**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4103235/2015**

**Hearing Held at Dundee on 15, 16, 17, 18 December 2015, 7 (Members reading transcription), 11, 12, 13, 14, 18, 19, 20, 21, 22 April, 18 (Members reading witness statements), 22, 23, 24, 25, 26 August, 13, 14, 15, 16, 19, 22, 23 September, 28, 29, 30 November and 5, 6, 7, 12, 13 and Members' Meetings on 14 December 2016 and 20 February 2017**

**Employment Judge: I McFatridge**
**Members: Mr WS Gray**
**Mr J Priestley**

**Mr DI Nutt** — **Claimant**
**Represented by:**
**In person**

**Scottish & Southern Energy plc** — **Respondents**
**Represented by:**
**Mr Crammond**
**Barrister**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Tribunal is that

1. The claimant was unfairly dismissed by the respondents. The remedy to which he is entitled shall be determined following a further Remedy Hearing.

2. The claimant's claim of automatically unfair dismissal in terms of Section 103A of the Employment Rights Act 1996 does not succeed. The claim of automatic unfair dismissal is dismissed.

3. The claim that the claimant suffered a detriment on the grounds of having made a protected disclosure in terms of Section 47B of the Employment Rights Act 1996 does not succeed. This claim is dismissed.

4. The claimant's claim of breach of contract does not succeed. That claim is dismissed.

5. The claimant's claim of unlawful deduction of wages does not succeed and is dismissed.

**REASONS**

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondents. He also claimed to have suffered detriments on the grounds of having made protected disclosures. He also claimed that the respondents were in breach of contract in respect of the notice pay which they had paid him and that he had suffered an unlawful deduction of wages. He also claimed in respect of holiday pay. The claim was subject to extensive case management and in particular at a closed Preliminary Hearing on 29 June 2015 I identified the various claims which the claimant was making at that time. The respondents made various criticisms of the claimant's pleadings and following an open Preliminary Hearing held on 31 August 2015 the claimant's claim in respect of unpaid holiday pay was struck out. The Final Hearing of the case was set down initially to take place over four days in December 2015. Unfortunately this proved completely insufficient time to hear the evidence. The case was set down for a further substantial number of days in April 2016 but again did not finish. Further dates were then fixed for August/September. In advance of this it was agreed that the claimant and the remaining respondents' witnesses would provide witness statements as their Evidence-in-Chief and the Tribunal met in chambers on 18 August in order to familiarise themselves with these statements. The case did not finish within the time allocated in September and further dates were fixed in

November and December. The evidence in the case was completed on 12 December and both parties made their submissions on 13 December. The Tribunal subsequently met in private in order to consider their judgment in the case. In all the Tribunal heard evidence for 34 days.

2. At the hearing evidence was led on behalf of the respondents from David Small, a Trading Manager with the respondents; Martin Pibworth, Managing Director of Wholesale with the respondents (whose evidence was interposed halfway through that of Mr Small for reasons of availability); David Fernie, a Director of Energy Contracts with the respondents; Emma Illingworth, HR Business Partner for Retail Division with the respondents; Keith Stainfield, a customer Services Manager with the Respondents who dealt with a grievance raised by the Claimant, Derrick Davidson Allan, a Director of Scotia Gas Networks (a subsidiary of the respondents) who chaired the Disciplinary Hearing following which the claimant was dismissed and Alan Broadbent, a former Director of Engineering with the respondents who currently works in a special projects team who heard the claimant's unsuccessful appeal against dismissal. The claimant gave evidence on his own behalf. The Evidence-in-Chief of the claimant, Mr Allan and Mr Broadbent was given by means of witness statements. Both parties lodged documentary productions which were added to during the course of the hearing. I have referred to the Respondents bundle by page number and to the Claimant's bundle using the page number and the prefix C.

3. It should be recorded that on 13 September 2016 when the hearing re-convened the claimant sought to lodge certain additional documents. These were strenuously objected to by the respondents' agent. After discussion the Tribunal took the view that it was far too late in the day to be adding documents to the bundle and the claimant's application was refused. On the same day the claimant sought to argue that there was before the Tribunal a claim that the claimant had suffered a detriment for raising health and safety issues in terms of Section 44 of the Employment Rights Act. After discussion it was established that, during the case management process at the very outset of the case, the claimant had not indicated he was making any such claim. The Tribunal agreed with the respondents that the suggested claim under Section 44 was an entirely different

claim from that which had been made previously and on which the Tribunal had now heard very many days of evidence. It was also entirely unclear how the claimant sought to bring himself within the terms of Section 44 given that his witness statement had already been lodged and did not refer to him being an appointed health and safety representative or someone to whom the terms of Section 44 would apply in some other way. The Tribunal considered that if the claimant was seeking to amend his claim then it was far too late in the day for him to do this and the Tribunal ruled that there was no such claim before it.

4. On the basis of the evidence and the productions the Tribunal found the following factual matters relevant to the claim to be proved or agreed.

**Findings In Fact**

5. The respondents are SSE which is a FTSE 100 listed company involved in energy production and distribution. The claimant started work at SSE in April 1998 having completed a Masters Degree at Dundee University. From January 2005 onwards the claimant worked as a Shift Energy Trader based at the company's Energy Management Centre (EMC). It was part of a section known as Energy Portfolio Management (EPM). The claimant worked as part of a team of 12 energy traders. The shift trader role was to balance demand and supply within the company. The trader required to relay information to and from power stations and work with system operators to ensure that the energy requirements were balanced and deal with any problems which arose. Because the electricity and gas markets are continuous such trading requires to be carried out 24 hours a day seven days a week. Traders worked together as a team of two who were on shift at the same time. The job is a demanding one which combines some elements of trading with a requirement for technical knowledge.

6. The claimant's standard shifts amounted to 37 hours per week over a six week shift period. The claimant worked early shifts, back shifts and night shifts. Early shifts were 7:00 am to 2:00 pm or 3:30 pm. Back shifts were 2:00 pm to 9:00 or 9:30 pm and night shifts were 9:00 pm until 7:00 am in the morning. Where a shift coincided with a weekend day (Saturday or Sunday) the employee worked a

12 hour rotation 8:00 am to 8:00 pm or 8:00 pm to 8:00 am. The rotation would start on a Tuesday where an employee would do four early shifts. The employee would then have the weekend off. The following Monday the employee would do five back shifts. The employee would then work weekend days (8:00 am to 8:00 pm). The employee would then do an early shift starting 7:00 am Monday morning. The employee would then be off until the following week. They would either start on the Tuesday or the Wednesday and do seven night shifts. There would then be one week project work. The project work involved the employee working in the office 9:00 to 5:00 and during that week they were not working on one of the trading desks but doing other work. It was also expected that employees could use their project work week to take holidays so that their holiday entitlement could be used without requiring to disrupt the shift pattern.

7. The respondents operate a system of appraisal. When the claimant started working as a Shift Trader in 2005 his Line Manager was David Fernie who was EMC Manager at that time. Mr Fernie was generally responsible for carrying out the claimant's appraisals. The claimant's appraisal dated 14 January 2007 was lodged (pages 152-153). This graded the claimant on various core behaviours as either a 3 or a 4. The overall score was a 3. The overall comments were

> *"Very conscientious worker with high level of technical ability contributing strongly to business objectives. Should look to develop trading skills in order to achieve multi-desk operation. In addition should .. market knowledge."*

His performance appraisal dated March 2009 was lodged (pages 154-156). The claimant scored an overall score of 4. The manager's comment was *"a good year of growth and development"*. The appraisal dated 18 February 2010 was lodged. The claimant's overall score was not given in the same way as previous years but again he scored 3s and 4s under most of the company values. The overall comment was *"Another decent performance from Donald. There have been moments of lapse in standards but he is always committed and strives to deliver an excellent service."*

8. The appraisal for the following year was not lodged but the performance appraisal for 2011/12 was lodged. This document is not dated but the appraisal would have taken place around February/March 2012. The claimant's overall appraisal score was 3. He scored 3s and 4s under Company Values. The overall comment was *"Donald has had a strong year and I have seen him become more authoritative in his present role. I would like to see Donald take on more responsibility to train and pass on his wealth of experience to the newer members of the team."*

9. The Respondents operated a scheme called "Licence to Innovate". In outline this scheme encouraged employees to make suggestions to improve the way the company did things. Employees were encouraged to think laterally and to make suggestions about areas they were not personally working in as well as areas that they had detailed knowledge of. The Claimant was an enthusiastic participant in this scheme, which was administered centrally and not by his line management. Over the years he received commendation for his contributions and in or about 2012 received a £100 reward for one of his suggestions.

10. It was the practice of the respondents that each year an employee such as the claimant would be allocated a specific task or area of business to concentrate on during the week they were allocated to do project work. This would be set out as an objective in their appraisal. On 6 June 2012 Mr Fernie wrote to all EMC Shift Traders (page 169). He stated

> *"We have completed the Appraisals some time ago but have yet to document the Objectives. I will provide four and I want you all to consider an additional one.*
> *1 Everyone has a key objective in delivering budget on the desk.*
> *2 Do something for Health & Safety – this is in addition to any company or team objectives. Eg you could do a safety audit, a note to the team, spend a project day with safety etc*
> *3 Fully integrate Wind operations into the EMC – now that the desk is picking up the day ahead operations.*

*4 Everyone to spend a project week with another business unit in EPM eg Trading, Contracts, Risk, Compliance or Settlements. If you would prefer something out with EPM then please make a proposal.*

*5 Your choice!"*

The claimant responded on 2 July at 04:56 am (page 169):-

*"Hi Dave,*

*There are a number of health and safety concerns with regards to shift working. I'd like to do my H&S objective on these. What I'd like to do is produce a questionnaire, possibly with questions suggested from the team or from the company (this will hopefully mean that they will be relevant). I'd expect the questions to cover a broad range of subjects in an open and informative manner.*

*Some people prepare for their nightshift by having a sleep for 2-4 hrs in the afternoon before they start, others stay awake all night. Some people use legal stimulants such as Red Bull / caffeine drinks other alcohol. Many of us have a poorer diet as we resort to quick snacks / meals. I don't want the questionnaire to be nosey but I would like it to be open and perhaps informative. Perhaps people are damaging their health or driving in too tired a condition after their 1st nightshift. There could be a health and safety case for breaking the 7 nights pattern up even though most EMC shift workers seem to want to keep it. The questionnaire might allow a reasonable debate to emerge and bring the area into line with the other 24hr operations."*

For 2012 the claimant's manager David Fernie suggested to the claimant that he do a project with a health and safety theme.

11. From around July onwards the claimant became interested in looking at the health and safety aspects of doing shift work. One of the claimant's concerns was that by this time he had personally been doing shift work for around seven years. He was aware that in general terms there were health issues found amongst employees

who did shift work particularly night shift work on a long term basis. He began to do research using the internet and other resources.

12. At some point in August 2012 the claimant was sitting at a desk along with three of his colleagues at or around the time of a shift change. It was early morning. The claimant was discussing with his colleagues the findings of his research into the various health issues which can affect shift workers. He mentioned that in his view, according to what he had read on the DirectGov website he and the other Shift Traders ought to be receiving free health assessments from the respondents. During this discussion Martin Pibworth came into the room. Martin Pibworth was at that time Deputy Managing Director of Energy Portfolio Management which was the section which EMC belonged. He was in the course of being promoted to Managing Director as David Franklin the current Managing Director was due to retire in March 2013. He was an extremely senior manager with the respondents. One of the individuals who reported to him was David Fernie who at that time was the respondents' Line Manager. Mr Pibworth asked the claimant and his colleagues what they were talking about and the claimant told him in fairly general terms. Mr Pibworth's understanding was that the claimant was doing some kind of project on shift work as part of the respondents' "Safety Family" initiative which he considered to be a fairly routine thing.

13. During the course of this conversation with Mr Pibworth the claimant understood Mr Pibworth to ask him for more details and on 10 August the claimant sent an e-mail to Mr Pibworth relating to the issue. Since it was the claimant's contention that this e-mail amounted to a qualifying disclosure it is as well to set out the terms of this in full:-

> *"Hi Martin*
> *With regards to the shift team I believe that you should put the following 3 point plan into action. I don't believe that it is onerous on the company or the individuals concerned, though the last point may be difficult for both sides. You can challenge whether you think the EMC qualifies as night workers and the whole authority of the DirectGov website if you wish but I think that you should accept both as being reasonable fair.*

*1) The company should offer a free health assessment under the guidance from the Direct Gov website.*

*2) The company should examine the rota to see if real improvements can be made and provide guidance to shift workers as to how they can mitigate the effects of shift work. Currently all of the risk of shift work is passed to the employee without any sort of guidance. I don't believe this is right and that the company has a moral duty under the induction / training program to help new and existing shift workers in this area. In my opinion I would look to break up the 7 nights in a row night shift week.*

*3) The long term effects of shift work are potentially dangerous but I'm not medically qualified and can't say more than that. I'd perhaps look to be on the side of caution and to reduce the time that people work on shift. Perhaps the free health assessment will naturally bring in a cap when someone's health begins to buckle but that would then be too late. Therefore am I proposing a cap of 10 / 15 / 20 years? No, I can't do that sorry, but the company should have a plan B for people to come of shift when the time is right.*

*I certainly won't get any thanks from the team for bringing any of this up. Who is going to thank me for saving their life 30 years from now at the cost of their shift pay for 10 years? I would like to think though that the above is an improvement on the status quo.*

*A show of hands at the team meeting to adopt the above? No chance – they will vote it down. In my opinion that's not the right outcome for them or the company and will impact on the next generation of shift workers.*

*Cheers*

*Donald.*

***Your health rights as a worker***

*As there are health risks linked with night work, your employer must offer you a free health assessment (normally a questionnaire) before you start working at night and on a regular basis after that. Generally this is done once a year, but your employers could offer a health assessment more frequently. You do not have to take the health check offered.*

*Your employer should get help from a suitably qualified health professional when devising and assessing the health assessments. If you do complete a health assessment questionnaire and the answers cause concern, your employer should refer you to a doctor. If a doctor tells you that you have health problems caused by night work, your employer must transfer you to daytime work – if this is possible.*

***What is the definition of 'night time'?***

*'Night' is generally the period between 11.00 pm and 6.00 am. You can agree with your employer to change the night time period. If you do, then it must be at least seven hours long and include the time between midnight to 5.00 am.*

***Are you a night worker?***

*You are a night worker if you regularly work for at least three hours during the night time period either:*

- *on most of the days you work*
- *on a proportion of the days you work, which is specified in a collective or workforce agreement between your employer and the trade union*
- *often enough to say that you work such hours on a regular basis (eg a third of your working time could be at night, so you would be a night worker)."*

14. Mr Pibworth forwarded this e-mail on to Mr Fernie the claimant's Line Manager and also wrote an e-mail to the claimant copying in Mr Fernie. This e-mail was lodged (page 170).

*"Donald, I thought Dave Fernie was looking at this so a bit surprised to see your email sent to me and not him? I've copied him in given that I know he's talking to HR about the majority of the below. Initial thoughts are:-*

*1) we will look at this and I think it is probably worth supporting*

*2) from what I understand the rota is the majority choice of the shift team and is compliant with all guidelines and standards. To be honest I*

*would have thought that doing the set of nights in one go would be better from a health perspective as it means you are only looking to change your body clock once through the cycle (the aspect I always found the hardest)*

*incidentally I would note that there are benefits of working shift including the point about handing over work and not having to do additional hours in the office. Not many office people work 37.5 hours a week. I would also point out that to make things a bit easier we don't enforce the 30 minute hand-over rule so actually the hours are slightly lighter still.*

*3) the Company is advertising jobs all the time. I would have thought someone who's done a bulk of years in trading would be quite attractive internally. Isn't it up to people to apply rather than me judge from afar and stop them working in something that they are enjoying just because they've hit an arbitrary number of years service?*

*and finally ……. wouldn't it have been better for you to attend the Safety Family (set up by the Company as a platform for you to make these points). Apart from the missed opportunity I was a touch disappointed from a courtesy perspective. It is mandatory that you complete the Safety Family so it is important for you to find another opportunity to attend. I think there's a warp-up session the 30th August that you could go to?"*

15. At or around this time Mr Fernie had already started to look at guidelines relating to shift work. The area of shift rotas was not a new one for Mr Fernie and was something which was raised from time to time. Mr Fernie had discussions with Sandra McDonald who was the respondents' HR Business Partner and also Mary Powell who was the Health & Safety Officer within the respondents responsible for EMC. Mr Fernie was aware of the claimant's suggestion that the current shift rota was in breach of health and safety rules or government legislation. Mr Fernie felt he needed advice on this. There was at least one joint meeting attended by Mr Fernie, Mary Powell and Sandra MacDonald. He had a follow up discussion with Mary Powell. The advice which Mr Fernie received was that the respondents were not in breach of any legislation or doing anything fundamentally wrong. The advice which Mr Fernie received from Ms Powell was that the respondents were

under no obligation to change what they were doing. His understanding was that there was no obligation on the respondents to provide free health assessments.

16. At that time the respondents' management had a corporate initiative to raise the profile of health and safety in the company called the "Safety Family". There were regular meetings of the Safety Family which could be attended by all staff.

17. Meetings of the Safety Family and other team meetings were generally held in the early evening since this was seen as the best time for shift staff to attend. Individuals on night shift would be starting their night shift and individuals on back shift would be coming off their shift. Individuals on early shift would however require to travel through to Perth for the meeting from wherever they live as indeed would individuals who were not scheduled to work that day. The claimant did not attend any meetings of the Safety Family.

18. Following his discussions with Mary Powell and Sandra MacDonald a team meeting was arranged by Mr Fernie on 14 August at which the issue of shift working and the shift rota was discussed. Although the claimant had to some extent been responsible for raising the subject the claimant did not attend this team meeting. The agenda for the team meeting on 14 August 2012 was lodged (pages C19-C29). It contains at page 21 the Agenda for the discussion on shiftwork. This states

> *"- Discussed with HR and Health & Safety*
> - *Rota is compliant – team choice to change*
> - *No feedback eg incidents, errors, poor performance*
> - *Risk assess & offer guidance eg driving*
> - *Breaks"*

19. At the team meeting Mr Fernie reported that he had checked the legal position and the "health and safety" position and that the current shift was perfectly compliant however, within the parameters of the shift, individuals might wish to consider changes. There was a general discussion and Tony Parsons, another Shift Trader who was present at the meeting agreed that he would take forward the matter of

trying to canvas the views of the Shift Traders on whether or not they wanted to change the shift pattern.

