. The claims were considered by the Tribunal to be ones of victimisation: the claimant was subjected to detrimental delays and decisions because she had raised a grievance which had been partially upheld. They were described as the "post-2017 complaints", brought under sections 27 and 39 of the Equality

Act 2010, based on the protected act of raising the grievance. The alleged detriments were identified as follows:

12.1 Repeatedly causing the claimant industrial injuries award applications to go missing up to August 2017;

12.2 Delaying the initial decision on the application;

12.3 Refusing the application on its merits;

12.4 Confining the industrial injuries award decision to an examination of the medical evidence and refusing to consider the content of the claimant's grievance;

12.5 Appointing Ms Collins as the decision-maker in respect of both the initial decision and the appeal, so as to keep the matter "in-house";

12.6 Delaying the appeal outcome; and

12.7 Confirming the original decision on appeal.

Although referred to as the "post – 2107 complaints", and the majority of the matters of which the claimant complains did occur in 2017, they may arguably go back into 2016, at least as far as Joanne Town's actions, or lack of them, are concerned.

The respondent's application and chronology.

13. The respondent has advanced two arguments. The first was that the post-2017 complaints should be struck out on the ground that they have no reasonable prospect of success.

14. Alternatively, even if the post-2017 complaints are permitted to go forward, the pre-2017 complaints are still out of time. It will be the respondent's case that the two categories of complaints are fundamentally different , and there is not even a reasonably arguable case that they form part of the same continuing act.

15. It was agreed, however, that the Tribunal in this hearing would only have time to deal with the first of these applications, and consequently no submissions were made in relation to the pre – 2017 matters , which will be considered subsequently.

16. Mr Hurd accordingly took the Tribunal through the chronology and the documents in the bundles, largely referring to the respondent's bundle.

17. The doing of a protected act by the claimant was not disputed, her grievance clearly was a protected act. What was very much in issue, however, was whether the respondent's treatment of the claimant, in the manner in which it dealt (or failed to deal with) , and ultimately rejected her Injury at Work application, was arguably victimisation of her for having raised that grievance.

18. That required the Tribunal to be taken through the history of the claimant's application, after her grievance. The following chronology was provided (adapted from Mr Hurd's document, with the page reference column omitted). It is appreciated that it may not be fully agreed, and where parts are contentious this has been taken into account.

Date	Event
04/08 January 2016	Application for injury at work (IAW) application made to cover absence periods 26.09.14- 27.02.15 and 14.08.15- Jan 2016
Jan 2016	IAW placed on hold pending grievance outcome – as, if successful, no need for application
1,4 and 11 July 2016	Grievance outcome - 4 of 24 allegations made by C upheld
11 August 2016	Email from Deborah Smith (DS) – unable to progress application as OH report indicated C was not fit to return to work in next 3 months
25 August 2016	C chasing update on IAW ; Delays related to Occupational health report
09 September 2016	Deborah Smith in process of completing form and due to meet HR case worker on 14/09 – DS notes the financial difficulties faced by C
15 September 2016	C asks IAW application to be dealt with as priority
16 September 2016	DS confirms to C that “wet signature” required and electronic copy documents not sufficient
22 September 2016	C confirms that she has printed off signature page and signed/posted it
29 September 2016	C told that IAW application could take 182 days to process
October 2016	Joanne Town (JT) sends C’s IAW application to Shared Services Connected Limited (“SSCL”) to be processed (received 31 October p138)
01 December 2016	C chases DS re progress and told 02/12 JT will be in contact with Capita and will update her
08/09 December 2016	C chases again and told JT will be in touch
December 2016	JT contacts SSCL to check progress – application has gone missing – JT liaises with C and her TU rep re replacement application
15 December	C chases DS ; DS states she has completed her part of the

2016	application but parts C and D require Band B completion Application returned as non-transactable because the absence reason relates to both abdominal pains and work-related stress. Also "medical in confidence" ('MIC') section missing wet signature , and signature on CSIBS1-P1 out of date
16 December 2016	C receives email from SSCL confirming application received 31 October but wet signature required
30 December 2016	Replacement IAW application submitted by C
03 January 2017	DS confirms JT is dealing with IAW application
05 January 2017	DS states that JT had spoken to C's TU rep and was awaiting documents to be supplied with C's signature on them
12 January 2017	C confirms she and TU rep are in the process of completing the forms for the fourth time & some delays attributed by RA (TU rep) to fire alarm, closed building and wanting to be certain: *"there are no pages missing, no signatures missing and no documents missing…"*
Mid Jan 2017	JT sends IAW application to SSCL using address from intranet – returned undelivered as wrong address on intranet JT unable to support application as "*sick notes for a long period of time do not state work related stress. I do not feel that the application meets the criteria…*" Recognition on 19 Jan 2017 that application had been sent.
End Jan 2017 (27 Jan 2017)	JT sends form off to SSCL at correct address Email 03 Feb 2017 from DS to C appears to confirm application sent recorded delivery on 27 Jan but to wrong address
03 February 2017	Application sent to wrong address and returned but sent to a different recorded address the day before 02 February 2017
13 Feb 2017	SSSCL return the IAW form unactioned as C and her line manager had failed to sign and date the medical consent and management sections (Band B approval) ; There was also again a query over whether the absence periods were linked (CFS and work related stress) – absence needed to be for same causative reason to succeed.
16 February	Returned package from SSCL signed for at Leeds CC , but not

2017	by JT
16 March 2017	C returns to work at Huddersfield CC
18 May 2017	JT (allegedly) submits C's application to SSCL
02 June 2017	C emails complaint to Julie Collins (JC) as SSCL not received application ; Same day - application rejected as C not provided info requested in 14.02.17 letter and consent for MyCPS to access medical records out of date
07 July 2017	JC visits C at Huddersfield CC to discuss 13.02.17 letter and acquire consent for My CSP to access medical records
21 July 2017	C confirms she had conversation with JC who told her that managers at Leeds did not know how to deal with such claims and guidance would be drawn up so this would not happen again.
31 July 2017	SOP Purchase Request Form re Injury at Work application
18 August 2017	Fully completed form sent SSCL with medical consent
22/23 August 2017	Email confirming that one of the forms was out of date (amongst other things as CS1BS1 and MIC consent form non-transactable) Health Management state report may take up to 65 days to complete Completed application received 23 August
24 August 2017	SSCL inform JC that C did not use the correct CSIBS1 form (latest version not used) and application was not sent to Health Management – who had now added extra information they required to be completed before application could be processed. C allowed to submit new application electronically
05 September 2017	Letter sent advising of delay in processing MIC at OH Assist
21 September 2017	MIC received from OH Assist and application sent by SSCL to Health Management
25 September 2017	SSCL confirm that application been received and was being processed

17 November 2017	Health Management approaches C's GP for medical report
28 December 2017	C's GP prepares report faxed to Health Management
24 January 2018	C informed that application is waiting in queue at Health Management for final review by Scheme Medical Advisor (2-4 week backlog)
16 February 2018	C confirms to JC that there is a backlog of arrears awaiting a final review by senior medical officer (Health Management having taken over cases from Health Assured) ; OH Assist also had technical delays preventing them providing the medical in confidence information JC chased SSCL for outcome & escalates as complaint to SSCL
20 February 2018	SSCL confirm to C that application in final stages & medical report has been dictated and needs to be reviewed before it could be posted
21 February 2018	Final report waiting transcription and checking
27 February 2018	JC checking with C if she had received outcome
01 March 2018	Report from Health Management ; Report actually appears to be dated 23 February 2018 (Dr Barbara Kneale, Consultant in Occupational Medicine). Report concludes that absences were primarily caused by gynaecological problems and that there was exacerbation of pre-existing CFS and anxiety – which does not meet criteria under the scheme – Dr concludes not her remit to comment on the grievance.
04 March 2018	C emails JC re perceived factual errors in the medical report
23 March 2018	JC was informed of medical advice from scheme medical advisor- C's condition did not meet CSIBS qualifying injury as C has 2 underlying conditions – CFS and anxiety and the primary reason for her absence actually related to gynaecological condition
27 March 2018	JC informed by email SSCL had obtained medical report and seeking her correspondence address

28 March 2018	SSCL send report to JC but had not received Part D decision from Band B manager by 18 April 2018
03 May 2018	It was communicated to C that application had failed – as her condition did not meet the qualifying injury
18 May 2018	C notified R of intention to appeal
25 May 2018	C files “appeal”
18 September 2018	Appeal submitted with GP medical evidence
09 November 2018	Appeal not accepted by Health Management until this date due to delays by SSCL in providing the correct paperwork
11 December 2018	Medical evidence from Dr Stanislava Saravolac – medical evidence similar to initial application; in essence that C did not meet the criteria under the scheme as CFS/anxiety was did not qualify under the IAW scheme as not wholly or mainly attributable to the nature of duty
12 December 2018	C receives medical report
21 December 2018	Email sent by SSCL re link to medical report provided by Health Management does not work
27 December 2018	Health Management advised account locked and has now been unlocked
28 December 2018	Health Management state they have re-sent report
02 January 2019	SSCL contact Health Management as still unable to access report
10 January 2019	Further link provided but still unable to access report
18 January 2019	SSCL telephone call to Health Management – requesting screen shots to refer to IT as still unable to access report
23 January 2019	SSCL having problems accessing the report – only Hannah James can access report despite a shared log in
28 January 2019	Health Management email again

29 January 2019	Health Management reiterate only Hannah James can access report
31 January 2019	Anna Brisset seeks urgent investigation and workaround
04 February 2019	Escalated to account director at Health Management and request to be sent report by email
15 February 2019	Letter from SSCL to Amanda Smith of R enclosing the medical report ; Scheme Medical Advisor upheld initial advice that C's illness did not meet the scheme's qualifying condition
26 March 2019	SSCL awaiting outcome from R
18 April 2019	JC admits most recent delays her fault – says she still does not believe she can justify approving IAW application but wants to speak to HR
24 April 2019	JC confirms she has completed part D and sent on all paperwork
30 April 2019	Appeal outcome
03 May 2019	C receives appeal outcome
20 June 2019	C contacts ACAS
20 July 2019	ACAS EC certificate
28 July 2019	Application to ET

The respondent's submissions.

19. Mr Hurd took the Tribunal through the chronology, and the relevant pages in the bundle, mainly the respondent's bundle, but occasionally also referring to the claimant's bundle.

20. He submitted that ,despite this unfortunate history, and the regrettable and serious delay in processing the IAW application, the claimant had no reasonable prospects of establishing that her treatment was in any way related to, and in response to, her having done the (conceded) protected act of raising her grievance. It was apparent that there were a number of different reasons for this delay, some were explicable, some were not, but there was nothing to suggest that the claimant's treatment was deliberate.

21. Examining the various periods of the IAW process, the first period , January to July 2016, was simply due to the fact that the IAW application would not be necessary if the outcome of the claimant's grievance was in her favour. Hence it was reasonable, and not an act of victimisation, to put it on hold until the outcome was known.

22. The claimant did not return to work in July 2016, so the application progressed, but then the "wet" signature issue arose. As it was , the process was likely to take 6 months. The respondent was relying upon two external organisations, SSCL and Health Management , in carrying out this process. Joanne Town was actually instrumental at this time in chasing the application up.

23. The form was , after being sent to the wrong address, then returned to Joanne Town on 13 February 2017, as various parts were incomplete, including parts that she was required, as the Band B Manager, to complete.

24. There was then a problem with part of the form being out of date. In due course, in October 2017, Health Management obtained the GP's report. There was a backlog between November 2017 and February 2018. Dr Barbara Kneale (page 271 of the bundle) set out her medical opinion that the claimant did not qualify for the benefit. Her reasons , and the medical evidence she relied upon are at page 272 of the bundle.

25. The rules of the scheme are at pages 329 to 332 of the bundle, and on page 330 the definition of "qualifying injuries" is set out. This is the real issue that the claimant has with the refusal of her application. The rules require, for claims after 1 April 2003, the injury in respect of which the benefit is claimed to be "wholly or mainly attributable" to the nature of the applicant's duty at work.

26. Dr Kneale's view was that the claimant had two pre-existing and underlying conditions of chromic fatigue syndrome , and anxiety and depression, which were not caused by her work, or, if exacerbated by it, still fell outside the remit of the scheme.

27. Dr Kneale had been aware of the claimant's grievance, but declined to comment upon it, as this was within the remit of the employer, and was not a medical matter.

28. Mr Hurd submitted that whilst the final decision was nominally with the employer, their role was very restricted. In these circumstances it was difficult to see how not granting the claimant's application could be any form of victimisation by Julie Collins, who, in effect, merely "rubber stamped" the decision, which was a medical one.

29. In terms of the appeal, he referred to the medical evidence at page 295 of the bundle. This came to pretty much the same view as the previous medical advisor had expressed. A review of all the medical evidence had been carried out.

30. In December 2017 and January 2018 there were further problems between SSCL and Health Management in getting the report out. Julie Collins would nominally make the final decision , but she had no real choice, the decision was that of the medical experts, be it right or wrong. Looking at the process as a whole , the claimant had not lost anything.

31. A lot of the delays were outside the control of the respondent, and were the fault of SSCL and Health Management. These victimisation claims had no reasonable prospects of success, or, alternatively , little reasonable prospects of success.

32. ***The claimant's response.***

33. The claimant also took the Tribunal, in some detail, through the history of the application and the delays to it.

34. She confirmed that Julie Collins was the Decision Maker.

35. The Employment Judge discussed the IAW scheme with the claimant, and asked whether she agreed that the scheme would not deal necessarily with what she was seeking. The claimant explained how this all went back to her grievances.

36. She referred to the Sick Pay Policy (pages 333 to 348 of the bundle). She referred to the exceptional circumstances provisions at page 343 , whereby the employer could extend sick pay, for example, as a reasonable adjustment for disability. She had made an application, but had not been officially given an outcome.

37. She made reference to pages 98 to 99 of the bundle, where these issues were discussed, with her union representative , Rebecca Allan, and her manager. A form ESP1A was required (see page 116 in the claimant's bundle). This was a different process from the IAW process.

38. After a break, having confirmed that she was alright to continue, the claimant went on explain what she meant by the term "containment" that she had used in formulating the claims.

39. Joanne Town had heard the grievance, and had written the report that would not clear her sick record. She (the claimant) had sought changes to her hours as reasonable adjustments, and had objected to Joanne Town hearing the grievance. Joanne Town then failed to action her IIDB (Industrial Injury Disablement Benefit – a term which appears to have been used interchangeably with IAW, but is not the same thing) forms when she got them. It was she who had made the decision not to support the application on 17 February 2017.

40. The claimant said that she had been advised to make the application for the industrial injury benefit as an outcome of her grievance. She had followed the advice she had been given.

41. The claimant made reference to being told that her grievance would be used in the application for benefit. She referred the Tribunal to pages 15 to 18 in her bundle, which were screenshots of texts to her union (so to the Tribunal assumes) representative seeking confirmatory emails in June/July/August (2018, it is assumed) about Julie Collins being asked for a "decision for compensation based on the outcome of the grievance" .

42. She went on to make reference to the ESPA1 from never being completed, (this appears to be a new claim) , and not receiving the help that she should have had throughout the process.

The further material and submissions.

43. The hearing concluded at that stage, the claimant feeling she could not manage any more, and it being 4.30 p.m. in any event. The Employment Judge considered, given the claimant's assertions about the application for benefit being part of , or otherwise linked to, the outcome of her grievance, that the Tribunal should see this material which was not in either party's bundle (which is not a criticism). Further, the parties could then make their closing submissions in

the light of that material, the respondent making its submissions first, and the claimant than having time and opportunity to make hers , also in writing.

44. The respondent duly sent the Tribunal the grievance outcome materials, and its further submissions on 19 March 2020 and the claimant responded with her further submissions on 31 March 2020.