20. Following the meeting Mr Fernie wrote two letters to all EMC Shift Traders. The first was also copied to Martin Pibworth and others. This letter was lodged (C30-C31). It stated

*"Key actions from the meeting:*

- *Shiftworking was discussed as part of the Safety Moment.*
  - *In general the rota is compliant with guidelines.*
  - *Tony to lead a team discussion on the pros/cons of the current rota, and establish if there is a desire for change.*
  - *DF to consider how to formalise breaks into the shifts*
- *Safety Family*
  - *Attendance is mandatory and the last chance is 30th August.*
  - *EPM Action Plan to be produced sometime in October.*

*……*

*Overall I thought the meeting was very constructive with some very interesting discussion points. I hope you all found the meeting useful and please feedback your thoughts or any additional comments."*

21. The second letter is dated 15 August (page 185). This stated

*"All*

*As discussed at the team meeting last night:*

***Guidance***

*Please see attached note with strategies and practical advice on improving health and wellbeing whilst working shifts. The notes have been taken directly from the HSE website and therefore don't represent my personal opinion, however most of the advice appears to be fairly straight forward and nothing you will not already be aware of. The guidance note covers what are considered to be the key risks associated with working shifts.*

*In addition to this note the company offers significant guidance and support on all aspects of Health, Safety and Wellbeing and I would encourage you all to engage with this. If you need assistance in finding out more then please let me know.*

***Breaks***

*It is essential that you take a break from work during your shift – you are entitled to this. You must take 20 mins each shift, however there is flexibility when you do this eg you don't have to take 20 mins at once but must ensure a break is at least 5 mins. For the smokers I would suggest you are already taking the breaks, whilst for others please ensure you have a break for a drink or chat etc. It is also an option to use your 20 min break at the end of the shift (e.g. only do a 10 min handover), however I will point out that this is not considered good practice, particularly when working the longer shifts. In addition, you will need to gauge whether a longer handover is likely and manage your time accordingly. I would also expect that the desk to be covered by at least one at any time."*

Attached to this was a document headed "**Strategies and practical advice shift workers can use to improve their health and well-being**". It was lodged (pages 186-188). As indicated by Mr Fernie it contains practical advice on them improving health and well-being while working shifts.

22. At around the same time Tony Parsons, as he had agreed to do, wrote to all Shift Traders seeking their opinions. His e-mail was lodged. Unfortunately the date on this e-mail together with the date on a substantial number of e-mails had been truncated in the copy provided to the Tribunal and in many cases the actual dates are simply unavailable. It is likely this e-mail was written on or about 15 August. The e-mail stated

*"EMS Ops Shift Rota – Are we happy??*

*I have taken an action from the team meeting to canvas the shift team on whether we are happy with the current shift pattern or whether we should consider changing the pattern for health, safety or other reasons. The current shift pattern has been in place for a number of years. The two week window of potential time off (rest days and project days) was introduced primarily to let shift staff take a decent time off when a number of the team had ties 'down south.' It has since provided a decent holiday window every six weeks allowing a fortnights holiday without disturbing anyone for a shift swap.*

*In recent months/years we have seen our colleagues in Hornsea and Generation change their shift pattern to a 12 hour shift, the primary driver of this I believe was to break up the night shifts.*

*Mr Fernie has been to HR and Health & Safety and discussed our current rota at some length. It ticks all the boxes with regard to employee health and safety and the lengthy breaks / rest periods are seen as a good counter balance to the two long weeks that we work.*

*I am also aware that some people have done their own research in to the health benefits / disbenefits of shiftwork and drawn various conclusions.*

*Now is the time to have your say!! …."*

23. Mr Parsons then went on to pose two questions. The first question essentially asked if individuals were happy with the current shift rota. The second question asked what would be an acceptable democratic majority to base a decision on (100%, 75%, 50%). He indicated that depending on the results of this questionnaire he would then go on to consider specific proposals at Stage 2. He sought a response by the deadline of the end of August on the basis that all individuals should be in a position to provide their answer by then.

24. The letter from Mr Parsons was lodged (pages 173-174). Various individuals responded to Mr Parsons and their responses are also lodged at pages 175-182 and 190-201.

25. At some point prior to the team meeting the claimant had had a discussion with Mr Fernie regarding his concerns about shift working. Mr Fernie had expected the claimant to be at the team meeting. He wrote to the claimant on 16 August. He was concerned that the claimant appeared to be raising issues regarding tiredness, driving while tired etc which no-one else in the team seemed to be experiencing. He stated

*"We had a chat last Friday and I told you that I would look into your concerns.*

*Your plan:*

1 *We are not classed as night workers and will not be offered health assessments*

2 *If the company are satisfied that the rota is compliant then they will not enforce any change. In our case the rota is compliant and it is therefore up to ourselves to manage the rota. The risks of shiftwork vary depending on the type of work involved and I have put a guidance note to the team which covers the risks we are exposed to eg driving (to and from work), proper sleep, healthy lifestyle etc. The notes were taken from the HSE website and therefore I assume they are credible.*

*Personally I think the company offers significant guidance and support on Safety, Health and Wellbeing and this is widely available on the intranet.*

3 *There is no policy within SSE to cap the length of time on shift. In addition, there will be no change to the rota without full consultation across the team – this is considered HSE best practice. Clearly you would like to change the rota but you will have to accept that you are part of a wider team. I raised this at the team meeting and Tony is going to gather thoughts and we will take it from there.*

*There has been many departures from the shift team as traders want to move on or simply get off shift – they have all been supported and I don't see why this should change in the future.*

*In addition to the above I'm concerned with some of your comments, in particular regarding your tiredness when on shift and when driving*

*home. Having a sleep on shift really isn't acceptable, and driving to and from work when so tired needs to be carefully risk assessed e.g. would it not be better to use public transport? We need to have a chat as I would like to know why you are finding things so difficult.*
*I'm off next week and will contact you when I return.*
*David"*

This e-mail was lodged (page 183).

26. The claimant's response is also lodged on page 183 and states

*"David*
*I don't understand why when I raised these issues you believed that I want to change the rota for personal gain or why you believe I'm finding things so difficult.*
*I raised these issues because some people have expressed concerns. It's never been all about me and can't understand why you would believe I would act in this way. With regards to your concerns about travelling to work I am careful and assess the risks to the best of my ability.*
*I've met my main objective which was on behalf of individuals (I'm included in here) in the team to raise the issues concerned. I guess now it's up to the team rather than me now.*
*From this Monday I'm off for two weeks and then on nightshift so won't really see you for a number of weeks. Therefore it's probably best if you put down your concerns / questions in an email before what I've said gets even more Chinese whispered."*

On 17 August the claimant responded to Mr Parsons' round-robin letter. He stated

*"Hi Tony,*
*Stage 1 C – I believe that doing 7 night shifts in one go are unnecessarily additional burden on an already long week. There are worthy alternatives that should be considered such as reducing the*

*nightshift from 10 to 9 hrs long and mixing the nightshifts with the week of backs. I'd only want to do this though on the back of medical evidence though and am concerned that the risks / benefits aren't being fully assessed (something I'm not qualified to do) and addressed.*

*Stage 2 B*

*I'm a bit worried that the use of the word happy is a false indicator and will allow people to push their workload unfavourably in the believe that they are getting something out of it. For instance if you asked 10 smokers if they should be allowed to smoke at their desks you'd probably get a 75% of them saying yes but clearly that's the wrong result.*

*I do hope though that you something good out of this."* (page 182)

27. The claimant also responded briefly to Mr Fernie's e-mail enclosing the guidance notes stating

> *"A really good note. Is it ok to put this onto the EMC document library?"* (page 185)

28. On or about 5 September Mr Parsons wrote to the Energy Traders advising of the results of his survey. He indicated that he had had 100% response from the team of Energy Traders. It was stated that only 2 out of the 13 were unhappy and wanted to change the rota. 10 out of 13 had indicated that a 75% agreement would be sufficient. Following on from the other comments he had received he proposed a minor change to the rota whereby back shifts were worked into the long weekend. He published the proposed new rota which was actually a reversion to a rota that had previously been used. This e-mail was lodged (pages 202-204). He sought an indication from Shift Traders as to whether they wanted to leave things as they were or make the small change suggested.

29. In the meantime Tony Parsons replied to the claimant's detailed letter. Again the precise date of this e-mail is unclear. He stated

*"Many thanks Donald, I'll take your points in turn.*

1. *If you have an alternative rota proposal that you wish to put to the team for consideration, which I believe you do, can you please forward me a copy so that it can be considered by the entire team in stage 2. You state that you are concerned that risks/benefits aren't being fully assessed. Fernie assured us all at the team meeting that he has spent a lot of time with HR and our HSE people and that all assessments had been carried out thoroughly.*
2. *I think the second part of your reply is just semantics. You know precisely what the question was and why it was asked. The smoking analogy is a complete red herring in my opinion."*

30. The claimant responded to Mr Parsons on 4 September. By this time Mr Parsons had already sent his email confirming the results of the initial survey and making his proposal for a minor change. In his e-mail the claimant states

*"Tony,*

*I worried you think I'm being awkward. I'm not.*

*People have raised issues with the shift Rota and health and safety aspects of doing shift work. I've been doing shifts for 8 years and have received almost no guidance with regards to H&S on shift from the company. My main driver in all of this was to raise H&S awareness and not seek individual gain through a rota change. The company has an obligation in this area but as I said in 8 years almost nothing.*

*With regards to assurances that the company HR and HSE people are happy with everything. Great! But I don't recall the company ever highlighting any of the risks from the HSE document. Fernie only sent the appendix of that document. It hardly mentioned any of the incredible dangers that shift work can do to people.*

*I've taken a lot of disproportionate flack raising these issue from management. I've even heard a rumour that I'm going to be taken off nightshift. Is this really what happens when people raise H&S issues? I don't think I'll bother next time as it's seriously a bad career move. You get labelled as selfish, a trouble maker and might lose out financially.*

*Seriously the amount of attention I've received is unjustified, and no the company has not taken shift work seriously. I've even heard of people getting told that their shift pay is a cover all, that they are expected to do whatever is requested on shift by management. You've heard this too as I'm sure you told me.*

*The HSE book link that you sent out has a lot of stuff on it and its a good starting point. In the future though I think that the company need to appoint a safety representative for the team (as suggested in the HSE book), perhaps from the team (but given this crap I'm getting I'm no way volunteering), who takes new starts through the health aspects of shift work. Too many times new starts seem to appear and then go on shifts with no proper induction.*

*I make this suggestion so that the shift team experiences an good lasting improvement in the way shift work is perceived. Hopefully some of the negative effects of shift work will be countered too.*

*I can't stop you but please don't forward this email."*

31. On 7 September the claimant sent a further e-mail to all Shift Traders. This e-mail was lodged (pages 219-220). It referred to the two rotas mentioned by Mr Parsons as A and B. The e-mail states

*"Hi Everyone*

*From the description in the Health and Safety Executive booklet shift pattern A can be described as a Weekly Backward Rotating shift rota. Shift pattern B can be described as a Weekly Backforwardback Rotating Shift pattern. The HSE recommends that they are to be avoided largely because they are 'weekly' rotas and there would appear to be better alternatives to consider outlined in their booklet (see link below).*

*From the advice given on Table 3 Shift Patterns (p18 and p19) contained in the booklet I'd like to put option C on the table which is a Fast Forward Rotating shift pattern. I don't want to specifically say how this would look but it's quite easy to imagine from the description outlined in the booklet (I've summarised it below along with Rota A and*

*B). It also mentions why choosing the right shift pattern so important for you and the company.*

*….*

*(Table containing shift data) …..*

*On purely the advice contained in the HSE booklet I believe that option C would be better for SSE and its shift workers in the EMC. Options A and B would appear to be the most disruptive schedules and the HSE actually recommend that you should avoid this type of shift rota. I have confidence that the HSE wouldn't make these recommendations without considered evidence to do so (ie health reports and years of experience / assessment).*

*Therefore for health and safety reasons I'd go with the recommendation of the HSE and choose option C. At least give the booklet a good once over before you make a final decision on what you believe is best for you and your present / future colleagues.*

*Finally I don't understand the need to impose strict deadlines for responses and the implementation of a new rota. The HSE booklet indicates that it should be considered good practice to regularly assess / debate shift working patterns but it looks like we are trying to get back the old rota pattern quickly, without fuss and permanently. Given the advice from the HSE this would be a really puzzling conclusion to the whole debate regarding health and safety for shift workers."*

32. The claimant received a response from Martin Laing one of his colleagues (page 219), this was sent on 7 September and stated

*"I take it from this you'll be sending out these e-mails constantly, telling everyone that you're right, until you get your way.*

*Personally I wholeheartedly disagree with 'Options A and B would appear to be the most disruptive schedules'*

***Do you really believe that doing early/back/night in one week is less disruptive – get a grip***

***'Therefore for health and safety reasons I'd go with the recommendation of the HSE and choose option C'***
***I don't feel that my health and particularly safety are at risk from doing the current option A or B.***
***I think you're just playing the health and safety card to try to force a change that seems to suit you, and judging by the responses from Tony's previous questions, not that many other people.***
***If you're sending any more of these e-mails out, please don't send them to me. I'm not interested.***
***If you're really not that happy, get another job.***
***These are my own personal thoughts and do not necessarily agree with anyone elses."***

33. Mr Fernie felt that he and others had been treated discourteously by the claimant. He felt that having raised the matter the claimant then failed to follow through by failing to attend the team meeting. He had then come back after the deadline making points about the A and B rota which colleagues had already decided was acceptable. At some point these concerns appeared to have been mentioned by Mr Fernie to Martin Pibworth and also to David Small who was another Manager within EMC at that time.

34. Alan McFadden who was the Senior Shift Trader also responded to the claimant's e-mail. Although the Senior Shift Trader was not the claimant's direct Line Manager he stated in his e-mail (C18):-

*"Donald*
*Tony is collating and dealing with the rota as per his action from the Team Meeting which you were unable to attend.*
*If you have suggestions for a new rota, changes, etc then please forward them to* ***him only*** *and he will follow his already agreed process in discussing these with the shift team."*

The claimant responded to this in an e-mail of 7 September (C17).

*"Alan,*

*No worries. Tony was off for a week and only gave out two option. I thought he was looking for suggestions to the debate but he proposed only 2 options (he did email me but I was off and unable to respond until after he was off and so there was no point emailing him). I thought he wanted us to propose options too as that's what usually happens when you propose stuff and was concerned that shift people wouldn't have time to fully assess the options by the 21/09.*

*Anyway that email was my last shot. After I sent it I didn't intend to send anymore. I don't think people will go for C, but I believe it was really important that it's considered by the team. This is why I stuck my neck in the guillotine. It hasn't been sliced off yet but there seems to be a few people queuing up to sharpen the blade and pull the cord.*

*I really don't understand why but people are saying that I've being doing this all for my own personal gain. Selfishness is not one of my traits and statements like that are simply not true. People have raised issues with me regarding H&S and the type of rota that exists and all I was doing is speaking up on their behalf, I also happen to obviously agree with them. 8 people said they would consider change and 2 said they wanted to change. That makes 10 out of 13 but with tight deadlines and only two almost identical options I had to say something. I've found that people are trying to discredit my argument saying that I'm driving change for personal gain – absolute rubbish. I've heard and read some awful comments about me.*

*You probably think I'm a pain the arse. I'm sorry about that. The whole speed and nature of the debate was taken from me and I've been firefighting ever since. Martin Pibworth moved this to Agenda 1 on the last shift team meeting and am pretty sure he knew I wasn't able to attend. I had no time to formulate a proper case (or to bring this up in a proper and orderly manner with you and the team which is what I was doing / would have wanted to have done – sorry) and I believe the debate has been driven by the personal opinion of some the longer serving shift members rather than scientific fact ever since. I'm absolutely convinced that if the shift was to be created from a blank*

*canvas tomorrow that the advice from the HSE would be more readily taken aboard and people would vote for option C. The other two options probably wouldn't even make it to the table.*

*I'm not intending to keep pressing this point as I'm clearly rubbing up a lot of people the wrong way. The problem I have with this is that a strong recommendation from the HSE is to regularly debate / assess shift patterns and we can't do this if we don't come back to this next year and talk about it again.*

*This is the first real discussion with regards to the H&S of the shift rota that the EMC team has had in the 8 years I've been here. Are we going to leave it again for another 8 years (or worse – never)? I certainly haven't found the debate a pleasant experience and have come under incredible pressure from managers and colleagues. With Health and Safety we are encouraged to 'speak up' but my experience with the EMC it's 'shut up'.*

*This is a terrible statement to make next but why bother about the H&S of your team if this is the reaction you get? With regards to any more emails on this subject or me 'piping' in a H&S meeting that makes improvement in the EMC – no chance."*

35. On 18 September 2012 Mr Parsons wrote an e-mail to all Shift Traders thanking them for their participation in the survey. He confirmed that by a 10 to 3 majority which was the requisite 75% it was agreed that they should revert back to the previous rota from 1 November. His e-mail was lodged (page 227). On 1 October David Fernie e-mailed Mr Parsons copying to all Shift Traders stating

*"Tony*

*This is an excellent bit of work to carry out a full team survey and deliver the changes required.*

*In addition I think we now have a change process for future requirements if needed.*

*Thanks"*

36. In or about October 2012 Mr Pibworth decided as part of the preparation for transition to him becoming Managing Director of Energy Portfolio Management following Mr Franklin's anticipated retirement he would re-structure the management of EMC. One of the changes made was that David Small became the claimant's Line Manager in place of David Fernie. The line of reporting became from the claimant to David Small, from David Small to David Fernie and then to Martin Pibworth. Mr Small took over as the claimant's Line Manager in or about the beginning of October. Mr Small was well aware of the shift rota debate and, like Mr Fernie, he considered that the claimant had behaved in a discourteous and unhelpful manner. Mr Small was aware from Mr Fernie that the claimant had raised an issue about whether the respondents should provide free health assessments to the Shift Traders and his understanding was that Mr Fernie had discussed this with the respondents' health and safety managers and been categorically told that this was not the case and that the rota was perfectly acceptable from a health and safety point of view.

37. Around this time the claimant's long-term shift partner Chris Scarborough developed a bad back and went off on long-term sick leave. Mr Scarborough had been the claimant's shift partner for the previous four or five years. The result of Mr Scarborough's absence was two-fold. First of all it meant that instead of being on shift with the same partner all the time the claimant was on shift with various other colleagues. The second effect was that there was general pressure on the shift traders to do additional shifts and to alter their shifts so as to accommodate Mr Scarborough's absence. Mr Small required to deal with this situation almost immediately after he took over as Manager of the EMC.