45. The grievance material provided by the respondent shows as follows. The claimant submitted her grievance on 3 September 2015. It related to two managers at Leeds County Court, and covered the period from 2013 to September 2015. She alleged bullying and harassment, on the grounds of her disability, and failure to make reasonable adjustments.

46. In the brief description section on page 1, the claimant said this:

"I wish to make a formal grievance about the way that I feel I have been mistreated, in that my managers have failed to support my needs due to a disability whilst awaiting an operation. Then following my return to work changed my working environment , and removed reasonable adjustments previously given to me, making it very hard for me to manage my disability."

47. The investigation report carried out by Janet Smith, Grade B manager in HH252, identified some 24 allegations of this nature , which were then investigated for the purposes of the grievance. The investigation appears to have commenced in December 2015, when the first interview of one of the manager was held. Thereafter the claimant was interviewed on 11 February 2016, and again on 26 February 2016. Further interviews , or "fact finds" were held in April 2016, and the investigation report was produced dated 20 April 2016. Joanne Town , Operations Manager, was hearing the grievance, and she held meetings with the claimant on 1, 4 and 11 July 2016. She produced an outcome document, which is in fact part of the grievance form "GRM01 v 1.14", which comprises of the original grievance, and contains other details of the progress of the grievance up to and including the outcome.

48. The outcome is set out over 6 pages (pages 5 to 10 in the document), in a box entitled "Response – To be completed by manager considering the grievance". In the six pages of her response Joanne Town goes through each of the 24 matters advanced as grievances by the claimant , and the conclusions of the investigating officer upon them. She upholds the investigating officer's conclusions, and thereby upheld 4 out of the 24 matters raised by the claimant.

49. In the "Requested Outcome" section (page 2 of this document) the claimant had said this:

"I would like full support of my managers and for them to recognise that I do require a baseline to return to when my disability is starting to overtake me and for my previous adjustments to be put back into place, so that I am once again able to manage to work and manage my condition to the best of my ability.

I would also like to request that my sick record be cleared, the warning given to me due to my sick levels be taken off my record and for any loss of earnings due to my sickness from work be re-imbursed to me, as I feel I should not be penalised for the discrimination ,harassment and bullying I have suffered.

I would request that the managers be disciplined in line with policy."

50. The claimant appealed, and her appeal form (also a GRM01 document) submitted by Rebecca Allan, her union representative, is dated 7 September 2016. The outcome sought in this document was:

"For the reasonable adjustments to be reinstated and for it to be acknowledged that at the outset of our meeting Case Conferences should be rearranged rather than attendance review meetings called. And for a move to another office to be seriously considered as per the advice of Doctor Arthur."

51. A grievance appeal meeting was held on 21 October 2016. The outcome of the appeal, communicated by Nadine Scaife on 27 October 2016 in the Response section of the form was that the grievance appeal was not upheld. Given the importance that the claimant puts upon the grievance process, and how she sees her application for Injury at Work benefit as some form of alternative outcome of the grievance process, the full terms of the appeal outcome are set out, thus:

"At the outset of our meeting we discussed the boundary of appeal and recent developments that had taken place. You confirmed that you wished your appeal to focus solely on the failure of HMCTS to consider appropriately your reasonable adjustments, these being the points that were important to you.

We discussed very recent developments that have taken place in that you confirmed that upon your return to work you have accepted the offer working at Huddersfield County Court with a car parking space provided. The other remaining aspects of your reasonable adjustments that were the subject of your appeal, in particular your working hours and initially a non-telephony role that you were able to undertake ,were discussed. You confirmed that you are flexible in hours that you could work in that you could start later and whilst currently you would be unable to complete a role answering the telephone, your aim was that you would, eventually, be able to undertake all the tasks required of a Band E Officer. I noted your comments and your willingness to be flexible and agreed to speak with Fran Fairhurst Operations Manager about the remaining reasonable adjustments necessary to secure your return to work.

You confirmed to me that whilst the points raised and outcomes achieved have been substantially resolved, you did not wish to withdraw your appeal but wished to express your concerns about the way the consideration reasonable adjustments have been dealt with by managers at HMCTS in the hope that you will be able to prevent this occurring with other employees.

As the outcomes sought for your grievance have been resolved outside the grievance appeal hearing I am not upholding your grievance."

52. It will be apparent from the foregoing, and indeed from the Employment Judge's reading of the grievance notes, that no mention whatsoever is made of the claimant making an application under the Injury at Work , or any other similar, provisions. It is thus hard to understand her often repeated contention that making that application was some form of alternative outcome to the grievance process. That , the Tribunal accepts, may be the way in which the claimant subjectively viewed that possibility, but objectively there is no basis in logic for her doing so. Clearly the claimant was seeking to reverse the historic adverse financial effects of her sickness absence , and to have her sickness record

restored so as not to be prejudiced in the future by any further absences. The grievance process, however, did not achieve this. She understandably sought other routes, in fact , it seems three other routes, to achieve this , one of which was the IAW application.

53. That it may, if successful, have achieved outcomes that the claimant also sought to achieve by the grievance process, however, does not make it part of that process, however the claimant may have viewed it.

The further submissions.

a)The respondent.

54. The respondent submitted that the claimant had been unable to advance any cogent evidence or submission to undermine the respondent's case as to why her IAW application was not granted, namely that she did not comply with the criteria of the scheme, on the basis that the two medical advisors had concluded that her absence was not wholly or mainly attributable to the nature of her duty. That conclusion, based also on evidence from the claimant's own GP, meant that the refusal of her application could not conceivably have been because the claimant had done a protected act.

55. It was further submitted that the claimant had fundamentally misunderstood the nature of the scheme, in suggesting that her managers (Joanne Town or Julie Collins) had a discretion to reject her application, thereby wilfully failing to take into account her grievance. The qualifying injury requirement comprised of two elements. The first was to identify if the injury in question occurred at work, and was not a pre-existing injury. If it was , the next test would be whether the injury sustained was mainly attributable to work. The analogy of a broken leg sustained by an employee falling off a ladder was used. In this case the claimant's application failed at the first hurdle, on the medical evidence.

56. The claimant had been unable in her submissions to point to any evidence which supported the assertion , or gave rise to any inference , that the actions of managers were deliberate, or that they had some financial motivation.

57. The claimant had changed her focus since the previous preliminary hearing, where Julie Collins had been the focus of her claims, but in this one Joanne Town was the main target of her allegations.

58. Whilst the claimant had made reference to the connection between the grievance outcome and the victimisation claims she was making, there was none. Most of her grievances had been dismissed.

59. Those which were upheld had been largely peripheral. There was no evidence that they had caused her financial loss, and none that she was told to seek redress through the IAW process.

b.The claimant.

60. In her reply dated 31 March 2020 the claimant took issue with the respondent's contention that she had misunderstood the IAW scheme. She repeated her assertion that she was told that such an application was the way to obtain the requested outcome of her grievance, and has referred the Tribunal to the documentary evidence which she contends supports that allegation.

61. The claimant refers to page 122 of her bundle in support of this contention. It is an email dated 5 November 2015, from Fran Fairhurst, Operations Manager, who heard the claimant's managing attendance appeal. In it, Fran Fairhurst says this:

    "I have checked about the injury at work process and I would start pulling that together and rather than someone investigating it separately they could use the information from the grievance investigation to formulate it. Therefore just get part of it prepped and then send to Joanne Town (has to be within your hierarchy) to complete it when she has the decision on the grievance."

62. The claimant also makes reference to page 6 of the Grievance Appeal notes of 21 October 2016 , where the claimant's union representative made reference to being informed by Deborah Smith that the claimant's reduction to half and nil sick pay, and the effect upon her sickness record , could only be addressed by Capita by way of an Injury at Work application, after the grievance outcome, and that was why these matters had not been included in the appeal.

63. The claimant goes on to say that she had been advised that only one aspect of her grievance had to be upheld in order for her to receive her requested outcome. For this reason she had requested Julie Collins to make a decision (i.e on the IAW application) based upon the outcome of the grievance, citing pages 235, 291 and 292 of the respondent's bundle, and pages 15 to 18 of her own.

64. The claimant's letter of 31 March 2020 continues in paras. 3 to 6 to make complaint of the respondent's "deliberate actions", focussing upon Deborah Smith's failing from December to support or assist the claimant , in particular in relation to actioning a claim for Extension of Sick Pay at Pensionable Rate (through an ESP1A form) in January 2016, referred at pages 115 to 117 of the claimant's bundle. Further complaint is made about the claimant not receiving a wage in March or April 2017, and Deborah Smith's lack of support in remedying that situation by providing the necessary documentation.

65. The claimant then goes on , in para. 7, to talk of "continuing acts of containment", and how she had not changed her case from that previously advanced at the earlier preliminary hearing.

66. In para. 8 the claimant states that she made three attempts to obtain the requested outcome of her grievance, making the application for "industrial injuries", requesting extension of sick pay, and the grievance procedure itself.

67. She draws attention to the grievance outcome , which expressly said that the outcome requested in respect of sickness was not appropriate to be dealt with through the Grievance Policy. She then referred to the pleading in the amended response that the CBIS application was put on hold pending the grievance.

68. She went on in para. 9 to refer to Joanne Town wasting a whole year from August 2016 to August 2017 in not chasing up the forms or communicating with the claimant, "sitting on" the forms for months on end.

69. In para. 10 the claimant seeks to draw direct connections between the victimisation and the grievance in five sub – paragraphs.

70. The first is managers failing to comply with policy with regard to the whole grievance procedure.

71. The second is Joanne Town dealing with the grievance , when she had objected to this, as Joanne Town had , in the view of the claimant , taken the very decision that was being complained of. Joanne Town went ahead and chaired the grievance meeting on 1 July 2016, in the face of objection from the claimant and her union representative.

72. Thirdly, Joanne Town had not supported her application for industrial injuries, giving no consideration to the grievance findings.

73. Fourthly, Joanne Town had failed to consider the requested outcome of her grievance , or assist in doing so.

74. Fifthly, Julie Collins had failed to consider a decision for compensation for loss of earnings (presumably a reference to the ESP1A application) .

75. Para. 11 goes on to refer to the four elements of the grievance which were upheld.

Discussion and rulings: initial observations.

76. At the outset it has to be observed that the terminology used by the parties in this case has not been consistent, and has caused confusion. Mr Hurd for the respondent has used the term IAW – Injury at Work – to describe the scheme to which the claimant made her unsuccessful application , but in the email communications others appear to refer to it as “Sick Leave Excusal”, and the claimant has referred to “IIDB” - Industrial Injury Disablement Benefit. It may be thought that they all, however, refer to the same process, i.e that commenced by the claimant on 8 January 2016, when her union representative sent the application form to the claimant’s manager Deborah Smith (page R104 of the bundle). Interestingly , she referred to it in the subject line as an “Industrial Injury application”. Examination of the form (page R106 of the bundle) , however, reveals that it is an application for “injury benefit assessment”. It is in very general terms, and nowhere in its pages is there any requirement for an applicant to specify what benefit they are applying for. The scheme is actually the Civil Service Injury Benefit(s) Scheme, and its terms, in summary, are set out at pages R329 to R332 of the bundle. The term “Injury at Work” does not appear in that document. The term “Industrial Injury Disablement Benefit” , however, does (on page R332), and under this heading it is expressly stated any award of industrial injury benefit has no bearing upon whether an applicant will qualify for CSIBS benefits. The two types of benefit appear to separate and distinct, though which is payable under which scheme is somewhat opaque from this document. As is clear, however, from an email from SSCL to the claimant on 11 August 2017 (page R215) , SSCL had no involvement with IIDB, which was, it appears a form of state benefit for which any person, not just employees, of the MoJ, could apply.

77. The term “Injury at Work” does not appear in the documentation until December 2016, when the claimant completes a further application form (pages R143 to R153 of the bundle) , which is entitled “Injury at Work”, and dated 30 December 2016.

78. Suffice it to say that the Tribunal’s understanding is that , whatever its proper designation, the type of benefit that the claimant was seeking by making the application that she did was one whereby the effect of her sickness absences upon her pay, and possibly future sick pay entitlement, would be removed or

reduced by receipt of this type of benefit. The purpose of the benefit was , as stated on page R329 , to bring her income up to a guaranteed level if she was "injured" on duty.

79. That, the Tribunal is clear, is the application, an "Injury at Work" or "IAW" application, that she was making from January 2016, and was ultimately declined after an appeal in April/May 2019. What is also clear, however, is that it is not an application for an extension of sick pay made under the Occupational Sick Pay Policy, which can be granted in exceptional circumstances (page R343 of the bundle). Whilst the claimant says she made such an application, her victimisation claims before the Tribunal do not relate to that application, but to her IAW application.

80. It is worth noting that a recurrent theme of the claimant's submissions in the hearing, repeated in her letter of 31 March 2020, has been that she, and possibly her union representative, considered the IAW application as an ongoing part of the grievance process. It was something that the claimant did because she was told to, as the only way to obtain the redress that her grievance had failed to achieve.

81. Whether that is a correct view is something that need not be considered further for these purposes. The Tribunal will assume that it is, although there are clearly arguments that the process was not guaranteed to produce such an outcome, and whilst there would be some overlap with the grievance process, this was a separate process, with different criteria. There was, the Tribunal accepts, some interrelation, as the respondent did put her IAW (or whatever application it was) "on hold", as , if her grievance achieved the same result, the application would become redundant.

82. The Tribunal struggles, however, to see the relevance of this contention to the assessment of the prospects of success of the victimisation claims. It can see potential relevance to any time limit issues, but the respondent's application in relation to the these claims is not based upon them being out of time, it is based upon the lack of any , or any sufficient evidence , to establish a prima facie case of victimisation. The claimant's confusion as to what course to take at various stages may well be relevant to time limit issues, but it cannot affect the merits of the victimisation claims as such.

83. In terms of specific claims, it is to be noted that one of the specific claims relating to Joanne Town is that she did not support the claimant's application of December 2016, by , on 17 February 2017 (pages R150 to R152 of the bundle) completing the form, saying that she did not support the application , and giving her reasons on page R152.

84. The Tribunal notes that there are some factual matters that are still unclear from the documents before it. Where they are, however, any facts alleged by the claimant will be assumed in her favour for the purposes of this application. In particular it seems that Julie Collins was the person who signed off both the original application , and the appeal against its refusal, but this is not apparent – the "outcome" letter of the appeal is said to be page 328 of the bundle, but this is in fact from Zainab Chand, from SSCL.

85. From the email exchanges in March and April 2019, and particularly Julie Collins' email to the claimant of 18 April 2019 (page 322 of the bundle) , in which

she makes reference to not being able to approve the IAW claim on appeal , but needed to speak with HR before making the final decision, it seems clear that the final sign off on the decision was hers. For the purposes of this application, however, it will be accepted that Julie Collins was , at least formally, the decision maker who could have approved, in theory, the application for IAW.

Further discussion.

86. The starting point has to be the burden of proof. Section 136 of the Equality Act 2010 , which provides that the reversal of burden of proof applies 'to any proceedings relating to a contravention of this Act'. It is expressly set out in the explanatory notes to the Act that in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation, point to a breach having occurred, in the absence of any other explanation, the burden shifts onto the respondent to show that he or she did not breach the provisions of the Act. The Court of Appeal in ***Greater Manchester Police v Bailey [2017] EWCA Civ 425*** held that 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see ***Madarassy v Nomura International [2007] ICR 867*** per Mummery LJ at paras. 54-56 (pp. 878-9).'