38. On 21 October the claimant wrote to Mr Small. The e-mail was lodged (page 231). He stated

> *"I know that with Chris being off several people have been asked to cover additional shifts. One thing that I've noticed is that with very long shift hours and additional working requirements that people can suffer from fatigue. One of the dangers of fatigue can become apparent when driving a car and there is a clear safety concern when asking relatively*

*new people to the desks to cover shifts. Would it be possible to formalise taxi expenses so that when people are requested to cover shifts they won't automatically resort to using their car. They will do this as usually the onus is on them to get into work under their own steam but I feel that the company should consider paying their expense.*
*This is only where fatigue is concerned. If it was just a day shift when the person is fully rested then no problem but if it's can you do 2-3 extra nightshifts after your usual set of nightshifts then yeah 'cough up' £20-30 quid taxi fare please. I saw Alex yawn quite a lot and I'm sure that Craig will be doing this on nightshift 8-10. Perhaps they have already asked but in case they don't I thought I'd do it on their behalf.*
*I seemed to remember that one time you paid for my taxi fare from Dundee so apologies if you were going to do / have set this up already."*

39. Mr Small responded to this on 22 October (page 231). He stated

*"As always we would look at any concerns and issues on a case by case basis and all members of the team can come and speak to me if there are concerns with additional work load that I have asked for and the impact this has.*
*I understand that there has been in depth discussion on the shift patterns and issue of fatigue was rightly addressed and I have been advised that this is covered. The shift team took personal responsibility to review the work pattern and with clear guidelines from HR and HSE this was reviewed."*

This prompted a further lengthy e-mail from the claimant which was sent on 23 October. It was lodged (pages 229-230-231). It is probably not necessary to repeat this at length however the claimant basically repeated a number of his concerns about health and safety issues relating to shift work. He made the point that he considered it strange that a key health and safety issue had been put to a vote and made it clear that he felt this had been inappropriate. At the end he stated

*"I'm really sorry this all seems like a rant. As I said it was a very difficult time for me in the company when the issue was hot. I think it will go cold, everyone will go back to how it was before and that, in my opinion, the team will continue to suffer from fatigue and not give countering the long term effects of shift work the attention it deserves. This is not what I thought the spirit of the recent H&S initiative was all about and feel that I've misunderstood the company message on safety completely."*

Mr Small duly responded to this on 23 October. His e-mail is lodged (page 229). It stated

*"Morning Donald*

*As you correctly identify I take safety and the well fare of the team as my priority and I am always approachable to have constructive discussions.*

- *Safety can not be compromised with taxi fares and money.*
- *The recent vote on the shift rota and pattern was a legal requirement, no one is entitled to change a shift pattern with out general consensus and was not carried out to force any issue. It was agreed at one of the team meetings that the team wanted the option to fully discuss the options and come to an agreement. Unfortunately we will never get a fit that suits everyone but I don't believe there was any intention other than to get agreement.*
- *I am also concerned if people believe that they 'don't want to make a fuss' we are an open team and we really rely on the cooperation and support as a team. We have been very fortunate that we have an excellent team spirit and I am surprised that because of experience you feel that someone should refuse to offer flexibility and that this is only left to newer members of staff, for the benefit of all shift members there has to be flexibility from everyone.*
- *As you appreciate the recent request for additional shift cover was to cover a serious injury on one of your colleagues. Unfortunately there was very little support from the team to try and cover the whole set of nights and as a final result had to request support from Alex and Craig. I*

*tried to get cover from almost every other member of the team with no success. I am trying to quickly put contingency in place and we need to continue to ensure that both desk can cross support and that we get as many people authorised to trade.*

- *All request for additional cover are voluntary but at the end of the day the disturbance allowance is in recognition of flexible and antisocial working hours.*
- *Much work was carried out into the concerns of work fatigue and David Fernie, through advice from HSE and HR sent round some very useful information on how you can personally help to manage your time and lifestyle to help with shift working. If you would like I can recirculate this material.*
- *I take your concerns and points very seriously and have discussed these with David Fernie. I would propose to facilitate a open and honest appraisal to this that we arrange for a meeting with yourself, David Fernie, HR and me at a suitable when you are back on day shift.*

*Let me know if you want to set up a meeting".*

40. Following Mr Small's invitation to set up a meeting the claimant never contacted him in order to do this.

41. Mr Scarborough's absence continued into the new year and Mr Small required to get people in who were meant to be on their project days to work shifts. During this period of time Mr Small felt that there were a number of incidents where things became unsettled. Several team members came to Mr Small complaining about matters and the claimant himself also complained to Mr Small about issues which arose with his colleagues. The complaints about the claimant were that some colleagues were finding him very argumentative to the point that they felt they were being badgered. Two individuals in particular raised this issue, Martin Laing and Angie Kennedy.

42. The dispute with Angie Kennedy was a fairly minor one. The claimant had indicated that he wanted to come in slightly early for a shift handover and Angie Kennedy didn't want to do this. It was not particularly unusual for individual

employees to seek to come to an arrangement like this. Angie Kennedy was not able to agree to the claimant's request and said so and she complained to Mr Small that she was feeling badgered over this. Mr Small stepped in to advise the claimant that no meant no. The other occasion was when the claimant telephoned Mr Small to speak to him about a falling out which he had had with Martin Shaw. There had been an argument between the claimant and Martin Shaw whilst together on shift. During this argument Martin Shaw allegedly threatened to hit the claimant. The claimant then said that either he would leave or if he stayed then they would only discuss work related matters for the rest of the shift. He complained to Mr Small about this but did not wish to take the matter any further. He wrote a lengthy email to Alan McFadden about the incident on 13 January (C56-57) but did not copy this email to Mr Small. He initially said that he was not prepared to go on shift with Martin Shaw any more but he subsequently withdrew this threat. Mr Small also felt that the claimant was still wanting to change the outcome of the shift rota exercise. On one occasion the claimant handed Mr Small a HSE document regarding this. There was also an argument the claimant became involved in regarding REMIT. REMIT is a set of rules emanating from Europe to govern energy markets. Its aim is to improve transparency to market participants. The acronym stands for Regulation of Energy Markets Integrity and Transparency. It was being introduced during this period with a view to regulating market behaviours and addressing possible market abuse in the energy market. For the first time Ofgem were being given the power to impose custodial sentences. The respondents were going through a process of ensuring that their procedures were in conformity with the new rules. During this period the claimant wrote to Alan McFadden the Shift Leader challenging advice which the respondents were giving to shift traders regarding the interpretation of the legislation.

43. There was an e-mail exchange in December when Mr Nutt wrote to Mr Small and others complaining that he was spending 8% of his shift time dealing with a particular piece of work on shifts. He felt that this was a poor use of the desk's time and that another team should perhaps be allocated this task. This prompted a response from Andrew Gavin, one of the claimant's colleagues which stated

*"The time he spent whinging and drafting the email he could have had the process completed.*
*His starting point as always is he'd rather not do anything at all."*

This was from Andrew Gavin one of his colleagues.

44. In early January there was an e-mail exchange between the claimant and various other colleagues regarding the cleaning of a fridge which the respondents provided in the area where the shift traders worked. This was used by others as well as the shift traders. Copies of certain of the e-mails in this exchange were lodged (page 233). The claimant's e-mail raised health and safety issues regarding bacteria in household fridges and suggested that the shift traders would require to be trained before they could undertake this task.

45. Mr Small felt that this period was an important one for EMC where there were a number of challenges. These included the introduction of REMIT and the long-term absence of Chris Scarborough. It was also a time of change in management with Martin Pibworth's forthcoming promotion to the Board. There were also a number of instances where things went wrong professionally.

46. As one would expect in a highly regulated industry the respondents carefully monitor the shift traders for breaches of regulation and other minor breaches known as "TIRs". For some reason there was an increase in those in December 2012/January 2013. None of these involved the Claimant.

47. Mr Small decided to meet with the claimant in January 2013 in order to discuss with the claimant the concerns which he had about the claimant's behaviours. The meeting took place on 22 January 2013 and following this meeting Mr Small sent an e-mail to the claimant which was lodged (page 241). Mr Small's intention was to bring to the claimant's attention the various issues which he had with his behaviours. He also wished to make it clear to the claimant that these issues would have an impact on his appraisal and give the opportunity to the claimant to change his attitude in advance of the appraisal. It is probably as well to set out the terms of the e-mail sent to the claimant by Mr Small in full.

*"Donald,*

*We discussed several issues today and I have noted below my main points. This is very much an informal discussion ahead of your appraisal.*

*It is important to me that we have a team structure that promotes teamwork, support for our colleagues, encourages innovation and is efficient and effective in delivering our values and budget requirements.*

*A number of concerns have been raised to me about your work quality and approach to teamwork.*

*This is disappointing particularly at a challenging time while your regular shift colleague has been absent from work due to health reasons.*

- *We raised examples of conflict between you and your colleagues where you have refused to not work with particular individuals and refused to speak to others. More specifically an efficient shift team needs all members to be flexible on shift cover. We discussed the examples of arguments and disruption with Chris Scarborough, Martin Laing and Martin Shaw with this one.*
- *Your ability to work well with members of the team is in question as many members have raised concerns working with you.*
- *I recognise that you have strong beliefs and are passionate about your job but this line is being perceived as stubborn, entrenched, and that your view is fixed and non-negotiable.*
- *We also discussed recent events where you felt surprised that I did not support your view that other colleagues were wrong. The examples of this were recent issues with Angie and Martin Shaw.*
- *I am concerned that your relationships and behaviours are becoming unsettling and disruptive to the shift team.*

*You have stated that you are unsettled working shifts and that there was a preference to come off them but financial considerations were a big issue. It is also difficult for you to evaluate alternative jobs where salaries are not openly mentioned.*

*We need to understand why the team feel so unsettled and I would encourage you to appraise your own attitudes and behaviour to fellow colleagues.*
*Going forward I want to support you where best possible, and I will take advice on the points stated above on alternative job opportunities.*
*I would appreciate your reply to this note to confirm that this is a fair overview of our discussion. Please advise on any omissions and further comments that you would like to make."*

48. The claimant was somewhat taken aback at the meeting on 22 January and he did not feel that Mr Small was justified in making the criticisms of him which he had made. The claimant's position was that he was the aggrieved party in the altercation with Martin Shaw. He considered that it was part of his job to be challenging and did not feel that he was acting in any way inappropriately.

49. At around the time of the meeting Mr Small took advice from Thomas Henery who was a member of the respondents' HR team responsible for dealing with EMC. Mr Henery reported to Emma Illingworth who was the HR Manager responsible for the area and who was based in the North of England.

50. Mr Henery had advised Mr Small to have the meeting with the claimant in advance of his appraisal and following the meeting Mr Small sent Mr Henery a copy of the e-mail he sent to the claimant (page 242).

51. Towards the end of January (28 January) Martin Pibworth wrote an e-mail to David Fernie which David Fernie then cascaded to all of the energy traders. The e-mail was lodged (pages 243-244). Mr Pibworth referred to the fact that there had been three breaches and eight TIRs since the start of December. He stated that his impression was that these incidents were due to a simple lack of care and that the energy traders should be extremely concerned about it because 'it undermines the trust the company has in us'. Mr Pibworth made the point that he had to go to the Audit Committee who individually consider each breach and TIR and provide an explanation. He stated that the respondents were operating in a zero forgiveness

environment and that going forward it was essential they did not breach any of the regulations. He went on to say

> *"sorry to have to be so tough on this, but it is for the benefit and protection of all."*

52. At some point in either February or March the claimant had a conversation with David Small regarding a piece of work which was carried out by the EMC for a company called Infinis. It was known as the WFFT contract. Basically the respondents had sold various wind farms to a third party company and, as part of the arrangements, they had agreed that the energy trading for the wind farms would continue to be carried out by the EMC using the respondents' shift traders. The contract between the respondents and Infinis was never lodged and it is not entirely clear precisely what the arrangements were. Mr Small expressed a concern to the claimant that various losses were occurring on this contract and asked the claimant and others for input as to what if anything they felt could be done to improve the performance. This was a perfectly routine conversation. The claimant indicated that in his view the WFFT contract should not be dealt with by the shift traders. He felt it should be dealt with by someone else in the company. He felt that it was a distraction to the shift traders to require to deal with this and that since it was seen as something tangential to and irrelevant to their normal role then it was unsurprising that the work was not done very well. His suggestion was that it should be moved to another part of the company. He expressed the view that until this was done the company would continue to suffer losses. He also expressed the view that as the third party company were paying the respondents for the service they may not be getting the service they were paying for.

53. In his mind the claimant had some idea that the contract between the respondents and Infinis might be regulated by the FCA and that the FCA principals of dealing fairly with customers should apply he also had a vague idea that he did not feel the customers were being well treated by the work being dealt with by the shift traders in addition to and subordinate to their normal role. He did not express any of these secondary points to Mr Small.

54. The respondents operated a highly regulated environment and, as an Energy Trader the claimant required to bear in mind the regulations and principals laid down by the FCA and other regulators. Within the respondents it is well known that the company is subject to regulation and that the regulator can have considerable influence.

55. Mr Small saw the conversation with WFFT as simply a routine matter and forgot about it soon afterwards.

56. Mr Small arranged to hold the claimant's appraisal meeting on 18 March. In advance of this Mr Small had a meeting with Mr Henery in order to discuss the approach he should take. Following this discussion Mr Henery wrote an e-mail to Mr Small confirming his views. At around this time Mr Henery made Emma Illingworth available in general terms that the claimant would be receiving a poor appraisal score and that a level of challenge about this score was anticipated. Mr Henery's e-mail was lodged (page 246-247). It states

> *"As discussed please find below a summary of our discussion from our meeting on*
> ***Day: Tuesday 12th March 2013 10.30am to 12.00pm***
> *If you agree I will issue to all concerned (myself, yourself, David and Emma Illingworth).*
> *We had a general discussion about Donald's performance and the behaviours identified below in your email. We also noted that Donald's performance review will shortly be carried out.*
> *We agreed that there are two areas of concern both of which will be discussed at the upcoming Performance Review:*
> *1. Performance on the Job (Potential capability issue)*
> *2. Aspects of Donald's behaviour (Potential conduct issue)*
> ***Performance***
> *This would be discussed at the Performance Review and SMART objective should be set out. If there is no improvement within 3 months following the review then this will be managed through the SSE capability procedure.*

***Behaviour***

*We agreed that there are 2 key behavioural aspects which need to be addressed:*

1. *Donald's inability to accept challenges or constructive criticism. (A list of examples should be prepared)*
2. *Donald raises inappropriate challenges referencing the company's golden rules (i.e training for cleaning material, illegal shift patterns)*

*If there is no immediate improvement in this area then this will be managed through the conduct procedure.*

***Strategy for Performance Review***

*This should be approached in a calm and rational manner giving way to Donald if he pushes back in an aggressive manner.*

*At the end of the meeting or earlier if appropriate refer to the Disciplinary Procedures and draw Donald's attention to the informal stage.*

*If the meeting becomes too heated and aggressive at any stage then warn Donald that his current behaviour is evidence of current problems. If he can not communicate rationally then the meeting will be suspended and a formal process under the disciplinary procedures will be instigated. This meeting will then form evidence for any future investigation."*

57. The respondents' Performance Appraisal Procedure was lodged during the course of the hearing (pages 151A-151M). The Performance Review Appeals Process was also lodged during the course of the hearing (pages 151P-151T). It does not appear that Mr Small had access to either of these documents prior to carrying out the appraisal but relied on advice from Mr Henery. In advance of the appraisal meeting Mr Small also spoke to a number of the claimant's colleagues. This was a standard practice. He asked them for one positive word describing the claimant and one negative word describing him. He spoke with about three or four colleagues, three from the shift team and one other. One of the words used to describe the claimant was 'erratic'.

58. Mr Small met with the claimant on 18 March. The meeting did not go well. The claimant did not react well to the points of criticism and did not accept that they

were justified. Mr Small advised the claimant that he would be receiving an overall score of 1. At the end of the meeting Mr Small took a copy of the respondents' Disciplinary Process which he had brought with him and threw it down on the table. He advised the claimant that he was receiving an informal warning. The claimant was upset and asked if he could go home without finishing his shift. Mr Small arranged cover and allowed him to go home without completing his shift.

59. He provided the claimant with an appraisal document which was lodged – pages 165-166. Given the centrality of the appraisal to what happened subsequently it is probably as well to set out what is said in each box.