87. Thus, it is not sufficient for the claimant to contend that she had done a protected act, and then suffered unfavourable treatment. She has to show "something more" to raise a prima facie case that the latter was because of the former. Whilst no comparator is necessary for a victimisation claim, it is nonetheless often instructive to examine whether there is any evidence to suggest that, had the protected act not been of the nature that it was (e.g was not a complaint of disability discrimination) , it would have been treated any differently.

88. The Tribunal has considered each of the claimant's claims of victimisation, and whether each one has any reasonable prospects of success, and, if not, whether it has little reasonable prospects of success. That analysis is as follows.

1.Repeatedly causing the claimant industrial injuries award applications to go missing up to August 2017;

89. The first issue is whether there is any evidence that it was the respondent, in the persons of the various individuals cited by the claimant, who was responsible for the loss or misplacing of the application on any occasion.

90. Looking at the chronology and the documentary evidence, and bearing in mind that only a prima facie case needs to be shown at this stage, the Tribunal notes that the initial application was made in January 2016, and then put on hold pending the grievance outcome. This application , it is noted, was on a form CSIBS1 – P1. The claimant does not appear to make any complaint about that as any form of victimisation, and the Tribunal considers that she could not really expect to.

91. After the grievance outcome on 17 August 2016 (the date on page 11 of the document disclosed after the adjournment of the hearing), following some communication in August 2016 between Deborah Smith and the claimant's union representative (which may have been in relation to the different

application for sick pay at pension rate), on 25 August 2016 Deborah Smith sent the claimant an AAW01 form , which, the Tribunal assumes, is different from a CSIBS1 – P1, although it seems to have to accompany it. Deborah Smith in September 2016 then progressed the application, Some time before 16 September 2016 Deborah Smith submitted the application , or attempted to do so. She was advised that a "wet" signature was required, and she so advised the claimant on 16 September 2016. The claimant thought she had provided this, but it was the AAW01 form that required it. The claimant was informed at that time that the application could take up to 182 days to complete.

92. The claimant provided her wet signature on 22 September 2016. The application was received by SSCL on 31 October 2016. Joanne Town, as the Band B manager, had to complete a part of it, and it was, in effect, her who submitted it.

93. It appears, however, that the very same day it was returned from SSCL, to Joanne Town, at Leeds Combined Court. The reason , as given by SSCL in an email of 15 December 2016 (page R139) was that upon receipt it was considered "non – transactable" , which the Tribunal takes to mean "could not be accepted" , because there were two different reasons given for the claimant's absences , and SSCL required confirmation of whether these absences were linked or separate, and which periods of absence were to be reviewed. Additionally , a "wet" signature from the claimant to provide consent for medical information was also required, and signatures on the CSIBS1-P1, which must have been submitted as well, were then out of date, requiring new forms to be completed.

94. By 15 December 2016, SSCL had not received the application forms back. The claimant completed a fresh AAW01 form and dated it 30 December 2016 (pages R143 to R147). She also completed another CSIS1 – P1 form, and dated those pages 30 December 2016.

95. Joanne Town remained the manager responsible for re-submission of the application. There is (in the bundles for this hearing, at least) no contemporaneous email traffic from her around this time, and it is Deborah Smith who responds to the claimant's and her union representative's enquiries.

96. By January 2017, however, the re-dated forms had not been returned to Joanne Town. It seems that they were still with the claimant's union representative, Rebecca Allan , as on 12 January 2017 (page R196) she sent an email to the claimant explaining how a fire alarm , and then work commitments, had delayed her sending the forms to Joanne Town.

97. Whilst Mr Hurd suggests that Joanne Town submitted the application in mid January 2017, and para. 31 of the amended response so pleads, there is no documentation in the bundles which supports this contention. Rather there is an email of 3 February 2017 (page R200) in which Deborah Smith informs the claimant that Joanne Town has told her that she had sent the application on 27 January 2017, but it had been returned as having been sent to an incorrect address. She had re-sent it to a different address on 2 February 2017.

98. The application was then eventually received, as , on 13 February 2017, SSCL wrote to Joanne Town (page R202) returning the application, un-actioned. The reasons for this were , firstly, that the previous query as to the link between periods of absence, and allied questions had not been addressed, secondly, that

parts of the CSIBS form had not been signed or dated, and thirdly, that Joanne Town had not completed Part C, as the relevant Band B manager.

99. Later enquiries revealed that the returned forms and covering letter had been received at Leeds Combined Court on 16 February 2017, and signed for by someone other than Joanne Town on 16 February 2017.

100. The documents suggest that Joanne Town received this package around this time, because she completed (whether on the returned document, or a fresh version is unclear) Part C on 17 February 2017 , as that is the date that she filled in next to her signatures (pages R151 and R152).

101. The respondent pleads that the application was resubmitted on 18 May 2017. There is no evidence in the bundles to support this contention , nor any explanation as to why, having apparently completed what she needed to on 17 February 2017, the application was not re-submitted for another three months.

102. The claimant chased up what had happened to her application by email of 2 June 2027 to Julie Collins (page R207).

103. It appears (initially only by assertion in the respondent's amended response) the submission of 18 May 2017 was again rejected by SSCL as still being incomplete. Precisely when this occurred was unclear, but from Alex Dunhill's email of 12 August 2017 to the claimant (page R214) it was sent back to Joanne Town on 2 June 2017.

104. There is no evidence in the bundles of precisely when anyone within the respondent became aware of the further return of the application, or what they did about it. On 14 June 2017 (page c49), however, Rebecca Allan reported in an email to the claimant that she had just seen Julie Collins , who had told her that the application had been "bounced back again", and the reasons why. She suggested a resubmission, with a change to the absences to remove one at the end of July 2015 for abdominal pains, which she considered would improve the chances of acceptance.

105. It is common ground (the claimant refers to this in an email to SSCL of 13 August 2017 at page R213) that on 7 July 2017 Julie Collins met with the claimant to go through the outstanding points, and obtain the necessary consent from the claimant. In this email the claimant reports that Julie Collins had told her that managers at Leeds did not know how to deal with such claims , and lessons were being learned.

106. On 31 July 2017 Julie Collins actioned the necessary purchase request for the Occupational Health report from Health Assured Limited (page R209).

107. The claimant was told that the application had been resubmitted on 18 August 2017. SSCL told the claimant on 22 August 2017 (page R210) somewhat confusingly that the forms had not been forwarded, and one of them was out of date, which may mean that the version sent out by SSCL was itself out of date. Whatever the position, the claimant was provided with more , and up to date, forms .

108. On 22 (or possibly 23) August 2017 the claimant's forms were received by SSCL, but there were still issues, requiring the claimant to send further completed forms by email on 23 August 2017 (page R218). Julie Collins on 24 August 2017 questioned Hannah James of SSCL why the claimant had to

submit yet more forms, as she considered that the ones submitted were in date (page R231).

109. Hannah James's email to Julie Collins (page R232) had provided the timeframe for the application to be dealt with, in total some 65 days. The process involved obtaining the claimant's "Medical in Confidence" file from OH Assist, which would then be submitted to Health Management.

110. Thereafter, from September 2017 to March 2018 there is no further instance of any delays, or failures to act, on the part of the respondent, and in particular Joanne Town, or Julie Collins. All issues after the resubmission on 23 August 2017 were with SSCL, or Health Management. The claimant chased up the application, and was informed in September 2017 of a backlog in Health Management dealing with cases.

111. The claimant has identified, and the Tribunal can see, no other instance of Joanne Town, or Julie Collins thereafter being allegedly responsible for the delays in the application then being processed.

112. The above analysis is necessary, of course, to examine the prospects of success of these claims, which are that the respondent "repeatedly caused" the claimant's industrial injury applications to go missing in this period.

113. As the above analysis shows, save perhaps for one early one, the applications did not completely "go missing". They were submitted , and returned to the respondent , then re-submitted. Kelly Williams' email to the claimant of 21 February 2018 (page R250) shows the relevant timeline. The applications went "missing" only to the extent that no action was taken upon them upon their return from SSCL to the MoJ for some time.

114. There are, the Tribunal agrees, some periods when the respondent, and in particular Joanne Town, could be required to explain when she became aware of the return of the applications from SSCL, what she did about it, and why several weeks appeared to elapse before any progress was then made in re-submitting the application.

115. Those periods are, firstly, from 16 February 2017 to 18 May 2017, when the forms having been returned from SSCL on 16 February 2017, it was not until 18 May 2017 that they were re-submitted. The claimant was not told of this development, and only found out about it after she chased up her application on 2 June 2017.

116. The next period is from 2 June 2017 until 23 August 2017. The application had been returned on 2 June 2017 again, but the claimant had to find out what had happened and why.

117. Throughout this period there is no direct evidence on the documents in the bundles from Joanne Town. Deborah Smith is the claimant's point of contact in these periods , and it is through her that information as to what Joanne Town did, or did not do, has been provided both to the claimant , and, thus far, to the Tribunal.

118. Factually, then, whilst not perhaps in the terms that the claimant has put it, there is some evidence that Joanne Town may not have acted with all due expedition in processing and re-submitting the claimant's applications to SSCL.

119. She, however, is the only person in the respondent department that the Tribunal can see as being potentially responsible in this manner. Whilst the claimant originally made more complaint of Julie Collins' actions, or lack of them, and has not abandoned those allegations, the timeline and the documents in the bundles demonstrate that she was the most proactive and diligent person who tried, when made aware of issues, to follow them up, keep the claimant informed, and to progress, as far as she could, the applications. It is to be remembered that it was Joanne Town, not Julie Collins, whose signature was originally required to submit the application.

120. Julie Collins' meeting with the claimant on 7 July 2017 is an example of her attempts to help the claimant. It was to Joanne Town, not Julie Collins , that the applications were returned on two occasions, and it was Joanne Town in whose name they had to be re-submitted.

121. Any responsibility that there may have been (and that word is used in a general non – legal sense, and is not synonymous with liability) for any applications going "missing" , or being delayed , potentially lies solely with Joanne Town, and the claimant has no reasonable prospects of success on this basis in any claim based upon the acts or omissions of Julie Collins.

122. The Tribunal will, however, return below to the prospects of success of these claims in so far as they relate to Joanne Town.

2.Delaying the initial decision on the application;

123. It is not entirely clear what the claimant means by this, but the Tribunal takes it to mean the period between January 2016 , when the application (quite what for is still unclear) was first made, and September 2016 when it was actioned and submitted to SSCL.

124. It is hard to see how this is can conceivably be advanced as a victimisation claim. At the time that the decision to put that application "on hold" was taken, the grievance had not been concluded. Indeed that was the very reason why the application was not progressed at that time. The claimant and her union representative accepted that at the time, and it is clearly a logical decision, as, if the claimant succeeded in obtaining the outcome she was seeking for her grievance, there would be no need for the application to proceed. Whilst it is, of course, theoretically possible for an employer to retaliate (for that is what victimisation is) against an employee for bringing a grievance whilst it is still current, it is highly unusual, and the Tribunal considers, unlikely. Given the entirely rational and reasonable nature of the decision taken, the claimant has failed to adduce any evidence of the "something more" that could possible lead the Tribunal to conclude that the motive for this decision was the nature of , rather than the fact of, her grievance. This claim has no reasonable prospects of success and will be struck out.

125. If, however, the claimant means later delaying of the decision, then the discussion above really answers that allegation, There were delays, but many were on the part of the external agencies involved, and those which may have been caused by Joanne Town will be considered further below.

3 .Refusing the application on its merits.

126. The Tribunal considers that this claim has no reasonable prospects of success. The refusal of the application was manifestly based on the medical recommendations received. The claimant relies , partly, upon the fact that Joanne Town had failed to support the application when submitting it in February 2017. It is true that she did not support it, but she gave her reasons (page R152) as:

"The sick notes provided for a large period of time do not state work related stress. I do not feel that the application meets the criteria."

127. That, however, would not be, and was not, determinative of the application. It was an opinion as to whether the claimant would or would not meet the criteria. The decision whether she did or did not was to be taken by SSCL, on medical evidence. Whilst Joanne Town could, in theory, have refused to sign off the application even if SSCL accepted it, that is, the Tribunal considers a highly unlikely event. In any event, the converse occurred. The medical recommendation was for refusal, and Julie Collins accepted that. She clearly did so on the basis of the medical recommendation.

128. The Tribunal accepts that, in the case of Joanne Town alone, the claimant may have the makings of the "something more" she needs to raise a prima facie case of victimisation. Joanne Town held the grievance hearing on 1 July 2016. Although the investigation was done by Janet Smith, and was primarily in relation to the conduct of two other members of staff, Joanne Town had a role in it. Further, at the outset of the hearing, the claimant and her representative asked her to recuse herself due to her alleged prior involvement in a 90 day notice issued to the claimant.

129. None of that, however, applies in the case of Julie Collins, and there is, simply no "something more" in her case. As she was ultimately the person who signed off the application and the "appeal", the relevance of Joanne Town's actions evaporates.

130. Even , however, if the burden of proof of disproving a discriminatory reason for the treatment rests with the respondent, the Tribunal considers it overwhelmingly likely that the respondent , based on the documentary evidence alone, will be able to discharge that burden. The claimant may disagree with the medical evidence, and may consider that the respondent "should have" taken more into account, the simple fact is that the rules of the scheme were quite clear, and the claimant , after independent medical consideration, was found not to fall within its scope. Even if the Tribunal accepts the claimant's point that the ultimate decision lay with the respondent, the respondent can clearly demonstrate that the reasons for the decision were clearly the medical advisors' opinions , and not related to the claimant's grievance. This claim is struck out.

4.Confining the industrial injuries award decision to an examination of the medical evidence and refusing to consider the content of the claimant's grievance;

131. To be clear, it appears to the Tribunal that in order for the claimant's grievance to be considered by SSCL and anyone else involved as part of her application, there was no need for any separate documentation, as the claimant copied (perhaps even by cutting and pasting) her grievance into the AAW01 form , which she submitted as part of the application on 30 December 2016

(pages R171 – 193). The medical advisors accordingly did not need to request sight of the grievance, they were provided with it in this way.

132. The Tribunal considers that this claim has no reasonable prospects of success. The refusal of the application was manifestly based on the medical evidence received. Factually, however, the claimant is wrong, in any event, as Dr Saravolac expressly did consider the claimant's grievance. Her complaint is that this did not alter the doctor's recommendation. The doctor did not consider it relevant to her assessment of whether or not the claimant met the criteria of the scheme.

133. Assuming, however, in the claimant's favour that the doctor was wrong to do this, the claimant has done nothing to begin to establish that the doctor(s) took this approach <u>because of</u> her grievance . The doctors both had nothing to do with her grievance, and did not even work for the respondent. The rules of the scheme were what they were, and both the doctors' view was that the claimant did not meet them. Rightly or wrongly , that had nothing to do with the claimant's grievance. Refusal to consider a grievance for these extraneous purposes is not, and cannot be, victimisation for raising the grievance.

134. This is a misconceived claim. The claimant is seeking to impose upon the respondent an obligation to re-write the terms of its scheme, or to disapply them to the claimant's application. A victimisation claim requires the Tribunal to consider the reason why the claimant was subjected to the unfavourable treatment, in this case, the refusal of her application. In this case it is manifestly clear that the reason why the claimant's application was refused was that she did not meet the requirements of the scheme. It is not victimisation not to change the terms of the scheme. It is not even victimisation if the decision that she did not meet the criteria of the scheme was wrong, and in fact she did.

135. If the reason for refusal was the respondent's (and for these purposes the scheme doctors are equated with the respondent, itself a tendentious issue) erroneous belief that the claimant did not qualify for the benefit that she claimed, then that is the reason for her treatment , and not the fact she had done any protected act. The Tribunal cannot consider whether that decision was reasonable, or fair, it can only consider whether it could amount to victimisation. There is no "something else" to begin to entitle the Tribunal to look at this decision as any form of victimisation .