60. In the box headed Safety the claimant received a score of 2 – Requires development. In the Comments section it states

> *"Donald is keen to query safety and welfare concerns and in many cases his intentions are bona fide. However, Donald behaves as a self appointed spokes person suggests safety and welfare concerns that he has others behalf, but without consent or knowledge from the interested party. I would like to see Donald engage in a positive manner to the safety family and use his creativity to develop wider participation."*

61. In the box headed Service the claimant scored a 1 – Unsatisfactory. The Comments section stated

> *"This is an area of concern and where I am not satisfied in the service that Donald provides to me or the shift team. Example of this is where Donald has failed to deliver several tasks that I have either directly requested of him or the team as a whole. Examples of this is not completing VRT training, late delivering BM Guidance note to do and has still to complete Compliance Refresher Questions to do."*

62. In the box headed Efficiency the claimant scored a 1. The Comments section stated

*"Donald is very imaginative and does promote many ideas. He is a significant contributor towards Lti and clearly has a natural ability to think creatively. Unfortunately this creativity if not applied correctly will actually appear as trying to limit the amount of work to be carried out by an individual. I spent time trying to discuss, what in my mind, was the difference between efficiency and trying to off load work. I would like Donald to consider how he approaches process improvements and to determine the business benefit ahead of the personal benefit."*

63. In the box headed Sustainability the claimant scored a 2 – requires development. In the Comments section it states

*"My impression from Donald is he over challenges advice and if a view does not agree with his he can ignore and read what he wants from it. A recent REMIT discussion is example of this where Donald did not appear to accept the view from Senior Trader, EMC Manager or official guidance and took a loose interpretation from parts of discussions that fitted with his own view."*

64. In the box headed Excellence the claimant scored a 2. The Comments section stated

*"With so many years experience in EPM and the EMC Donald is a very knowledgeable individual. He has the ability to be hugely respected and authoritive in all things of the business. It is clear that Donald enjoys the business we are in and that he is keen to grow this knowledge. I would like Donald to consider why with such knowledge has does not lead within the shift team, drive strategy and command both operations desks."*

65. In the box headed Teamwork the claimant scored a 1 and the Comments section stated

*"This is my main concern with Donald and with very challenging budgets, compliance, regulatory requirements and with a great place to*

*work in mind, it is more important than ever that the EMC operations team work well together. I have raised concerns before with the conduct from Donald and question how well he managed working with others. I expect to see real noticeable change in this area and a real spirit of cooperation and relationship building."*

66. In 'Section 6. Overall Comments' it is stated

*"Donald has been issued with an informal warning on his conduct and really needs to take time to reflect on the points raised during this appraisal. I want to work with Donald and know that he has a good heart along with great experience. Donald has to consider how he interacts with the team and management, there needs to be improvement in communication and how he presents himself at work. Working for SSE and the EMC is like family, for it to function well there is the need to compromise, trust, not take things personally and to be there for each other. EPM work is demanding and there has to be consideration of the issues others have. Successful communication is how well the person you are informing understands your message. I would like Donald to think about how well he achieves this. Donald needs to accept that without clear communication it can only result in confusion, mistrust and a breakdown in the team relationship. My expectations from Donald for the coming year is that he will show immediate improvement, he will use his knowledge in a positive manner to nurture the new members of the team, he will look at how he interacts with the team and make real effort to improve his standing and to show that he is willing to listen, compromise and accept challenges."*

67. After the meeting Mr Small composed an e-mail which he intended to send the claimant reinforcing these points but decided to send it to Thomas Henery for checking first. This e-mail was lodged (pages 251-253). This stated

*"Overall your conduct is unacceptable and I am appraising your overall score as 1.*

*Today we tried to understand where we believed there was concerns. I feel there are issues with communication and how you accept challenges and views of others. In addition, you have not met a deadline when requested to complete a number of important tasks.*

*I have attached a copy of your appraisal that gives details on the scoring.*

- *You failed to complete a pre-appraisal self assessment form and return a copy to me in advance of the meeting. Your reasons for not completing the forms were based on your concerns to write down issues in case it would identify gulfs in opinions between us. I can confirm that everyone I have appraised has been asked to complete the pre-appraisal forms and that the information provided is used to gauge where expectations are and for management to help prepare for the meeting. I will also point out that the forms are part of the Appraisal process under HR guidance.*
- *You have refused to put any of your issues down in writing which makes it difficult for me to find any supportive evidence in your favour.*
- *You have not completed several training and compliance tasks that I have set for you and this is not acceptable. Tasks include VRT Training and Compliance Awareness Questions. I expect that all requests are completed on time unless there is a reasonable reason for not completing which is agreed with myself prior to the deadline.*
- *I raised the question if you believed you were the self appointed spokesperson for the team. You have raised your concerns regarding the welfare of colleagues without their approval, and you have stated that they are not comfortable raising concerns themselves. These claims are without any evidence or discussion with the individuals concerned. While I fully support that we are brothers keepers, the incidences of additional shifts that you raised where not without consideration or the opportunity for individuals to refuse.*
- *During the period where Chris Scarborough was on long term absenteeism you have been asked to be flexible on the roles you carry out and had a number of different shift colleagues. You raised concerns*

*today that this has had an impact on your ability to manage your role. We discussed that as one of the most experienced and time served members of the team you are expected to be fully capable of managing both desks. This has been an appraisal objective or comment for 4 years and I questioned why you do not lead on the desks or believe that requests to cover either operations desk is challenging.*

- *You feel that behaviours towards you are the cause of problems and you stated that you do not want to raise any concerns or get people into trouble; however other people have raised concerns or grievance with you. I again reminded you that I have had members of the team approach me with concerns or raised issues with your conduct, and are often one of the parties involved with any of the behavioural issues in the shift team.*
- *You have previously suggested you would refuse to work with particular members of the shift team. You are well aware that flexibility is essential for a strong team performance. With the challenging budget, compliance and regulatory obligations on the EMC this approach is far from acceptable.*
- *I find that you take the right to challenge too far, and that you do not accept challenges very well. Examples of this were a recent incidence with guidance on REMIT where you did not agree with the advice from Alan McFadden, myself or the guidance note produced by the company. You failed to recognise the guidance from all involved and continued to hold your original view. You see alternative advice to your personal view as being instructed to simply do as you are told.*
- *Another example of over challenging relates to the EMC Shift rota where last year you raised concerns with David Fernie and involved a significant amount of management, HR and the team time to determine that the rota was fit for purpose and what the team wanted. As soon as I became EMC manager you immediately took the opportunity to furnish me with copies of the HSE Shift Working Guidance note and continued to query the Shift Rota, still appearing to not accept the conclusions that had been met.*

- *It is important that you understand that as EMC Manager I expect to be aware of exceptional situations to the markets or SSE energy portfolio. I believe that you had peoples best intentions at heart, however I want the team to keep me informed on significant events. You challenged what were significant or exceptional events but I would recommend that you are sensible with this. There are plenty of guidance notes on when to escalate when constraints reach certain values or if there is a larger than normal movement in the energy position.*
- *We discussed that you believe all of the issues that I have raised are now resolved, however I still have concerns surrounding these problems and need to be satisfied with evidence so that we can move forward.*

***Going Forward***

*I am issuing an informal warning on your conduct as a member of the EMC shift team and recommend that we follow the guidance noted in the company document BF-COR-010 Management Guidelines Disciplinary Procedure, with particular reference to section 3 Informal Procedure.*

*My recommendation is that we meet to clearly reaffirm what my expectations are and that we regularly meet to demonstrate immediate improvements. You have stated that you would like a meeting with HR and to progress on a formal basis, whilst I make no recommendations, I need you to confirm that you want to progress in this approach. Should the discipline process proceed as formal then myself, senior management or HR may be required to interview other members of EMC operations team to fully appraise the situation. Should you request the process to progress as formal then it is necessary for you to advise what suitable dates and times are for you to meet with representatives from HR.*

*You need to take the time to reflect on the points raised. I will want to speak with you when you are next in on a day shift and discuss how we are going to progress.*

*I need all members of the team to work together to help deliver the objectives that have been set for the EMC to deliver this coming year. For this to be delivered we need to see a change in your approach.*

*I want you to consider your approach and understand that the points raised are not insurmountable and with a change in attitude will see you pushing up high appraisal scores and receiving the recognition that your experience should expect.*

*As I advised, you have the right of appeal on the appraisal score. I make myself available at any time if you would like to discuss any points raised or look for clarity. It is your right to raise any concerns surrounding this warning directly with HR, and in doing so will lead to the disciplinary process going formal."*

68. On 20 March Mr Henery replied to Mr Small stating that he agreed with the letter he proposed to send but making a further point stating

*"I would take out this section 'Should you request the process to progress as formal then it is necessary for you to advise what suitable dates and times are for you to meet with representatives from HR'.*

*I appreciate Donald works shifts but if he wants to move it to the formal stage then both HR and the local management i.e you and David will decide the time frames for meetings and investigations."*

69. The disciplinary procedure mentioned by Mr Small "BF-COR-010" was lodged by the respondents (pages 136-138). As it happens for reasons which will be mentioned later the respondents subsequently decided that this disciplinary process was not the correct disciplinary process which applied to the claimant since the claimant was on a personal contract. The Personal Service Agreement setting out the terms of this Personal Contract were lodged by the claimant (pages 6-11). The section regarding discipline is set out on pages 7-9. Both disciplinary policies have a common feature in that if an informal warning is given and this is not accepted by the employee then the only way that the employee can appeal the matter is for the warning to be transformed into a formal warning under the disciplinary procedure.

70. Following his appraisal the claimant was extremely unhappy and did not feel that he had been dealt with properly. The letter he received from Mr Small had advised

him of his right of appeal. The respondents have a policy dealing with appeals against appraisals. This was lodged during the course of the Tribunal hearing as it was not in the initial bundle and is contained at pages 151P, Q, R, S, T. It would appear that neither the claimant, his Union representative nor anyone in the respondents had reference to this document at this time. Interestingly the document sets out at page 151P that the appraisal process is a three-step mandatory process. This involves objectives being set, an interim appraisal taking place after approximately six months and then the final appraisal process. The appeal process states that if an employee has been in their role for a full year and the three-step mandatory process has not been carried out then a default rating of 3 – meets expectations – will apply without the need for the employee to go through the appeals process. This only applies where there are no exceptional reasons justifying why the mandatory appeal process has not been carried out. One of the ironies of this case is that had the Claimant formally appealed using this process then, given that no interim appraisal had been carried out, it is hard to see how he would not have achieved a "default rating of 3". In any event the claimant spoke to his Union about the possibility of a formal appeal.

71. The claimant also spoke informally to Martin Pibworth when they had a chance meeting at the respondents' premises on a Saturday morning. The situation was that Mr Pibworth had come in over the weekend to do a piece of work and had his son with him. The claimant was working at the shift desk and spoke to Mr Pibworth about his concerns. The conversation was entirely unstructured. Mr Pibworth got on with the claimant and would generally be happy to engage him in conversation. He didn't expect the issue of the appraisal to be raised in this way and felt somewhat upset that the claimant was raising the matter with him in an informal conversation. The conversation lasted longer than Mr Pibworth had anticipated. During the course of it the claimant who had initially presented as being open and engaging became more irritated and angry. Mr Pibworth indicated that this was not the appropriate way to engage with him in relation to the matter. Following this conversation the claimant wrote to Mr Pibworth in an e-mail dated 27 March. The e-mail was lodged (page 256). It stated

*"Martin,*

*Thanks for taking the time to talk to me on Saturday. As you are aware, I have some serious concerns about how my work and my conduct has been appraised. I had intended to formally dispute both the appraisal and the informal warning with which I have been issued. However, following our discussion I have decided that this may not be the most mutually profitable route to take.*

*Going forward, the resolution of these issues is clearly necessary, for my own peace of mind, for the good of the team and ultimately the company. As such, I would like to accept your offer to arrange a meeting so we can discuss how to proceed from here."*

72. Mr Pibworth responded also dated 27 March 2013 (page 256).

*"Thanks Donald. This seems a good constructive start. I agree all that everyone wants to do is move forward.*

*I think the first question that you need to ask yourself is whether its better to start with the two Dave's. They are your management team. What you want from this is to emerge in a better place and it strikes me another session talking calmly about this to them might be beneficial. They will want to hear the message that you have written to me below. Once this has happened then we can consider the next steps. (Think about how they will feel if you don't do this and go straight to me. Do you really want them to be feeling like this?) What do you think?"*

73. As part of the appraisal process Mr Pibworth had been made aware in advance that the claimant was likely to be receiving a low score. He also received a copy of the appraisal form for his comments. He returned this to Mr Small on 29 March copying the e-mail to Mr Fernie. The e-mail was lodged (page 258). It stated

*"I am hoping that this marks the low point in Donald's career in SSE and that he very quickly responds to the clear messages that management are giving, shows immediate improvement and then within six months we are through this and out of the other side. To do this Donald MUST*

*listen to what is being said. My sense is that he finds it incredibly difficult to take criticism, would rather dogmatically argue the point rather than think about the quality of the advice, and completely fails to see that people are actually trying to help him.*

*The facts are that no-one is questioning Donald's operational or commercial competence. BUT the delivery of the EPM goals depends upon us functioning as a cohesive and constructive team. It is therefore of grave concern that management are saying that tasks are not being completed, communication is poor, he resists advice that differs from his view, and is not seen as a team player. Even more alarmingly in the light of his appraisal Donald's instinct was not to go away and think about all of this rationally and calmly, but rather to spend his efforts disproving it all. This has to stop. So let me put it very clearly; Donald – you need to listen to management and show immediate change. You need to combine this with a humble, first class attitude. You need to rebuild some of your team relationships (again with humility and grace). You need to support your team and David Small and stop diverting his time to having to deal with pettiness.*

*The good news is that if Donald can do this the future does look quite bright. Even within a highly critical appraisal there is some good. Donald is 'very imaginative', a 'promoter', 'very knowledgeable', has 'high technical ability'. Which makes all of the other stuff so maddening. Donald – your call, but I'm hoping you can fix this quickly. I want to be writing a six month interim review in September which is much more up-beat in tone."*

74. On 29 March Mr Small copied this e-mail to the Claimant together with his completed appraisal form with comments from Mr Pibworth and also from David Fernie.

75. Mr Small did not hear any more from the claimant until 18 April. Just prior to this Mr Small had e-mailed the Claimant advising him that he still required to complete a regulatory and financial crimes questionnaire which he had been due to complete before his appraisal. This questionnaire was part of the respondents' ongoing

efforts to ensure that shift traders were familiar with the requirements of the regulators.

76. On 18 April the claimant wrote to Mr Small. This was the first direct feedback Mr Small had received from Mr Nutt since the appraisal meeting. Part of the reason for this was that the claimant had been off or on shifts where his presence in the office did not coincide with the time Mr Small was there. The claimant had had some interactions with Mr Small but generally these were fairly short conversations. There was one unfortunate incident which took place around this time. The claimant's father-in-law was ill and one evening when the claimant was due to work a night shift his condition worsened. The Claimant requested the night off. The request for the night off was passed to Mr Small via Alan McFadden who was the Senior Shift Trader. It was not conveyed to Mr Small that the claimant was looking for time off because of a family medical emergency. As it happens, Mr Small was out of the office at a social function with Mr Fernie. Mr Small found the late request to cancel a shift most unusual and Mr Small stated that the Claimant could only do this if he found someone to swap with him. This would be his normal response. Mr Small did not appreciate that the claimant was asking because of illness in his family. As it happens the claimant's father-in-law died shortly thereafter. Mr Small felt upset when he found out as he believed that it had not made it clear to him that the claimant was asking for the night off because of illness in his family. On the other hand the claimant felt aggrieved that he had been refused time off at a time of family emergency.

77. The claimant's e-mail of 18 April to Mr Small was lodged (page 260). It states

> *"Following your email of the 20th of March 2013, I was shocked that during an internal performance review I was given an informal warning. I have subsequently discussed this with my trade union, in particular Jeff Rowlinson who sits on the Performance Management Review Committee and he expressed his surprise that the performance review ended with an informal disciplinary warning without following correct company procedures.*

*With regard to comments made in your email, I would ask you to delineate between disciplinary issues and performance, and to please explain exactly the incidents which have allegedly broken company rules. Clearly the performance management process that I have gone through will need to be reviewed to gain an understanding of where support is going to be given in areas you feel I am lacking. I look forward to having a substantial personnel development plan put in place to allow me to reach the company's expectations."*

78. Following receipt of the claimant's letter Mr Small tried to have an informal discussion with the claimant but it broke down into an argument. Mr Small's view was that he had asked the claimant to set up an informal meeting but the claimant had not responded to this. He wanted to agree a plan of action with the claimant so as to make improvements and felt that it would be appropriate to have a formal meeting with HR there. He wrote to the claimant on 22 April inviting him to a meeting which was to take place on 24 April (page 268).

79. The claimant responded to the effect that he wanted to take someone along to the meeting with him (page 269). Mr Small agreed to this request but stated the person should be a trade union representative or work colleague. The meeting duly took place on 24 April and was attended by Mr Small, Mr Henery of HR, the claimant and Nigel Fielding who was the representative of Prospect. A note of the meeting was taken by Mr Henery and lodged (page 272-275). The Tribunal considered this to be an accurate record although not verbatim of what took place at the meeting. Essentially Mr Small set out his concerns and the claimant did not accept these. The claimant indicated that he felt that he was being harassed by being given a 1 for his appraisal. He said he felt very upset about the whole situation. Mr Small indicated that he was looking for the claimant to be part of the team and to work with management but that he felt that (Mr Small) was walking on eggshells and couldn't move forward and that there was a lack of respect. It was agreed that Mr Nutt would discuss matters further with Mr Fielding and that Mr Fielding would then revert back to the claimant. There was also a discussion during the meeting of a personal development plan for the claimant. The claimant and Mr Fielding had asked Mr Small for a specific list of the conduct issues which

were causing concern. On 29 April Mr Small sent the claimant a list. He went on to state

> *"I have been encouraged by our conversation and hope we can move forward in a positive manner. I will wait for your reply as agreed at the meeting but I should inform you that I have no obligation to do so at this stage.*
> *From now on I will meet with you on a regular basis and feedback any conduct aspects that may require improvement.*
> *You should be aware that if there is no improvement, a formal disciplinary interview may be convened."* (Page 276).

80. The list which was attached to this was lodged at pages 277-280. Three examples were given under the heading "**Failure to carry out reasonable work instructions & general lack of cooperation**". These were failure to complete a standard company form in advance of the appraisal, refusal to inform your manager of issues that are causing you concern. This latter was a reference to a point made by the claimant at the appraisal meeting to the effect that he had a grievance against various individuals but did not wish to raise it. The third point was headed refusing to attend meetings. This was a reference to an occasion when Mr Small had asked the claimant for a chat and the claimant had instructed Mr Small that if he had any issues he should put them in writing.

81. The second heading related to "**Inappropriate behaviour and communications**". One example given was headed "**Presenting unfounded allegations**". This related primarily to the claimant's appraisal on 18 March and to various issues where the claimant had raised concerns but then refused to take them further. There was also a reference to a discussion on 16 April when the claimant was alleged to have stated that Mr Small and Mr Fernie were getting back at him for something that happened years ago and that the low appraisal score was because of this. A second example was given in respect of the claimant vocally refusing to work with some colleagues and creating team conflict. This was a reference to the "run-in" with Martin Shaw. The third point was stated to be "**Inability to accept unfavourable challenges and move on**". Under this heading was a reference to

discussion about REMIT on 9 November 2012 and the EMC shift rota. Mr Small made the point that there had been considerable discussion about this over the summer and he had been disturbed when the claimant raised the matter again in October and still did not appear to accept the conclusions that had been made. At the end of the document Mr Small stated

> *"You are free to raise any reasonable concerns you have with your manager but once the outcome has been decided you should accept that outcome and move on in a positive and constructive manner. The topic should not be questioned again unless there is a change in the situation."*

One of the claimant's concerns about this document was that all of the issues apart from the EMC shift rota and REMIT appeared to have happened either at or since his appraisal. With regard to the issue with Martin Shaw the claimant felt that he had a valid case to the effect that he was the one being harassed and that Mr Shaw was in the wrong particularly as the claimant's position was that Mr Shaw had threatened him with violence.