136. Again, even if the burden of proof shifts to the respondent, the Tribunal considers it overwhelmingly likely that the respondent will be able to establish this, just on the documents. This claim will be struck out.

<u>5.Appointing Ms Collins as the decision-maker in respect of both the initial decision and the appeal, so as to keep the matter "in-house".</u>

137. The Tribunal considers that this claim too has no reasonable prospects of success. Firstly, and primarily, the appointment of Ms Collins as the decision maker was not "unfavourable treatment", as it was not treatment of the claimant at all. The treatment was the decision on the application, not the appointment. The claimant may complain that Ms Collins was the wrong person to make the decision, and was likely to make a decision adverse to her, but that is merely a facet of the treatment complained of, which is the decision.

138. There is, in any event no evidence that the decision that Ms Collins would be the decision maker was taken for the reason that the claimant suggests it was. The opposite is the case, there is evidence that Ms Collins would be the appropriate person to be the decision maker under the applicable procedures.

139. This claim has no reasonable prospects of success. In the alternative, even if this could be viewed as treatment, and if it could possibly be shown establish a prima facie case, then, for the same reasons set out above, the Tribunal is quite satisfied that the respondent can demonstrate that the decision on the application taken, even if nominally taken by the respondent , in the person of Ms Collins, was effectively determined by the medical opinions received. Further, there is nothing to suggest that there was anything unusual or untoward in the process being retained "in – house". As the documents show, the scheme provides , via external agencies, information and financial support to the respondent. There is nothing unusual in that being done through the employee's line management. There was , and can be, no victimisation on this basis.

6.Delaying the appeal outcome.

140. By this the Tribunal presumes that the claimant means the appeal against the refusal of the application for the IAW payment. The chronology of that is as follows. The claimant was given the outcome of her application on 3 May 2018. She appealed on 25 May 2018, having stated that she would on 18 May 2018. . As stated in the "Advice from medical assessment on eligibility for Civil Service Injury Benefit" dated 23 February 2018 (page R271) There was no formal appeal procedure in respect of the recommendation. Julie Collins, however, by her email of 8 May 2018 (page R282) , had provided the claimant with the guidance from MyCSP, and advised her of the need to produce new evidence which was not previously considered. She attached the form CSIBS2 and the MIC consent form to progress the appeal.

141. That appeal went to be considered by SSCL, in effect, rather as a further application than , strictly, an appeal. The claimant appears (for she has pleaded this on page R24) not to have instituted, or progressed , this appeal until 18 September 2018. She does not suggest that the respondent (i.e as opposed to SSCL) is in any way responsible for this delay, a period of some four months.

142. There was then a delay in SSCL accepting the "appeal" until 9 November 2018, due to a backlog, a further 7.5 weeks. Again, the claimant does not suggest anyone in the respondent Department was responsible, nor could she. Thus, the delay from May to November was not attributable to the respondent at all, and could not be victimisation. Thereafter, SSCL and Health Management acted fairly promptly, as Dr Saravolac's report was obtained and dated 11 December 2018. The claimant got it the next day.

143. There ensued communication difficulties between SSCL and Health Management in late December 2018, through to late January 2019 , about which the claimant complained, and an analysis of these difficulties can be seen at page R319, an email dated 7 February 2019. Again, all this is between SSCL and their service provider, and nothing to do with any acts or omissions by Joanne Town, Julie Collins, or anyone one else in the respondent department.

144. SSCL finally, on 15 February 2019, send the Advice document , from Dr Saravolac, dated 11 December 2018, to Amanda Smith of the respondent page R306).

145. What is unclear is why SSCL sent the Advice document to Amanda Smith. Julie Collins was the appropriate manager, and on 12 February 2019 Abigail McCarthy of SSCL informed the claimant that an email had been sent to Julie Collins for an address to send the application for a decision.

146. The process by which the application was passed to Julie Collins for a decision is far from clear, and by March 2019 the claimant was clearly trying to find out what the delay was.

147. Julie Collins clearly had received the necessary papers from SSCL by 18 April 2019, because that day she emailed the claimant (page R322) , saying that she had gone through the paperwork , and warning that she thought she would be unable to justify approving the IAW claim She wanted, however, to speak to HR before making the final decision. She was to send off the necessary "Form D" , and to tell the claimant when she had done so.

148. She did so on 24 April 2019 (page R326). That resulted in SSCL writing to the claimant on 30 April 2019 ,formally notifying her that her application had been rejected.

149. There is thus, it seems to the Tribunal a period of just over two months, from when SSCL sent, or tried to send, the medical Advice document in mid – February 2019 through to the respondent, to Julie Collins finally returning the Form D on 24 April 2019.

150. There is thus , on the facts, a possibility that Julie Collins was responsible for some, or all of that delay, and she admits that to some extent in her email of 18 April 2019 (page R326).

151. If she was, however, the next question would be, why ? What is the "something else" in her case, that would mean that the burden of proof shifted? She, unlike Joanne Town, had not been involved in the previous grievance. She had done nothing more that act as go – between for the communications between the claimant , Joanne Town, and SSCL , she was the "messenger".

152. Comment has already been made as to the extent to which she had tried to help the claimant with her original application, and she continued in that vein in the appeal. Indeed, the claimant at the time also considered her helpful, as she expressly thanked her on a number of occasions, including as late as 23 April 2019 (page R326) , when she thanked her for her "continued help and kind consideration".

153. The Tribunal appreciates that a claimant can change their perception, and hence their mind, as to the conduct of a manager, and can come to view apparent kindness and support as nothing of the sort. The Tribunal, however, is looking at this stage for anything which could base a prima facie case that Julie Collins delayed the appeal outcome <u>because of</u> the fact that the claimant had raised her grievance, but it can see nothing. That the claimant at the time did not see anything either, rather reinforces the dearth of any such evidence.

154. Thus, this claim too has no reasonable prospects of success, and will be struck out.

Summary and review

155. A further point to bear in mind that the claimant has already , in the previous preliminary hearing (see para. 12, page R55) , ascribed a different motive to the respondent's actions, of wanting to avoid the cost of granting an industrial injuries award. That , of course, is a non – victimisatory motive.

156. In overall terms, the Tribunal has examined, in some detail, whether the claimant has an arguable case that the burden of proof shifts in respect of these six claims. In the Tribunal's view, save in respect of one of them, she has manifestly has not.

157. In relation to the decision on the IAW application, whilst the decision was signed off by her managers, this Tribunal is, and any future Tribunal will also , be quite satisfied that this was in reality a decision pre-determined by the medical advice. There is no, nor could there be any , suggestion that this advice was in any way motivated by the claimant's protected act, so Joanne Town or Julie Collins could do no more than "rubber stamp" that decision, and, under the terms of the scheme had no option but to do so.

158. That means two things, they were personally not treating the claimant unfavourably at all, and secondly, the decision to reject the application was not by reason of the doing of any protected act, the decision was by reason of the medical recommendations of two doctors, who could not possibly have been motivated by the claimant's grievance. The claimant has no reasonable prospects of establishing a prima face case.

159. Similarly, in relation to the appeal, and the involvement of Julie Collins, there the claimant lacks the "something else" that at least applied to Joanne Town, as she was not the subject matter of any grievance, nor did she hear one. The most the claimant says is that this kept the matter "in – house". There is nothing before the Tribunal to suggest that was in any way unusual or improper. The IAW procedure, as the forms demonstrate, operates through the applicant's line management. If that would have been exceptional, and out of normal procedure, the claimant may have had "something" to point to suggesting a discriminatory motive, but she has not.

160. Thus in terms of the decision on the appeal, the Tribunal considers the claimant has not done enough, and will be unable to do any more, to establish a prima facie case so as to reverse the burden of proof.

161. That means these claims have no reasonable prospects of success. If the Tribunal, however, was wrong, and the burden of proof was reversed, then the Tribunal would find that the respondent's prospects of satisfying the burden of proof that there was no link between the protected act and the dismissal of the claimant's IAW application, and appeal against it, were so overwhelmingly strong that the claims would still have no reasonable prospects of success.