82. Following receipt of this document the claimant discussed matters with his Union. The advice which he received was that in general terms that the Union believed that Mr Small had acted inappropriately by conflating the idea of performance and conduct. In the Union's view it was inappropriate for Mr Small to have used the appraisal meeting as an opportunity to issue an informal warning for conduct under the disciplinary policy. The claimant also, however, received advice that, with regard to these matters the Union's view was that it was better to sort matters out direct with the manager without invoking any specific policies. The claimant's understanding of the matter was that the Union would discuss things with Mr Small and with HR with a view to changing the appraisal. For his part, at this time Mr Small was frustrated because he felt that the important thing that needed to be done next was for the claimant to engage with the criticisms that had been made and change his behaviours. Discussions took place between Mr Small and Mr Henery and either or both of these also discussed the matter with Emma Illingworth. Emma Illingworth decided that one of the difficulties in managing the

situation from an HR point of view was the fact that the claimant was on shift. He was not always in work at the same time as Mr Small and therefore some time could go by without there being a possibility of any meaningful interaction between them. She also felt that the claimant would have better access to his Union to discuss matters if he was not working on shifts. She also felt that he would be better able to access HR if he was not working shifts. Emma Illingworth made a decision that it would be appropriate to remove the claimant from shift work for a time until the outstanding matters were sorted out. She conveyed this as a strong recommendation to Mr. Fernie who made the decision after discussing the matter with Mr. Small. When Mr. Fernie advised the claimant of what was happening on 16 May he indicated to the claimant that this was his idea and did not mention that it had been suggested to him and indeed strongly recommended by Emma Illingworth.

83. Having been advised on 16 May that he was coming off shift, albeit that he would keep his shift allowances, the claimant felt upset. He saw this as reflecting on his performance and felt that matters were being escalated. It appeared to him that he was in some kind of disciplinary process. He decided that he would lodge a grievance about this. The claimant did not consult the respondents' Grievance Policy in advance of submitting the grievance. He did speak to Nigel Fielding.

84. There is a degree of confusion as to which grievance process applied to the claimant. The claimant's understanding was that at the time he submitted his first grievance in May 2016 Mr Fielding had in mind the Grievance Policy which was lodged in the claimant's bundle at page C249 and in the Respondent's bundle at 139. This provides that stage 1 of the grievance is informal. The respondents also lodged a Grievance Policy at page 476 which states that Stage 1 commences with the submission of a formal grievance. As will be seen there is also a further grievance policy yet which is described in the claimant's Personal Service Contract and was sent to the Claimant in 2014 but that does not appear to have been relevant at this stage. In any event the claimant's understanding was that the first stage of the grievance which he lodged would be dealt with informally and indeed that it would be dealt with informally by Mr Small who was the subject of the

grievance. The policy which the claimant thought he was using suggests at paragraph 1.2 (C249)

> *"In cases where the grievance involves the Employee's Manager, they should instigate an informal discussion with their local Human Resources Manager or the Employee Relations Team based at Inveralmond House, Perth.*
> *Where this has been unsuccessful, or circumstances make this route inappropriate for the individual, then matters should be raised formally through stage 2 of the procedure".*

In any event it appears that neither the claimant nor his Union nor HR saw anything unusual with the claimant's grievance against Mr Small being referred to Mr Small to be dealt with. The text of the claimant's grievance was

> *"Dear David*
> *Further to our recent emails, conversation and meeting, I would like to raise a grievance in accordance with the Company's Grievance Procedure.*
> *My grievance is*
> *1) I received an appraisal score of 1 for my personal performance review. At two meetings I have stated that I felt that this score not reflected of my performance.*
> *2) I received an informal warning without the proper company procedures being followed. In my email dated 18/04/13 and at our meeting with Tom Henery (Human Resources) I requested that you delineate between the disciplinary and performance issues. Neither of these requests has resulted in me receiving the information required to permit me to work with you to resolve this problem.*
> *3) The low appraisal score has resulted in a no pay award.*
> *4) I have been taken off shift while still working through the process of discussing all the above issues.*
> *I am available to discuss the above as per Stage 1 of the Grievance Procedure (informal stage).*

*I look forward to hearing from you."*

Mr Small sought advice from Mr Henery on how to deal with the grievance. One of his letters to Mr Henery was lodged. It does not bear a date but would appear to have been written around the same time as the claimant lodged his grievance (page 282). Mr Small states

*"Hi Tom*
*I have spoken to Donald and advised that he has the right to appeal and have given 2 weeks for the appeal. Donald is off on holiday next week and has asked for another week but I am not sure this is necessary as I would have thought the 2 weeks is still enough can you please advise.*
*I have also advised that if we can complete the appraisal process and continue with the work ethic that he is demonstrating while off shift then we will look at potential return to shift Mid August but subject to the appraisal being accepted or rejected by the appeal board."*

Mr Henery's e-mail in response is lodged (page 283):-

*"Hi David,*
*This is the advice from Employee Relations – can we have a call to discuss?*
***Performance***
*Tell Donald that his concerns regarding his performance rating need to be addressed through the appeals process*
*Issue a copy of this and give him a time scale to follow*
***Change of hours***
*Give a clear explanation of why this has been done and give time scales regarding training etc*
***Grievance***
*Explain that the disciplinary policy will deal with point 2 of his grievance and the performance appeal process will deal with point 1 and 3 of his grievance*

*once the above actions have been confirmed this addresses the points raised, ask if he has further issues to raise and if he does explain that Stage 2 of the grievance process will be initiated once this is receiving in writing.*

*Please also find an Investigation Report which you/we need to complete to progress to the formal stage. I will try and give it a bash and let you review once complete.*

*Tom."*

85. The claimant also wrote to Mr Fernie on 20 May formally indicating that he had not asked for the change from night shift and asking if he could be put back on his normal shifts (page 286). At around this time the claimant also wrote a lengthy e-mail which he planned to send to Mr Small setting out his position. In the event the claimant did not actually send it however he did forward a copy to his home e-mail address and the document was lodged (pages 287-301). The document quotes extensively from the letter which Mr Small sent to the claimant and provides the claimant's position as feedback. Since it was not sent to Mr Small I shall not dwell on it in this Judgment however it is interesting as it sets out the claimant's position at this time. In particular the claimant sets out his recollection of the conversation he had with Mr Small regarding WFFT and this is set out in paragraph 2 on page 298. The context in which the claimant mentions this issue in his e-mail was that he was trying to address the allegation made by Mr Small that the claimant was an " 'offloader' of work". The claimant's position was that he had thought deeply about what Mr Small could be referring to since the claimant did not recognise this description of himself. The only thing he had come up with was the suggestion he had made to Mr Small during the conversation about WFFT that this work was not appropriately placed with the EMC shift traders and should be moved to another part of the organisation.

86. Mr Small responded to the claimant's grievance letter in a letter dated 4 June 2013. There was no formal procedure carried out by Mr Small in relation to this grievance. The response was simply a document drafted by Mr Small having taken advice from Mr Henery.

87. The response (pages 303-304) states

*"GRIEVANCE – Stage 1 (Informal stage)*

*I refer to your letter dated 18th May 2013 regarding the above. Please see my response to each of your points below.*

*1. We met on Wednesday 24th April 2013 and discussed your performance namely in relation to your conduct. We have been in discussions before and since this date and have failed to agree a way forward. For your information you should refer to document PF-HR-022 Performance Review Appeal Process within the document library on SSENET. This process should be used with regards to performance review appeals and not the grievance procedure.*

*2. Please see the note that was sent to your representative which delineates between disciplinary and performance issues. This should clarify the situation if this is not the case please let me know as soon as possible.*

*3. This is as per the company policy.*

*4. We have failed to reach agreement on a viable way forward and conduct issues remain. It is in your best interest to receive extra support and guidance and the best way forward to successfully achieve this is during the dayshift.*

*We have met on several occasions to discuss the above without successful resolution and I now believe that stage 1 has been exhausted as per the grievance procedure which states:*

*In cases where the grievance involves the Employee's Manager, they should instigate an informal discussion with their local Human Resources Manager or the Employee Relations Team based at Inveralmond House, Perth.*

*Where this has been unsuccessful, or circumstances make this route inappropriate for the individual, then matters should be raised formally through stage 2 of the procedure.*

*If you require any further clarification or have any queries with regard to the content of this letter please do not hesitate to either me or Tom Henery, HR Manager."*

88. Mr Small enclosed a copy of the Company Grievance Procedure with this document. The Grievance Procedure which he lodged and which he understood was relevant is one lodged by the respondents at page 139 which is similar to that lodged by the claimant at page C249. Interestingly the Respondents also lodged a further grievance policy at p476-477 which was the one apparently used later on in the Claimant's case and is different again.

89. Following receipt of this letter the claimant did not either submit an appeal against his appraisal score or ask for the grievance to proceed to Stage 2 nor were any steps taken to move the disciplinary process which rested on the informal warning into a formal process. Instead it would appear that there were various meetings between the Union and HR, some of which involved Mr Small. The claimant received various reports that meetings were going on but did not receive any detail from his Union nor is there any documentation of any of these meetings.

90. At some stage in either June or July a consensus appears to have been reached between Mr Small and HR to the effect that the Union position that Mr Small had acted incorrectly by tagging an informal warning on to the end of an appraisal meeting was accepted. It is unclear whether this consensus was ever passed on to the Union and it was certainly not passed on to Mr Nutt at that particular time. At that stage Mr Small was being advised by an Elaine Harley of the respondents' HR department as well as Mr Henery and Ms Illingworth as Mr Henery's Manager was also in the background. A decision was apparently made that because the informal warning should not have been tagged on to the end of an appraisal meeting the informal warning would be rescinded. At the Tribunal hearing neither Mr Small nor Emma Illingworth took responsibility for making this decision although both were of the view that this was the decision which had been made. There is absolutely no record of this decision being conveyed to the claimant at this time.

91. In addition it would appear that Elaine Harley concluded that Mr Small had not carried out the appraisal correctly and the position of the respondents' HR department was that the appraisal should be re-done. The understanding of Ms Illingworth was that the appraisal would be re-done with the claimant having the opportunity to attend a fresh appraisal meeting and bring forward any evidence

which he had with which he could justify his criticism of Mr Small's scoring. Mr Small's understanding of the position was that there would be no requirement to change his scoring but that some of the wording he used was inappropriate and that he would require to have some coaching from HR on the appropriate wording to use in an appraisal form. At some point around this time Mr Small did receive some additional coaching on how to do appraisals and prepared a fresh appraisal form for the claimant. He prepared this with no additional input from the claimant although he did have some coaching from HR as to how to re-phrase his views. Although the amended appraisal form was prepared by Mr Small it was retained by him and was never handed over to the claimant until after the Tribunal proceedings began. The amended appraisal form was lodged at pages 242-243. Interestingly although the amended appraisal appears to date from around the time it was agreed that the informal warning be rescinded there is no mention in this document of the informal warning being rescinded and in fact the informal warning is restated in Section 6.

92. The claimant went off sick on 1 July. He went to visit his doctor who advised him that he appeared to be suffering from work related stress and signed him off for a period of weeks. The claimant never in fact returned to his employment.

93. The situation at the point the claimant went off sick appears to have been that the claimant had received his appraisal but had not lodged any formal appeal using the appraisal appeals process. The claimant had lodged an informal grievance which had been responded to by Mr Small with the suggestion that if he wished to take matters further he would require to move to Stage 2 (Formal Stage) and the claimant had not yet done this. On the other hand the respondents had apparently agreed that they would re-visit the claimant's appraisal although there appears to have been a difference of view as to what this involved between Mr Small and the HR department. They had also agreed to rescind the informal warning. None of this appears to have been conveyed directly to the claimant although there may have been an expectation that the claimant's Union representatives would have passed some of this information on to him. Mr Small had, based on his understanding of what had been agreed as regards the appraisal prepared a fresh

appraisal document which used different wording but focused on the same issues as the original appraisal and provided the same scoring as the original appraisal.

94. The claimant's first medical certificate was issued on 1 July 2013 and signed the claimant off for two weeks. The claimant's condition was stated to be

*"Other physical and mental strain related to work"*

No adjustments were suggested. The claimant was then signed off again on 15 July for a further two weeks and then on 30 July for two weeks. The claimant sent his sick notes in to Mr Small. In an e-mail sent around the time the claimant went off absent Mr Small stated that he was available should the claimant need it. There were a couple of conversations between Mr Small and the claimant but Mr Small felt that the claimant was not keeping in contact as much as he should and that he was not getting much information.

95. At some point around mid-July Mr Small had a telephone conversation with Emma Illingworth who suggested that the appropriate course of action was to refer the claimant to Occupational Health. Mr Small was not familiar with the process having only carried out one referral to Occupational Health previously. He agreed with Emma Illingworth that he would draft the form and send it to her for approval. The position at this point was that Tom Henery was the HR point of contact for Mr Small. Emma Illingworth would be copied into e-mails and had had at least one conversation direct with Mr Small. She felt that she was being sucked in to the issue. In any event the instruction to complete an Occupational Health referral to Mr Small came from her. Mr Small completed the first Occupational Health referral form and submitted this to HR. He was under the impression that Emma Illingworth revised it but Emma Illingworth's position, which the Tribunal thought on balance was correct, was that Tom Henery had revised the document. In any event a referral was sent to the respondents' Occupational Health provider Serco. This referral was lodged (pages 333-337). A copy of the referral was not sent to the claimant as is a requirement of the respondents' Sickness and Absence Policy. The copy of this referral document which was lodged is not entirely legible however the entries in the pro forma include the following:-

*"Donald has been advised of behavioural issues that are not suitable for the working environment. Donald has refused to accept this critique. There has been no expression of stress in the work place or request for support. Donald has been given tasks to complete for the business and has not advised on any concerns or difficulty to deliver. A disciplinary investigation has been taking place in the last couple of months with regards to the behavioural issues but this has not yet been successfully concluded."*

*"There have been several meetings with Donald to try to discuss the concerns regarding his behaviour and interaction with the wider team, but this has lead to frustration and denial. Donald is presently under a disciplinary investigation for conduct and it has been hard to engage with him."*

*"An email was sent to Donald from David Small on the 1st July to advise that he was welcome to get in touch and discuss anything to help. A follow up phone call on the 2nd July to Donald by David Small and a message left with his answer service wishing him well and to get in touch if there was anything that can be done to help. No replies or acknowledgement from Donald".*

*"Donald has presented a number of behavioural problems which have affected his work performance and caused concern for the management and colleagues within Energy Portfolio Management (EPM). Earlier in the year Donald was informed of the behaviours which were causing concerns but there was no subsequent improvement or change. In March 2013 Donald attended a performance review at which details of the behavioural issues were again outlined. At the end of the performance review meeting an informal warning was issued but Donald refused to acknowledge or accept the need for improvement. In May 2013 Donald submitted a grievance. Subsequent meetings have been held with Union and HR representatives present. In June 2013 it was agreed to recind the informal warning and to carry out the performance*

*review again. Before this could be enacted Donald called in sick on 1st July 2013 with work related stress."*

96. The referral form being used also has a number of questions in Part B on page 336.

97. During a telephone conversation with Mr Small the claimant was advised in general terms that he might be getting a call from an external doctor. He then received a telephone call from Serco asking him to make an appointment. The claimant was concerned about this and decided to take advice and was advised that the company should have sent him a copy of the Occupational Health referral. He contacted either Mr Small or Mr Henery about this. It would appear that his Union representative also contacted the respondents' HR department and indeed Serco appeared to have contacted Holly Wishart of the respondents' HR department. Serco advised that the claimant had not received the referral form. There appears to have been some conversations and e-mail correspondence between the claimant and Tom Henery which was not lodged but which resulted in the claimant being sent a copy of the Occupational Health referral form and an appointment for an Occupational Health consultation by telephone. Holly Wishart wrote to Mr Henery advising that Mr Nutt did not appear to have any information about the process and suggested that Mr Henery provide him with this.

98. The claimant did not attend the initial telephone consultation because he only received the referral form shortly before this and he was perturbed at its content, in particular the reference to him being involved in disciplinary investigation. On 12 August Mr Small wrote to the claimant challenging him about not attending this meeting (page 351). The claimant responded shortly thereafter stating

*"Just to clarify, I had every intention of attending the meeting with Serco last week. I was obliged to cancel due to having received HR's referral form just a couple of hours before close of business on the day before the phone call had been arranged. I needed time to absorb and discuss the implications of this, as, on reading the document, it became clear that what had been described to me as a 'routine' process in connection*

*with my health, was anything but. In fact, the document contained some information of which I had previously been completely unaware. As such, it felt entirely inappropriate for me to proceed until I had sought advice, which I'm sure you will understand. Interestingly, I hadn't realised that I was entitled to a copy of this document until informed of this by a Serco employee, I am entirely willing, and always have been, to cooperate with an OH referral.*

*I am happy to discuss with my GP whether he thinks an imminent return to work is appropriate for my state of health. I will also ask him if he can make a recommendation on what steps I can request that the company take so as to help the assuage the circumstances that had become so detrimental to my health."*

99. There then appears to have been another flurry of activity involving Mr Small, Mr Henery and Emma Illingworth. At around this point Emma Illingworth came to the view that the way the whole matter of the claimant's appraisal and performance issues and subsequent developments had been handled by Tom Henery left a great deal to be desired. She felt that a lot of things had been done badly. Emma Illingworth could quite see why the claimant had taken exception to the comments made in the Occupational Health referral form. She also realised that Mr Small appeared to be out of his depth and he was expressing to her a degree of unwillingness to become further involved in the detailed HR management of the process. Emma Illingworth decided that the appropriate way to proceed would be for her to meet with the claimant when she was next in Perth which was at the end of August and that she would personally take over management of the claimant's case.

100. She also decided, although it is not entirely clear whether or not she told the claimant of this at the time, that as from this period she would also act as the claimant's Line Manager as well as the HR Manager managing his case. Within the respondents this is something which is done from time to time. Where an employee is off on long term sick and the management of the case involves issues which are more within the scope of the HR department than an Operational Manager sometimes an employee will be re-assigned to a member of the HR

department as their Line Manager. This meant that for example things like receiving sick lines and deciding whether or not to hold absence management meetings would be dealt with solely by Emma Illingworth rather than by Mr Small in conjunction with HR. Emma Illingworth told Mr Small that he was not to be involved in the matter further.

101. In terms of the respondents' Absence Management Policy it would have been usual to hold an absence management meeting at some time in August and in fact Mr Henery and Mr Small had taken steps towards setting this up. In the event Emma Illingworth decided following her meeting with the claimant at the end of August that it would not be appropriate to deal with the claimant's absence under the Absence Management Policy whilst other processes were ongoing.

102. A meeting took place between the claimant and Emma Illingworth on 29 August. This represented the start of Ms Illingworth taking control of the case. She had previously spoken to the claimant's Union representative and was aware of the issues. She had also discussed the matter with David Fernie. She felt that David Fernie as a more experienced manager should be involved. Ms Illingworth's intention was that at the first meeting with the claimant and his Union rep she would advise them that she agreed that the matter had not been handled well by Tom Henery and that she was not happy with this. Her intention was to reset the scene and start again. Her intention was that during the second half of the meeting she would bring Mr Fernie in and invite him to discuss things with the claimant from the respondents' point of view. In advance of the meeting Emma Illingworth also asked Mr Henery to produce a document setting out his understanding of what had taken place with regard to the Occupational Health referral. This document was lodged (pages 364-365). Mr Henery's view was that the claimant had refused to co-operate in a reasonable manner with regards to the Occupational Health referral process. Ms Illingworth's view was that the claimant's position was perfectly understandable given the inappropriate comments in the referral.

103. No formal minute was kept of the meeting which Ms Illingworth had with the claimant and his Union representative on 29 August. The respondents lodged various handwritten notes which appeared to cover this meeting and also a

subsequent meeting which Ms Illingworth had with the claimant in September. After a considerable amount of time spent at the hearing trying to work out which notes were which it would appear that the notes at pages 380A, 381, 382, 383, 384, 385 and 386 referred to the meeting which Ms Illingworth had with the claimant on 29 August. During the meeting the claimant raised the issue of his appraisal. He raised the issue of fatigue among shift workers and mentioned his take on the shift debate. The claimant spoke of a colleague who had died in a car crash a few years previously whilst driving home from work. He speculated that fatigue may have been a contributory cause of the accident. He mentioned that he had discussed his appraisal with Martin Pibworth.

104. Ms Illingworth formed the impression that the claimant was downloading everything that had happened on her and saw her role as to let him talk and get it off his chest. She noted down what he discussed and put an asterisk beside things which she wished to investigate further. She formed the impression that the claimant's emotional state was such that it would not be appropriate to bring Mr Fernie in for the second half of the meeting as she had anticipated. The meeting lasted two or three hours. Following this the claimant had a discussion with Mr Rowlinson. The outcomes of the meeting so far as Emma Illingworth was concerned was that there was to be another meeting on 20 September. In the meantime Ms Illingworth would re-do the Occupational Health assessment and the claimant would go to an Occupational Health referral. On 30 August Emma Illingworth wrote to the claimant and Jeff Rowlinson confirming this and attaching a copy of the amended Occupational Health referral (page 366). She also attached details of the respondents' counselling service for employees and also sent a reference to bereavement counselling as one of the issues highlighted by the claimant was that he was still grieving for his father-in-law.

105. The new Occupational Health referral was lodged (page 367-371). The additional comments section (page 371) the following was stated

> *"There have been a number of meetings between Donald and his line manager over the last 8 month. HR has been present at some of these*

*meetings. Donald can divulge the nature of these meetings to the OH advisors if he chooses to do so.*

*Donald has advised Emma Illingworth that the content of these meeting have led to stress and his absence from work since July 2013.*

*Emma Illingworth met Donald for the first time (along with his trade union representative) on Thursday 29th August 2013. The aim of the meeting was to discuss Donald's current health, the reason for his absence and the factors that may have lead to this.*

*In the meeting Emma asked Donald how he felt about discussing a return to work. We discussed the support mechanisms that were available, primarily mediation between Donald and his line manager / management within EMC. Emma advised Donald that she would provide Donald with details of the Company's confidential counselling service.*

*Emma gave Donald a period of time to consider whether he feels mediation is a route that would be acceptable to him and have agreed to meet to discuss this further on Friday 20th September 2013.*

*Can you advise if you feel Donald is able to participate in mediation at this time?*

*Are there any other support mechanisms that can be put in place to support Donald at this time?"*

106. The claimant was much happier with the terms of this referral and confirmed this in an e-mail to Emma Illingworth dated 6 September (page 374). He also asked if the meeting on 20 September could be moved to late morning or even the afternoon as it was his 10th wedding anniversary the night before.

107. The claimant attended his GP on 10 September. The claimant e-mailed Emma Illingworth after this stating

*"I felt I gave him a really positive view of what was happening on the back of our meeting the other week. He has signed me off for a month as he would be on holiday in 2 weeks time and the timing of our next meeting was such that he wants to see me in 3 weeks time."*

The next meeting duly took place on 20 September. Emma Illingworth had to leave Perth at 11:30 and although she was available from 8:30 the meeting started at 10:00 because of the claimant's request. Emma Illingworth's notes of the meeting were lodged (pages 379-380). The claimant had brought with him some information from ACAS regarding mediation. There was also a suggestion that the claimant would perhaps benefit from mentoring or going on courses. There was a discussion regarding conflict, resolution and relationship management and the best way of raising areas of concern. The claimant discussed counselling and he also indicated he was happy with the content of the referral. The outcome of this meeting was that the claimant agreed to attend mediation which would be organised by Ms Illingworth. The claimant assumed that the mediation would be with David Small since that was the person who was his Line Manager and who he was in conflict with.

108. Thereafter Emma Illingworth obtained sanction to employ an outside mediator at a cost of around £1100. She wrote to Mr Small and Mr Fernie setting out her view of the position in an e-mail which was lodged (page 387). This was probably written by her on a mobile device whilst on the train travelling back to the north of England.

109. It is as well to set out the terms of Ms Illingworth's e-mail to David Fernie in full. The e-mail was also sent to Martin Pibworth. It states

> *"I met Donald Nutt and his TU rep this morning.*
> *In my last meeting with Donald he provided me with lots of information and examples of where he felt some points / concerns he had raised over the last 18 months had lead to the management team having a view that he was 'difficult', 'were out to get him' (my words). He has interpreted this as bullying. This has lead to his inability to take on board the feedback about his performance.*
> *He also detailed a few instances where he had fallen out with colleagues. I do not want to go into the full background but ultimately the information he provided has lead me to discuss the following with him and went to implement the following steps:*

- *I have offered Donald and full investigation into the points that he raised with me. His TU rep advised Donald against this and Donald has agreed that I should not go down this route but the info provided was to set the scene and give me some background. I have made it clear that I have not and will not go and look at these points to obtain a balanced view. Therefore the matters cannot be raised again as we have agreed to draw a line.*
- *I advised Donald that I have made some inferences from the information he gave me to obtain a view of him as an individual. I advised that I believe he has an issue with how he communicates. It's not necessarily what he says but the way he says it.*
- *My suggestion is that I find a suitable internal mentor who can work with Donald about his approach to managing conflict and relationship management. I will also pull out the L&D manual to see if we have any suitable courses.*
- *In my last meeting I suggested Donald considers mediation. He was slightly reluctant but having given this some thought has now agreed.*
- *I have made some contacts with external providers to obtain info of what this would involve so will share this with you ASAP. This will need to involve David Small and David Fernie as a minimum. The aim is to get the professional employee / line manage relationship back on track and get both parties to a stage where we can have open and difficult conversations (about performance etc) and how Donald can articulate his responses better.*
- *This may or may not work for various reasons.*
- *If it does we would then start to look at bringing Donald back into EMC. I made it clear that this would be on a phased basis and he would not go straight back onto shift / the desk until we were all happy he was ready (if at all but that is something we need to discuss).*
- *If this does not work we may get into exit discussions.*

- *As an alternative to returning to EMC, I have spoken to Alastair Cleland to see if he would be willing to take Donald into Hornsea Gas Trading. This would create an opportunity for somebody to rotate out and into EMC. Alastair was keen to look at this in more detail as this satisfies his requirement to stimulate some movement. I also floated the idea with David Fernie yesterday. Donald is not aware of this.*
- *I have agreed that Donald will now attend OH.*
- *He is now attending counselling following my last meeting with him.*
- *After the meeting I had an off the record discussion with his rep and outlined that irrespective of what team Donald works in he needs to be more self aware regarding his style and communication skills.*

*I will be honest. There is no quick fix with Donald. It is clear that I have built some trust and he is responding to the steps I am suggesting. Mediation will be a real challenge for him. Therefore it is imperative that the management team fully cooperate with the process, which I realise will be difficult as there are clear frustrations with Donald.*

*I would like to ensure that if mediation breaks down this will be because of Donald and no other factor.*

*Prospect are keeping a close eye on how we manage this case and the FTO Anne Douglas is aware of the case. I am therefore keen that whilst this may take a little while longer to reach a conclusion (which ever outcome we arrive at) we follow a thorough and professional process so we are not open to criticism.*

*Happy to discuss in more detail.*

*Next steps:*

- *Referral to OH will take place next week.*
- *Aim to have details of mediator next week.*
- *I will look to put in place a mentor – over next few weeks.*
- *I will review potential courses with L&D over next week.*

*Regards."*

110. The Hornsea gas operation referred to by Ms Illingworth is a division of the respondents which operates a large gas storage facility at Hornsea. There is a trading desk situated in Perth which manages inputs and outputs in respect of this from an energy trading point of view and the work done there was not entirely dissimilar to that done by the Claimant. Although Ms Illingworth in her letter speaks of re-deployment and possible "exit discussions" she had not mentioned this to the Claimant at her meeting with him on 20 September. He was unaware at this stage that if mediation failed then exit discussions might be a possibility.

111. On 26 September the claimant e-mailed Ms Illingworth to advise her that the Occupational Health form which he had been sent appeared to be in order. He also went on to state

> *"A while ago I emailed David Small requesting access to my work email account. Would it be possible to see if I can get access granted soon?"* (Page 390)

Ms Illingworth responded (page 389) stating

> *"I would suggest we discuss this at our next meeting. You are currently signed off by your GP as being unfit for work."*

As it happens Ms Illingworth's failure to act at this time caused repercussions later on. The respondents' e-mail system is operated by their internal IT department. They have a standing policy that if an e-mail account (or Lotus Notes Account in this case) had not been used for three months then the account will be closed down. It is the responsibility of an employee's line manager to ensure that where an employee is off on long term sick or, more usually, maternity leave to advise IT of this so that the e-mail account/Lotus Notes account is not deleted. By this point the claimant had been off nearly three months. Ms Illingworth had been acting as his line manager since the end of August and it was her responsibility to advise IT that he was off on long term sick and that they should not delete his e-mail account. She did not do this.

112. The claimant duly tended a telephone consultation with Serco Occupational Health on 9 October. Following this they issued a report (pages 392-393). The report noted that the claimant had advised the writer briefly of his perceived workplace issues prior to his absence and noted that the claimant described being able to function normally on a daily basis outwith work. It went on to state

> *"however becomes anxious when discussing work and the perceived issues which apparently contributed to his absence surrounding Line Management."*

In answer to the question whether he was fit to carry out his normal duties the report stated

> *"Mr Nutt is fit to return to work following further discussion and mediation as suggested within the management referral and when an amicable agreement is reached by all parties involved."*

113. In answer to a question on outlook it was stated

> *"It is hoped that when Mr Nutt returns to work following the Mediation and amicable agreement that he will remain at work."*

In answer to the question if the condition was work related it stated

> *"It would appear from the information obtained today that there are work issues which would appear to have contributed to this gentleman's health condition."*

With regard to whether or not a gradual return to work was recommended the writer confirmed that it was. It was suggested that the claimant avoid night shift for the first two weeks, have reduced responsibility initially, that there be regular meetings with Mr Nutt to ensure he had no problems and that a workplace stress risk assessment using your internal tools/policies be carried out. In answer to the question whether the claimant was able to participate in mediation it stated

*"I would advise that Mr Nutt is fit to attend mediation and I have encouraged him to engage in this process to allow the situation to progress and discussion to take place to help reach an amicable agreement for all parties."*

It was noted that Mr Nutt had contacted counselling and had his first appointment arranged for the following week. The writer went on to state that she had made no plans to review Mr Nutt.

114. This report was forwarded to the claimant and received by Ms Illingworth within a few days.

115. Having obtained authorisation Ms Illingworth contacted Rowan Consultancy, an external company offering mediation services, with a view to arranging mediation. The mediation company wrote to the claimant on 4 November 2013 (pages 593-595) setting out their view of the mediation process and introducing themselves. The claimant did not in fact ever receive this letter directly however on 8 November Emma Illingworth wrote to the claimant an e-mail enclosing a copy of the letter and asking the claimant if he was okay for the mediation session on Tuesday 12 November (pages 596-597). The claimant e-mailed Emma Illingworth on 8 November stating (pages 600-601)

*"I've just got your letter now. I'm happy to go along on Tuesday but will have to rearrange some things.*
*I also thought I'd have the chance to meet with you and Jeff beforehand to allow for a bit of preparation and a setting of expectations. For example I've tried to recount exactly what has happened to me quickly to other people and have found that 1.5 hours just doesn't do it all justice. I'm unsure exactly what is up for discussion, what I'm supposed to admit to and exactly what behavioural changes either party should reasonably accept. With just 1.5 hours I will have to concentrate on what is important but have previously found that this is difficult to do.*
*To be honest I don't feel prepared and am concerned that without being so I could be in danger of inadvertently sabotaging the process. I am*

*keen to fully participate but worry that I'm going into the process with equal blame attached, that all the bad things that they did are to be forgotten (if I were them I'd want to forget them too) and that a lot of the behavioural issues can't readily be agreed on such a level.*
*Would it be possible to meet with either you, Jeff or both of you ahead of the meeting. I can be there the day before or at 09:00 on the day."*

Ms Illingworth responded later that day (8 November) (pages 599-600). She stated

*"There are a couple of statements in the letter from the mediation Company that should address some of your concerns.*
*The letters advises that mediation is about solution mode and not going over the past and deciding who was right.*
*This is about understanding if both parties can communicate with each other and work better in the future.*
*I am a little concerned at this stage with the points you have raised regarding:*
*I am keen to fully participate but worry that I'm going into the process with equal blame attached, that all the bad things that they did are to be forgotten (if I were them I'd want to forget them too)*
*In our previous meeting I offered to open an investigation into some of the points that you raised to me in confidence. I was advised that this was an avenue that you and Jeff did not want to pursue and were happy that instead we draw a line, work towards mediation and getting the relationship with your line manager(s) back on track.*
*I am in Perth on Tuesday morning and am happy to meet before the mediations commence, but am unsure of Jeff's availability. I have cc him to this email."*

The claimant responded the following day (9 November) (page 599). He stated

*"Hello Emma,*
*Thanks for your email.*

*You are right to point out that I, in conjunction with Jeff, agreed to mediation. I understood from our previous meetings that the process would be explained to me and that we would have a further meeting before mediation was arranged. Yesterday I received your email with the attached letter from Rowan Consultancy, advising that I was to attend work for the process of mediation in three days time.*

*For the past months, you are obviously aware, I have been signed off work with stress. The occupational health report, which SSE requested, advised that this stress was specifically in conjunction with issues at work. As such, I found the short notice of mediation enormously anxiety provoking. I still haven't received the actual letter yet. It is suggested, for example, that I can take someone into the process with me. A weekend and a working day is a very short space of time in which I can decide whether this is appropriate, and, if it is, to assess the individual's availability.*

*Please understand that, although I have agreed to move ahead and not dwell on past issues, that this is not easy for me. I realise that I need to get into the right frame of mind, and, to be honest, my previous email reflected my anxiety that I would be going into mediation without the necessary preparation, and as such, it wouldn't be as successful as it needs to be.*

*I do want to thank you for your assistance with these issues."*

Ms Illingworth wrote to the claimant on 11 November (page 598). She stated

*"I have tried to arrange a pre meeting with Jeff but this proved difficult as he is very busy.*

*If I am honest I am not sure what else I can / could have said to prepare you for tomorrow. I have referred you to OH to obtain a medical opinion on your ability to attend, which confirmed you are.*

*I am not aware that you have made contact with Jeff or myself for another catch up meeting recently?*

*I realise you have done some background research and reading re mediation and I am sure Jeff has discussed this with you.*

*I am disappointed that you have not yet received the letter as I have been pushing ER to issue the for some time.*
*I am just heading to Perth on the train specifically to support tomorrow's mediation.*
*I am not sure from your email whether you intend to attend?"*

The claimant responded later that day stating

*"Hi Emma,*
*Don't worry I will be attending the meeting tomorrow. It is obviously a big day and like all big days people get a bit nervous no matter how much preparation or how well they know their subject. I've never been to a mediation session before but I'm sure Rachel has the experience to help me through the process.*
*I just want to make the day a success. I know we all do."*

Emma Illingworth responded virtually immediately thanking the claimant for confirming and stating that

*"As Jeff highlights, Rachel will only progress to the group session if she feels this is appropriate."*

116. The claimant anticipated that the representative of the respondents who would be attending the meeting would be David Small who was his line manager and with whom the difficulties had arisen. The letter from Rowan Consultancy mentions (page 594) that the first stage would be that mediator Rachel Weiss would be meeting with "David" and the claimant assumed that this would be David Small. As it happens Emma Illingworth had decided that David Small was still too stressed by the situation to take part in mediation. She therefore did not ask him to take part but instead only asked David Fernie to participate. As a result David Fernie was the other person who attended mediation for the respondents. The claimant was extremely surprised when he found that this was the case.

117. The mediation took place on confidential terms and both parties were in agreement that it would not be appropriate for the Tribunal to make findings in fact relating to what took place at the mediation. We therefore do not do this. Suffice to say that the mediation was not a success. After the meeting Rachel Weiss the mediator provided the respondents with a letter in terms which stated that the claimant and David Fernie engaged in the mediation process on November 12th. She went on to state

> *"They listened to each other, but were not able to agree on a way forward that would meet both their needs and the needs of the organisation."*

She went on to confirm that the content of the mediation sessions was entirely confidential and that she would not be available as a witness in future. This e-mail was lodged (page 606). Rachel Weiss also had a meeting with Emma Illingworth after the mediation. The claimant became concerned shortly after this when he formed a belief that the mediator had in fact tweeted about the mediation. A copy of the tweet was not lodged at the outset of the hearing and when the claimant sought consent to lodge this at a late stage in the hearing the Tribunal refused permission since it did not appear relevant.

118. Following the mediation the claimant spoke to his union representative, Jeff Rowlinson. He in turn spoke to Emma Illingworth. Emma Illingworth indicated that she was not prepared to discuss the mediation with Mr Rowlinson. On 20 November Mr Rowlinson e-mailed the claimant to advise him that he could not speak to the mediator. He said that his next move was to try and arrange a meeting with Emma Illingworth and David Fernie (page 608). It appears that around this time there were a number of conversations between Emma Illingworth and Jeff Rowlinson. None of these meetings were documented or recorded in any way nor was there any contemporaneous report back to the claimant about what was being discussed. This situation appears to have gone on for some weeks.