The prospects of success of claims no.1 and no. 2 in relation to Joanne Town – deposit orders.

162. The only aspect of the claimant's claims where the Tribunal has hesitated in finding that the claimant has no reasonable prospects of establishing a prima facie case is in relation to Joanne Town. The Employment Judge notes that Joanne Town had a role to play in processing the claimant's

IAW application. She was required to complete sections of it, and actually to either support it, or to say why she could not do. She also had a role to play in progressing it through to SSCL.

163. She had thus a procedural , and , it appears, possibly, a substantive part to play. The respondent's submissions are that the latter is an illusory role, as it was the medical opinion which effectively made the determination that the claimant did not qualify, and that Joanne Town's role was therefore little more than "rubber stamping". In any event Julie Collins ultimately signed off the applications. The Tribunal can see considerable force in that, and on that aspect sees how the claimant will have great difficulty in disproving the respondent's case, assuming the burden of proof does shift.

164. The more procedural aspects, however, may be more open to question. The period from January to July 2017, for instance is one in which the IAW application was returned because parts of it were not completed by Joanne Town (see page 202 of the bundle). There ensues some confusion and mystery as to whether, and by whom, the application had been returned. The upshot was that another form was necessary , which was then submitted in August 2017. Precisely what occurred in this period, and why is unclear, but it does seem to the Tribunal that Joanne Town may need to explain why how state of affairs came about.

165. As observed, there is very little material in the bundles directly from Joanne Town. Rather , Deborah Smith or Julie Collins at various stages relayed to the claimant information that they had been given by Joanne Town about the process.

166. There may be perfectly innocent explanations for the delays, which negative any victimisatory motivation, but if the burden of proof shifts to the respondent, that evidence will need to be adduced.

167. Unlike the cases of Deborah Smith or Julie Collins, the Tribunal can see how the claimant may be able to establish the "something more" necessary in the case of Joanne Town. In her case she was, albeit to a minor degree, someone who was complained of in the claimant's grievance. More importantly , however, she heard it, and declined to recuse herself when challenged to do so by the claimant and her union representative. That may be enough to establish a prima facie case.

168. On that basis the Tribunal would not consider it appropriate to strike out this one aspect of the claims as having no reasonable prospects of success, in so far as the claims relate to Joanne Town. By "the claims", however, the Tribunal means claim no. 1 , above, i.e that of causing the claimant's application to "go missing", and part of no. 2, delaying the decision on the application. Joanne Town , however, can only be responsible for those alleged forms of victimisation from August 2016 until August 2017.

169. That means, of course, that the claims made in relation to this aspect of victimisation have only been presented on 28 July 2019, almost two years after the any last alleged act of victimisation by Joanne Town .

170. That will, if those claims proceed, of course, raise issues as to time limits. If all the other , later, claims are struck out, the remaining claims made in the claim form will go back to August 2017, at the latest, and be considerably out

of time. The claimant will therefore have to seek the just and equitable extension, which will entail an examination of the reasons why the claimant did not present these claims in time, or sooner.

171. It is clear that she knew of the delays in her application for IAW application, because she complained about them. She had the assistance of her union throughout this process. She could have, but did not, grieve about the delays , especially to the extent that Joanne Town may have been responsible for them.

172. All these factors, and others, will have to be examined, but the claimant will have to persuade the Tribunal that it would be just and equitable to allow her to proceed with this out of time claim, such an extension being the "exception and not the rule" (see ***Robertson v Bexley College [2003] IRLR 434***)

173. For all these reasons, whilst not persuaded that the remaining claims in so far as they relate to Joanne Town have no reasonable prospects of success, the Tribunal does consider that they have little reasonable prospects of success, so as to entitle the Tribunal to consider making a deposit order under rule 39.

174. Such a possibility was alluded to in the respondent's further submissions, and is always an alternative available to a Tribunal considering a strike out application. The claimant has not expressly made submissions in relation to a deposit order, but the Tribunal appreciates that she would oppose one. There may be grounds for making more than one such order, as there may be different claims in respect of which such orders ought to be made. The respondent may wish to make further submissions upon what deposit orders ought to be made in the light of this judgment.

175. Before making a deposit order, however, a Tribunal is required by rule 39(2) to make reasonable enquiries into the paying party's ability to pay the deposit. The claimant has not provided any financial information, and the Tribunal accordingly will afford the claimant an opportunity to make further representations relating to her means, if she wishes them to be taken in account, before making a deposit order.

176. The Tribunal has accordingly afforded her the opportunity to do so, and the respondent to make any further submissions as to the form of orders to be made.

177. The Tribunal will then determine what deposit orders to make, and afford the claimant time, usually 21 days, in which to pay any deposit order, or any part thereof, or to abandon those claims.

Conclusion and post script.

178. It is difficult to avoid the conclusion that the claimant may be (for perfectly understandable reasons, as a lay person, and because of her particular sensitivity to these issues) conflating her claims of victimisation, which are complaints of unfavourable treatment because she had complained of discrimination, with the ongoing effects of the discrimination that she had originally complained of. The mere fact that the IAW may have been , and was clearly perceived by the claimant as being, a final opportunity to obtain redress or remedy for previous acts of discrimination does not make its refusal an act of victimisation. The issues of discrimination raised in her grievance may be the

background to her application, and may be the matters that she was basing her application upon, and thus were the events which occasioned the unfavourable treatment, but the refusal of her application does not thereby become victimisation unless the reason for the refusal (or any other treatment connected with it) was the nature and the content of the grievance, i.e the protected act.

179. The way in which the claimant puts her claims perhaps rather emphasises how they are not appropriate. In essence, she regards the IAW process as part of her grievance, which was similarly unsuccessful in achieving her desired outcomes. It is thus part of the same process . The nature of victimisation is that the claimant suffers detriment because of doing a protected act. Not getting the outcome sought from the doing of the protected act is not, without more, victimisation.

180. Further, in her letter of 31 March 2020 at paras. 3 to 6, under the heading of "Respondent's Deliberate Actions" , the claimant sets out allegations against Deborah Smith from December 2015. She contends that she failed, from that date, to make any attempt to support her, failed to adhere to guidelines, failed to make a decision upon her ESP1A application for extension of sick pay or otherwise assist her. She goes on the say that the respondent cannot show any evidence that it offered her any assistance in completing the forms to claim "Industrial Injuries" for the whole of the period from August 2016 to August 2017.

181. That may all be so, but these are not the claims of victimisation that the claimant has presented to the Tribunal, which were identified at the previous preliminary hearing. None of those relate to Deborah Smith at all. These are specific claims, with specific elements that need to be established, and it is these, and only these, that the Tribunal has considered in terms of their prospects of success. These are new allegations, for which permission to amend is required.

182. The claimant's submissions of 31 March 2020 elide into issues of time limits, in terms of "continuing acts", which are not particularly germane to this part of the application, but may be in the next hearing.

Further steps,

183. The remaining part of the issues to be determined, of course, i.e. those relating to the pre – 2017 claims, and time limit issues for any claims which pre-date 21 March 2019 , are yet to be determined.

184. Those matters are best addressed after the claimant has paid, or declined to pay , any deposit(s) ordered, as what claims remain before the Tribunal may then be relevant to those determinations.

185. The Tribunal has accordingly listed the further preliminary hearing , which , it is considered ,would be most beneficially heard by the same Employment Judge, as set out above. It is appreciated that no enquiries into availability have been made, so either party may seek to vacate that date by appropriate application.

186. As time limits will be considered, and the claimant may, if any of her claims are found to be out of time, and do not arguably form part of conduct extending over a period of time ending with claims which are in time, the claimant may seek the exercise of the Tribunal's discretion to extend time on the

just and equitable basis. Orders have therefore been made for her to prepare and serve a witness statement addressing the factual matters that the Tribunal will be asked to take into account in any such application .

Employment Judge Holmes

6 July 2020

ORDERS AND REASONS SENT
TO THE PARTIES ON

8 July 2020

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.