119. At the beginning of this process Emma Illingworth on or about 21 November set out her thoughts on paper. This appears to have started out as a draft e-mail to

Jeff Rowlinson but at the end of the day Ms Illingworth simply sets out her thoughts and the document was never sent to anyone. The document was lodged (pages 609-612). The first part of the document simply sets out Ms Illingworth's understanding of what had taken place up to the date of the mediation. It would be fair to say that her history of events would probably be challenged by the claimant. She then went on to describe the mediation and makes clear that in her view the claimant had been responsible for the failure of the mediation (page 611). She then went on to summarise her current view and it is probably as well to set this section of her document down in full.

> *"We have both met with Donald on two occasions (previous meeting had taken place with David Small and Tom Henery) we have met Donald and I have felt that I was unable to introduce David Fernie to the discussions due to the issues Donald has with his line managers.*
>
> *At no stage has Donald (in my opinion) taken on board any of the feedback provided, but continued to refute the points.*
>
> *Donald has questioned the mediation process and from our conversation, I took the inference that Donald was challenging the mediators professional abilities.*
>
> *Following the mediation Donald asked if we could now explore redeployment out of EPM.*
>
> *During our conversation on Tuesday 19th November 2013 you asked me what would happen if Donald chose to return to work next week. I asked you if Donald wishes to return to EPM and you said yes. I find this slightly conflicting when I consider the following:*
>
> - *On two occasions (our 1st meeting and following the mediation) Donald has asked that we explore redeployment.*
> - *Donald has been signed unfit for work since 01/07/13 and has felt unable to return to work.*
> - *Donald still rejects all feedback provided by his line manager and senior manager regarding his behaviour and performance.*
> - *The mediation session failed to reach resolution.*

- *The OH report said Donald was unfit to return to work unless the relationships are improved with his line manager(s) via mediations.*
- *Based on successful mediation, a return to work may be possible on a phased basis. At no time have we entered into detailed discussions about what a phased return programme would look like.*

*You asked if you and I could now meet with David Fernie to discuss a way forward. I have considered this route and see little value. We have entered into mediation with an external professional to facilitate this and reached no resolution. The mediator has not recommended any further sessions.*

*My concern is that if we could not seek a resolution through the mediation route; a meeting between you, I and David Fernie is unlikely to change matters.*

*As discussed I have a fundamental concern regarding exploration of redeployment whilst Donald continues to completely reject any form of feedback from his line manager. Whilst feedback can be a little uncomfortable and painful if this is not 100% complimentary, we must learn to take this on board and either develop and improve or prove that the person has the wrong impression. I have seen no sign of the latter elements, only a defensive stance. I am therefore concerned about redeploying an employee unless these elements have been addressed.*

*During the call I advised you that I personally think you have been very supportive to Donald and asked what else we (collectively) can do to continue to support Donald considering the above has already taken place. I am aware he has been out of the business for some time and would like to now put a time limit on the matter.*

*Donald has been absent since 01/07/2013, has submitted a total of 7 sick notes which detail 'other physical and mental strain related to work' as the reason for absence. Donald's current sick note runs until 1 December 2013 and his full sick pay is due to expire on …."*

The remaining part of the note was not lodged and in fact the note may not have been finished. Emma Illingworth's reason for documenting things was simply to

record where she was at that particular point. It is clear that at this stage Emma Illingworth did not envisage the claimant returning to work in EMC.

120. At some point in December Jeff Rowlinson ceased to be the main point of contact for Ms Illingworth in the claimant's union. She began discussing the claimant's case with Anne Douglas who was a full time official with Prospect. One of the first issues which came up related to the claimant's pay. In terms of the respondents' Sick Pay Scheme an employee is entitled to 182 days' full pay and 182 days' half pay when off sick. The claimant's initial 182 days was due to expire on 22 December and in the normal course the claimant would have gone on to half pay from this date. The respondents' absence team in fact wrote to the claimant on 13 December 2013 confirming this. It would appear that subsequently there was a conversation involving Anne Douglas, Emma Illingworth and Dale Cargill who was Emma Illingworth's manager and the Head of HR. Emma Illingworth made the decision that instead of going on to half pay the claimant should remain on full pay. At around this time it was also agreed between Ms Illingworth and Ms Douglas that the way forward would be to investigate the claimant's complaints. Emma Illingworth had in mind that an investigation would take place under the auspices of the respondents' grievance procedure it is not entirely clear if it was made clear to the claimant that what was being suggested was that he lodge a grievance and that this be dealt with under the grievance procedure. In any event the claimant was asked to produce a written statement setting out his concerns so that these could be investigated. Essentially Emma Illingworth agreed that despite the fact that she and Jeff Rowlinson had both agreed to "draw a line" under the claimant's historical allegations at their meetings in August and September 2013 Emma Illingworth now decided that the way forward would be to investigate these concerns. Ms Illingworth understood that the company's grievance procedure which would apply to the investigation was the document lodged by the respondents at pages 476-477.

121. In addition to agreeing that the Claimant's allegations would be investigated, another outcome of the discussions between Emma Illingworth and the Claimant's union representatives was that efforts would be made to identify a role outwith EPM to which the Claimant could be redeployed. It was arranged that the Claimant

would be put on an email list so that he would receive details each week of all current vacancies. In addition it was arranged that the Claimant meet with a representative of HR to assist him with updating his cv. This meeting took place early in 2014. The Claimant received lists of vacancies every week. These were not differentiated in any way and most of these were of absolutely no relevance to the Claimant's situation. At some point in 2014 the Claimant was advised of a particular vacancy which was of interest to him but on contacting the person named as the appropriate contact he was told that in fact this vacancy had already been filled before the Claimant had been advised of it. The Claimant felt he had been made to look foolish in contacting that person in those circumstances.

122. The claimant submitted his formal statement as requested by Emma Illingworth on 17 January. The document was lodged (pages 467-472). At the beginning of his document the claimant sets out what he advises is "Background"

> *"1. I have worked in the EMC for nine years, and have scored consistently on my previous appraisals. There has never been any previous disciplinary action taken against me.*
> *2. During the last six months of 2012, my shift 'partner' was absent with medical problems, which led to his shifts being covered by other members of the team on overtime.*
> *3. There was some conflict in the latter part of 2012 between myself and EMC Management regarding issues of health and safety, particularly concerning shift work.*
> *4. There had been personnel and role changes in the EMC Management and team structure in Autumn 2012. Whilst it was very clear who was doing what there were also subtle changes to management responsibilities too but this was not very clear. In the new year there were significant workload changes for the shift traders though this time responsibilities were clearly defined."*

The claimant then set out what he indicated were specific instances in 2013 where he believed EMC management's behaviour and actions towards him constituted workplace bullying.

123. Given that the document is lodged it is probably as well if the points made by the claimant are simply summarised in this Judgment. The claimant complained about
1. The performance review and informal warning in March 2013
2. The Personal Development Plan.

He indicated that after requesting a delineation between the warning and the appraisal he was presented with a personal development plan by David Small accompanied by the information that if he failed to make immediate improvement the disciplinary process would be formally escalated. This document is the document previously referred to at pages 277-280. The claimant indicated that these included matters which he did not believe would have constituted disciplinary issues under normal circumstances.

124. The claimant also complained at point 3 about being taken off shift. He advised that when his union asked management why this had been done he was advised that it was to "monitor my behaviour". The claimant complained at point 4 about demotion and humiliation in front of colleagues. He believed that the role he was put into while on day shift was demonstrably a demotion and that he had been subjected to good natured joking from colleagues regarding this. He said that he had felt isolated, embarrassed and under scrutiny. He also felt that any mistakes he made would be used as evidence against him. The fifth point he made was in relation to the Occupational Health Report. In the section on this he does mention the mediation. He makes the point at paragraph 7 on page 471

> *"The escalation of this situation, from one where I was issued an informal warning to one where I was no longer welcome back at my job appears to have happened as a result of my appeal, and my resulting sickness absence. I would like to underline the fact that this entire process has adversely affected my health, as indicated by both my GP and by the company's occupational health report."*

At the end of the document the claimant requests the situation is investigated.

125. On 29 January Amy MacDonald of the respondents' HR department wrote to the claimant confirming that they had received his e-mail and that they were in the

course of appointing a Manager to investigate his grievance. Amy MacDonald was involved rather than Emma Illingworth because Amy MacDonald worked in the section of the respondents' HR department which dealt with the processing of grievances. The grievance process itself was managed by Lorraine Hamdani of that department. She decided that she would allocate Keith Stainfield who was a Customer Services Manager with the respondents. He had also carried out a small number of disciplinaries. He had only been with the company since September 2011. He had previous experience of carrying out a small number of disciplinary and grievance hearings. On 13 February a letter was sent out from HR copied to Mr Stainfield advising the claimant that there would be a grievance hearing in accordance with Stage 2 of the Company's Grievance Procedure which would take place on 20 February 2014. The letter was lodged (pages 474-475). A grievance procedure was enclosed with this (pages 476-477). It should be noted that this is a different grievance procedure from the one which the claimant and his union had understood to be appropriate. In particular the first stage of this grievance was formal. One of the provisions of this grievance procedure is that this is a formal discussion which will be tape recorded in order that a word for word record could be produced. It then noted that

> *"2.8 The nominated Manager will consider all the information presented and write to the Employee detailing the outcome without unreasonable delay."*

There is provision for an appeal at Stage 3 and this states

> *"3.1 Failing a resolution at Stage 2, the Employee may appeal against the outcome. This should be made in writing to the Manager that delivered the outcome.*
>
> *3.2 A further hearing will be arranged on the same basis as Stage 2, however it will be held by a more Senior Manager accompanied by a Human Resources Manager.*
>
> *3.3 The Manager's decision will be final."*

126. The grievance hearing duly took place on 20 February. Mr Stainfield was accompanied by Lorraine Hamdani and the claimant was accompanied by Jeff Rowlinson his trade union representative. At the outset Mr Stainfield read a script (page 478). The remainder of the grievance hearing was recorded. During the hearing the panel listened to the recording in private. In addition a transcript of the meeting was lodged (pages R479-R518).

127. At the initial meeting it was made clear to the claimant and Mr Stainfield by Lorraine Hamdani that this grievance was not the process for reviewing the scoring itself but it was about the alleged background of bullying. Part of the meeting was taken up with the claimant explaining to Mr Stainfield what the EMC did and how it operated some of the key concepts associated with energy trading. The claimant described the "safety debate". He stated (page 485) that

> *"There was some conflict in the latter part of 2012 between myself and the EMC Manager regarding health and safety, particularly concerning shift work."*

The claimant made the point that if the health and safety debate hadn't happened he didn't think the appraisal would have happened in the way that it did. Mr Rowlinson made the point that the management team were intimidating the claimant not to appeal appraisal. He made the point on several occasions that processes were not being followed correctly. The claimant mentioned being taken off shift. The claimant spoke of getting mixed messages whereby on the one hand the union were telling him that everything would be unwound whereas Mr Small was saying particularly in response to the grievance that he was not going to do the appraisal again (page 496, paragraph 2). Mr Stainfield asked questions about whether he had been demoted to doing a job of a lower grade when he was taken off shift work.

128. There was a discussion regarding the occupational health assessments. Mr Stainfield's understanding of this (which may have been reached at this stage or at a subsequent meeting) was that whilst two reports had been written only the second one (prepared by Emma Illingworth) had been sent and his understanding

was that the original document produced by David Small and Tom Henery which contained the inappropriate comments had not been sent to Occupational Health. Mr Stainfield was simply incorrect in this assumption. Mr Stainfield's view was that he was being presented with a lot of information in an unorganised way and that whilst the claimant would give very full responses to any questions he asked they did not necessarily answer the question or address the point which Mr Stainfield wanted to raise. During the meeting the claimant did not specifically state he believed the respondents were in breach of any legal obligation with regard to WFFT or the Infinis contract. By the end of the meeting Lorraine Hamdani advised that Mr Stainfield would draw up a list of people that he thought he needed to speak to and draw up a list of questions which he needed to ask. She indicated that she would liaise with Mr Rowlinson on a weekly basis to give him an update in terms of where the process was. There was an indication that they would try to deal with this as quickly as possible.

129. Following the meeting the claimant's understanding was that he would be able to provide Mr Stainfield with additional information from his e-mail account. The Claimant had originally asked David Small for home access to his e-mail account and had repeated this request to Emma Illingworth in an e-mail on 26 September 2013 (pages 389-400). It had not been granted. Emma Illingworth's position was that if someone was off with stress like the Claimant, access to work e-mails might be contra indicated for health reasons. On 26 September she e-mailed the Claimant to say the issue would be discussed at their next meeting (page 389). During January the claimant had again, via Mr Rowlinson, asked for home access to his e-mails to be set up and this had been agreed. On accessing his e-mail account however the claimant discovered that this had been deleted. The claimant became aware of this around the beginning of February and contacted Emma Illingworth regarding this on 4 February by e-mail (page 451). The claimant indicated that he had spoken to IT and they had advised him that accounts are first disabled after 30 days of inactivity and then after 90 days they get deleted. The claimant indicated that he had been advised that his e-mail account was deleted in December. He indicated to Emma Illingworth that she needed to recall a back-up in a Cirtis request. The claimant indicated he had been told that the recall might not succeed in recapturing any e-mails but as his account was deleted only in

December there was a chance it could be a successful recall (page 451). It is unclear whether Ms Illingworth responded to this e-mail at the time and by 18 February nothing had happened and the claimant arranged for Mr Rowlinson to contact Ms Illingworth. On that date Emma Illingworth e-mailed the claimant stating that she had e-mailed IT on 4 February and had not heard anything else. She then said

> *"I have spoken to IT and they have confirmed that your account was deleted. If this was done within the last 60 days they may be able to recover the old data but I need to raise a new CIRTIS for them to do this.*
> *One of my team have now raised the CIRTIS. I will update you when I have progress."*

Although Ms Illingworth refers to having e-mailed IT on 4 February this e-mail was not lodged. No e-mail in fact appears to have been sent on that date. A CIRTIS request was lodged by one of Ms Illingworth's colleagues on 18 February and this was lodged (pages 453-454). In the appropriate box on page 454 under request details it states

> *"follow up request after discussions between Simon George and Donald Nutt. To reinstate Lotus Notes and recall data from December."*

On 26 February Mr Nutt e-mailed Emma Illingworth and Jeff Rowlinson. He noted that he was meeting up with his proposed mentor. He also enquired whether there had been any progress with his e-mail. He went on to state

> *"There is a lot of detail in my account that we weren't able to present last Thursday. When I spoke to Rosanna Weekley from IT services last week she said that the job was awaiting for approval from Dave Cargil. If you secured that and emailed her directly she could have the backup reinstated very quickly perhaps in only a day or two, far shorter time-scale than 4-6 weeks. …."* (page 460)

On 28 February the respondents' IT department e-mailed Emma Illingworth to advise that the account had been recreated.

130. Unfortunately when the claimant went in to his account he discovered that e-mails prior to December 2013 had not been restored. This meant that he did not have access to any of the e-mails which had been sent to and from his account during the periods of time which were subject of his grievance. The claimant raised this issue again with Ms Illingworth. This eventually resulted in an e-mail from the respondents' IT Service Desk on 10 March 2014 stating

> *"Apologies for nobody getting back to you regarding this request previously.*
> *Everything that was in the backup was restored onto his new account, so unfortunately the rest has been lost.*
> *In regards to his account being suspended in the first place, if someone is on long term sick, we can only keep the account if someone raises a cirtis for us to keep it on hold."*

For the sake of completeness it is as well to record that in October 2014 Emma Illingworth contacted the respondents' IT department and received a response from them setting out their understanding of the position (page 465). The letter states

> *"The following has been sent back from the messaging team:*
> *This account was deleted on 20th Jan 2014.*
> *Which suggests to us that the account was left unchecked 4 months prior to this date. We have no information suggesting it was a Cirtis request to delete the account, so we are assuming we have used our housekeeping process to delete the account.*
> *His account was re-created on 28th of February and has been locked out ever since, we have fallen behind on our account deletions because of heavy workload, but he would have been deleted again after June. He has now been migrated to exchange.*

*As far as a proportionate amount of data recovery is concerned, our backups only go back 3-4 weeks, if he has not used his database in a long time then most would get removed.*
*Hope this helps your enquiry."*

131. The upshot of all this was that the claimant had no access to any of the e-mails which had been sent to and from his account during the period he had been in dispute with Mr Small apart from e-mails which for some reason he had sent to his home address or had retained somewhere else. This necessarily means that so far as the Tribunal was concerned the claimant only had access either to e-mails in this category which were lodged by the Claimant, those which were lodged by the respondents, or e-mails which the claimant was able to recover following a subject data access request he made following his dismissal.

132. In the meantime Mr Stainfield proceeded with the interviewing of various individuals. At that time Mr Stainfield did not have access to the transcript of the meeting since this was not prepared until a later date. It is unclear what he had in the way of notes. In any event he decided that he would interview those individuals with whom the claimant was said to have a poor relationship. They were Angie Kennedy, David Fernie, David Small, and Martin Laing. There was also a meeting which took place between Lorraine Hamdani and Elaine Harley at which Mr Stainfield was not present. Elaine Harley was a member of HR who gave her "take" on how the appraisal process had been carried out. Lorraine Hamdani took notes of all of these meetings and the notes were lodged (pages 519-536). The notes were not provided to the claimant at the time of the grievance. The claimant was not advised who was being spoken to as part of the grievance investigation.

133. Angie Kennedy's statement bears a date in March 2014 which may be the 12th (page 519-521). She described the dispute with the claimant over the start time. She described the issue over the shift pattern and is recorded as stating

*"He tried to change shift pattern, but I steered clear. It was all documented in e-mails. Core hours are 8am-8pm. I wanted to stick with that. Had to e-mail him to say stop e-mailing me. The matter is closed."*

She then went on to state

*"When he gets something in his mind he won't let go."*

She also stated

*"I can only go on hearsay as I've never worked with him."*

She described issues with him being late for a back shift having put his car in for an MOT and waiting for a washing machine. She indicated that he wouldn't see anything wrong with coming in at 2:10pm. She indicated that she had never been asked to do a 360° feedback. She described her career progression. On page 521 Mr Stainfield is recorded as asking her a question

*"David Small quite involved on a daily basis with traders how confrontational is it?"*

Her response is stated to be

*"Day ahead planning when they hand over you question ask for logic, economics, strategy – why?*
*Generally the situation at handover is OK. It is a very engaging 30 minutes.*
*As you are on a backshift you are relying on your handover to give you your information.*
*Shouldn't be done in an aggressive manner.*
*Trying to think of anyone I could see being like that.*
*It is all down to team working."*

134. Martin Laing was also interviewed, it would appear on 25 March 2014. The notes taken by Lorraine Hamdani of his meeting were lodged (pages 532-535). He described the EMC as a good place to work. He indicated that he had worked on shift as a buddy with the claimant. He was asked if he had noticed confrontational behaviour and said

*"No, I wouldn't say so.*
*Everyone seems to get on with each other.*
*No-one stands out as being different from anyone else."*

He was asked about the relationship between the prompt desk and the power and gas desk and indicated that he did not see the prompt desk as being a demotion- more of a sideways move. Mr Laing indicated that he had been on shift with the claimant for 1½-2 years prior to him being paired up with Chris Scarborough. He mentions speaking to the claimant twice about timekeeping. He mentioned an occasion when the person the claimant was taking over from was looking at his watch and raised the issue with the claimant. The claimant had asked Mr Laing if he was out of order and Mr Laing had indicated he was not. Mr Laing stated

*"He kept going on and on about it, questioning me.*
*I told him to leave it.*
*If he has a point of view and you don't agree he will keep at you, because he thinks he's right.*
*This is generally the way things were with Donald. He would have a view and wouldn't accept a different opinion of the matter.*
*Colleague used to dread getting a handover from Donald.*
*Donald had managed to fall out with most of the team over his time within EMC."*

Mr Laing described the claimant's challenge to the 12 hour shift as not being H&S compliant. He was asked again about people saying they didn't want to work with the claimant and said

*"He did have certain ways of doing things which would rub people up the wrong way. If you're on a 12hr shift, that's a long time to be working with someone you feel like that about."*

He indicated that there were sometimes heated discussions but one needs the ability to consider other people's point of view otherwise you are just butting heads all of the time.

135. The meeting with Mr Fernie took place on a date in March. The note prepared by Lorraine Hamdani is at pages 522-524. It is noted that there weren't concerns about the claimant's technical ability but about his behaviours. He was noted to be a technically very competent guy, bright, intelligent. He was described as a character and a little more eccentric than other people – different but not in a negative way. Mr Fernie goes on to state

> *"Always capable of arguing / debating to the endth degree. For some people was OK for some it wasn't. He is quite strong-minded.*
> *He could read massive contractual documents and pull stuff out which is impressive."*

It was noted that the claimant sometimes challenged too much although this was stated to be (some time ago). It was noted that shift traders were on two at a time and had to get on with the job. Mr Fernie is quoted as saying that the claimant couldn't shake disagreements off quickly and get over it. He was noted as saying

> *"Over the years recognised as being eccentric, but nothing worrying ….. few things started to come out.*
> *I had worked shift, couldn't do it forever, quite intense.*
> *He had indicated that shifts were getting harder.*
> *We discussed what options may be available."*

He mentioned the debate over shift rota and stated that there had been a restructure in October but that the claimant kept coming back again and again. He stated the claimant believed he should have got a 5 for safety as he had challenged the safety aspect of the shift pattern. Mr Fernie stated the claimant went on to be almost obsessive. He is quoted as stating

> *"It was a reasonable challenge, but it just became a problem.*
> *It wasn't the end of it for Donald.*
> *I think we termed it overchallenging and disruptive."*

136. Mr Fernie described the situation where pressure on delivery had grown. He said that

> *"Asking people to use their imagination and creativity but sometimes you have to do what you are told in line with law and it's not open for discussion."*

He referred to the regulatory background and the pressure on the respondents to make money. He was asked if the claimant had been spoken to prior to January about this and indicated

> *"I'm sure Dave had spoken to Donald, but I'm not sure."*

Mr Stainfield asked Mr Fernie if his move from shifts could have been perceived as a demotion. The response was

> *"Might have been a feeling he had, but depends on your thinking and how you perceive those jobs. The roles are equal. Would require same skill set, same level."*

He described a historic rivalry between planner and trader but stated that this was not the case now and gave his opinion that the claimant was definitely not demoted. Interestingly, he referred to the reason for the claimant being moved as due to a perception of risk. He said he didn't think it was reasonable to have a broken relationship with one's Line Manager on a responsible desk out of hours. Mr Fernie indicated that he had explained to the claimant that they needed to get things sorted and wanted to give him time to do that.

137. There are notes lodged from a meeting with Mr Small which are dated 19 March. These are lodged (pages 525-531). He referred to the move from shift work and stated that the problem with the shift role was that one only sees someone two weeks out of six. He indicated the claimant had been failing to engage and the relationship was going sour and that this was to give him an opportunity to come back to him. He indicated the claimant had not been put in a particular role but that

he was given time to meet with HR and have dialogue. He referred to the history of the role of Shift Trader. When asked about the claimant's appraisals he indicated that the claimant had been very capable and clever. There had always been a difficult history with his manner and approach. He referred to an appraisal in 2010/11 when the claimant had been given a grade 2 for one behaviour and said it had always been about his conduct. He indicated that the claimant required to work on communication with his team. He noted that the claimant could be frosty and difficult. Mr Small described the history of contacting HR to get advice. He noted that the claimant was accusing the respondents of operating a shift rota which was unsafe. He noted the debate over health and safety and said that the claimant would not let it lie. He said that there had been an increase in tension while Mr Scarborough had been signed off work. He mentioned the claimant starting to refuse to work with people in the team. He indicated that the respondents did not have that luxury as they were already a man down. He mentioned a disagreement on shift where the claimant had alleged he was threatened but stated that all of the evidence suggested Martin Shaw was wanting to clear the air with the claimant. Mr Small indicated he didn't want the underlying problems developing and that this was the build up to the January meeting. He referred to the meeting and that this fed into the appraisal process. He referred to the appraisal and noted that the claimant had never appealed his performance grading. He indicated his understanding that the respondents had agreed to review their wording of the document and that he had taken advice from Elaine Harley, that he had re-worded the document in preparation for if the claimant came back and they were discussing it again. He said that 1 was a tough score. He then stated

> *"When I look at others I've awarded a grade 2 – he was nowhere near that."*

He indicated that the union had been involved and wanted Mr Small to award him a grade 3. He referred to the claimant's role and the appropriateness of challenge in certain circumstances but not in others. He referred to the incident involving the illness and subsequent death of the claimant's father-in-law. He made it clear that he did not know the specific reason for the claimant's request to change his shift at

the time. He described the process as *"he said he would like to be off – that changed to I've had a bereavement. That changed from nice to have to must have. I feel I helped him."* With regard to the Occupational Health Referral he accepted that the first one wasn't handled 'as well as we hoped'. He stated that they had made him aware of the referral in advance. He made the point he was keen to resolve this.

138. The note on page 536 refers to a meeting between Lorraine Hamdani and Elaine Harley. It relates to the coaching session she had with Mr Small and gives her opinion on the matter. She referred to deficiencies in the appraisal and said *"Guy was getting mixed messages"*. She said that she had encouraged Mr Small *"to be overt about things and to give examples"*.

139. The tribunal noted with some concern that, whilst the interviews were being conducted in relation to the Claimant's grievance to the effect that he was being bullied, all of the questioning seemed to be aimed at asking about problems with the Claimant's behaviour. The people interviewed were all people who had been reported as having problems with the Claimant. No-one was asked about Mr Small or Mr Fernie's management style or whether the Claimant's reports of bullying behaviour were founded in fact.

140. At some point Mr Nutt conveyed to Mr Stainfield via Jeff Rowlinson that he would like to present additional information and on 2 May 2014 the respondents' HR department wrote to the claimant inviting him to a further hearing to be held on 7 May 2014 (page 537). The second meeting was attended by Keith Stainfield, Lorraine Hamdani, the claimant and Jeff Rowlinson and took place on 7 May. Once again it was recorded. The recording was listened to by the Tribunal panel during the course of the hearing. Prior to the second meeting the claimant felt unprepared. As he put it he had anticipated turning up with a bundle of e-mails a foot thick but had documents only one inch thick. A transcript was lodged at pages 538-561. In the early parts of the meeting the claimant explained the situation regarding his e-mails. During the course of the meeting Mr Stainfield put it to the claimant that perhaps his over-exuberance on the health and safety aspects of shift work took it beyond being a reasonable approach. He put to the claimant that the

claimant was not prepared to accept that people had investigated it and come to a decision. During the course of the meeting Mr Stainfield put it to the claimant that they were now in a different compliance environment and that the culture had changed. There was a degree of talking at cross purposes about two appraisals having been given since at that point the claimant was unaware that Mr Small had written a second appraisal. Mr Rowlinson advised Mr Stainfield of what his understanding was. Mr Stainfield put to the claimant on a number of occasions that he had problems communicating with people. The Claimant referred to various documents which were not in fact read by Mr Stainfield. He provided Mr Stainfield with a copy of the e-mail to Mr Pibworth (page 170). Mr Stainfield did not take it from what the claimant was saying that the claimant was saying that he had suffered detriment as a result of sending this e-mail. During the meeting Mr Rowlinson agreed with Mr Stainfield that there were sometimes issues with how the claimant said things. The claimant was annoyed by this but did not intervene. The claimant did not provide any witness statements personally and had been advised not to speak to anyone by Lorraine Hamdani. At one point in the meeting (page 576) Mr Rowlinson suggested that Mr Stainfield might wish to interview some other people within EMC who could perhaps give a different slant on the way the claimant operated. He offered to give Mr Stainfield some names. The claimant's position was that he believed all of his colleagues should have been interviewed. There was a discussion around the claimant producing a timeline of what happened from January but this was not actually agreed. Lorraine Hamdani indicated that Mr Stainfield would make a decision hopefully within a short space of time. The meeting lasted overall around 1½ hours

141. On 9 May Mr Rowlinson sent an e-mail to Lorraine Hamdani in which he confirmed that the claimant's view was that all members of the team should be interviewed but stated that he had reduced this to Tony Parsons, Andy Gavin, Dave McFerran and Marcus Mands (C295). In this e-mail Mr Rowlinson also makes the point that he was surprised to hear that one of the reasons given for taking the claimant off shift was risk. Lorraine Hamdani wrote to Mr Rowlinson asking for some context around why these people had been named. In the event it appears that they were not interviewed.

142. Following this it would appear that Mr Stainfield discussed matters with Lorraine Hamdani. He produced notes from which Lorraine Hamdani produced a grievance outcome letter and Mr Stainfield approved the final version of this letter. On 10 June 2014 Lorraine Hamdani wrote to the claimant inviting him to a further grievance meeting at which he would be given the outcome. This was fixed for 18 June. On that date Mr Stainfield handed the claimant the grievance outcome letter (pages 584-587). Mr Stainfield had taken four points from the claimant's initial letter and he indicated that his findings were as follows. It is as well to set this out verbatim.

> *"Point One:*
> *You do not believe that the Performance Review and PDP that was conducted/issued by David Small was fair and did not in any way reflect your work performance over the year.*
> *Furthermore given that the appraisal led up to the Informal Warning that was issued was an entirely punitive measure.*
> *I have investigated the concerns you have raised within this first point and I have established that during a subsequent meeting with Claire Hamilton, ER Manager, Tom Henery, HR Manager, and Nigel Fielding that the following was agreed:*
>
> *1) To remove the Informal Warning from your File*
> *2) To redo the Performance Management Review*
> *3) That prior to conducting the new Performance Management Review, David Small would receive some coaching from Elaine Harley who was the Performance Management expert*
> *4) That you would gather evidence to substantiate why you should have been awarded a higher performance rating*
>
> *Unfortunately shortly thereafter, you were signed off sick and this agreement was never actually carried out.*
> *I have also noted that you never officially appealed against your Performance Review Rating, which is the recognised route in which your review rating could be assessed.*
> *I do not believe that it is within my remit as Grievance chair to now explore this in any detail with you over a year after the event.*

*I am satisfied that appropriate measures were taken by the business at the time to address your concerns, although I acknowledge that this never actually happened due to your subsequent illness.*
*In conclusion I do not believe there was evidence to uphold this point of grievance."*

With regard to this point the information which Mr Stainfield set out regarding what had been agreed with Claire Hamilton, Tom Henery and Nigel Fielding was based on what he was told by Lorraine Hamdani although he understood she may well have spoken to Emma Illingworth and or Elaine Harley in advance of this. If she did discuss the issue with Elaine Harley it is not recorded in the note of meeting with Elaine Harley that was lodged at p536. It is noteworthy that what Mr Stainfield says does not accord with what David Small's understanding of the position was as set out in the notes of Mr Stainfield's meeting with him.

143. Overall Mr Stainfield's position was that he was not looking into whether or not the appraisal was correct but was looking to see if the appraisal process was tinged with bullying and harassment and he had come to the conclusion that it was not. The section on the second point identified by Mr Stainfield reads as follows.

*"Point Two:*
*You believe that being taken off shifts and being assigned tasks that were very different to your usual responsibilities was a deliberate attempt by David Small and David Fernie to undermine you and to set you up to fail. You felt like this was a demotion.*
*Having spoken with both David Small and David Fernie separately, I am satisfied that the reasons behind why they removed you from shift were purely to ensure that there was an opportunity was given to you to improve communications and engagement and to sort out your concerns. This is based on the fact that both Davids' only saw you on a very infrequent basis due to shift patterns.*
*I am also satisfied that this decision was taken to allow you access to HR and Trade Union Representation during normal working hours when*

*they were most readily available in an attempt to resolve your ongoing concerns in a timely manner.*

*I have also been informed that you were not designated to carry out a particular role and the tasks that you were given were relevant to the role you carried out and were of no less importance. It was only when a resourcing issue became apparent that you were asked to help out to cover that particular desk. Whilst doing this, your shift allowance was never removed from you.*

*Following conversations with your fellow colleagues around the perceptions of seniority of the different desks, there was no evidence presented to me that would suggest this was something that was perceived within the office.*

*In conclusion I do not believe there was evidence to uphold this point of grievance."*

Interestingly, Mr Stainfield does not appear to have been advised that the decision to move the claimant from shift work was in fact taken by Emma Illingworth. The reasons which he gives do not include reference to the very specific reason given by Mr Fernie.

144. The third point mentioned by Mr Stainfield was dealt with as follows.

*"Point Three:*

*Occupational Health – You believe that the referral David Small submitted was written in a hostile and defensive manner and he described you as being in denial and having behavioural problems. You believe that the document was more concerned with casting doubt over your credibility than it was to communicate your health issues to an outside agency.*

*I have investigated the concerns you have raised within this point and as you quite rightly pointed out, this report was re-written by Emma Illingworth (Wholesale HR Business Partner) before the actual referral assessment took place and I believe that you were happy with the content of this.*

*My investigations have established that David Small did not write the original referral although his name was on it and it was actually written by Tom Henery, HR Manager.*

*At the time that the referral was written and you read the content, your Trade union representative Jeff Rowlinson raised concerns regarding the document with Emma Illingworth. Appropriate action was taken in respect of this and Tom was removed from dealing with your case and Emma picked this up. Emma re-wrote the referral, which you saw and agreed before the information was submitted to Occupational Health.*

*I am therefore unsure of what your grievance is in respect of this now, given that appropriate action was taken at the time to address your concerns."*

The evidence before the Tribunal was that contrary to what is stated here the Occupational Health report was actually written by Mr Small. His impression was that it had been revised by Emma Illingworth before being submitted but Emma Illingworth's clear evidence was that it was Tom Henery who revised it on behalf of HR. Further, it was clear from the evidence heard by the Tribunal that the original referral was sent to the respondents' Occupational Health providers albeit that by the time the claimant had his consultation with them in October a fresh referral document prepared by Emma Illingworth had also been sent to them.

145. With regard to point four Mr Stainfield stated

*"Point Four:*

*Mediation – You stated that you have agreed to go into mediation as a step towards allowing you back to your job, but David Fernie told you that you were bitter and too much trouble and that you were not welcome back in his team.*

*Due to the fact that Mediation is a confidential process and no information relating to this can be disclosed, I am not at liberty to address any of your concerns in relation to this."*

146. The claimant was advised that this concluded the stage 2 of the grievance process but that he had the right to appeal against the decision. He was told that if he wished to appeal he should do this by writing to Holly Wishart/Shona Williams or by e-mail stating the grounds on which he was appealing within five days of him receiving the letter.

147. On receiving the outcome the claimant felt that it was a mixed result. He was pleased that for the first time it was confirmed to him in writing that the informal warning had been rescinded. He was also pleased to be told for the first time that an agreement had been made that the appraisal would be re-done. His understanding was that if the appraisal was re-done he would have the opportunity to increase his score. He was, of course, unaware that Mr Small's understanding of the position was that the only thing wrong with his appraisal was the wording and that Mr Small had in fact already prepared an amended document with the same scores but different wording.

148. The claimant also felt that Keith Stainfield had missed out quite a lot. He also felt that Mr Stainfield's position was that he felt there was not enough evidence to justify bullying and harassment.

149. The claimant understood that the grounds upon which he could appeal were very limited and that nothing could be done about the fact his e-mails were missing. With regard to the Occupational Health report he had no evidence and was unable to challenge the assertion that it was not Mr Small who wrote the Occupational Health referral. He decided that he would not appeal and he advised the union of this. They said it was up to him. The claimant said he didn't want to appeal but simply wanted to move on. On 23 June the claimant wrote to Keith Stainfield (page 588). The letter stated

> "*Dear Keith,*
>
> *Thank you for your letter dated 18th June 2014. Your purpose was to resolve a grievance in Energy Trading between parts of the management team and myself. This was to be done through considering*

*information presented and through further investigation without unreasonable delay.*
*I am pleased to say that from my perspective your decision has resolved this grievance and that I will not appeal your decision.*
*Thank you*
*Donald Nutt".*

150. The claimant's position at this stage was that he wanted to put everything behind him and return to work. The claimant had been signed off work at this point since 1 July 2013 and had been receiving regular sick notes which were lodged (pages 308-319). At this point the last sick note he had received was dated 1 June 2014 and stated that the claimant was unfit to work for a period of two months. As before his condition was stated to be

*"Other physical and mental strain related to work".*

On 23 June 2014 (the same date as he wrote to Mr Stainfield) the claimant attended his GP who certified him as fit to return to work. The GP he saw was a different one from previously. The fit note issued by his GP stated

*"Patient now feels following recent meeting he can return to work. No medical reason as to why he can not return now".*

The claimant wrote to Emma Illingworth on 25 June 2014 (page 409). He stated

*"I went to the doctors yesterday but it wasn't my usual doctor. The key points are that I am fit for work, that I should have a phased return and he has indicated that I am so from the 1st of July. This is only one week away which is quite soon. I believe the new fit note should complement the existing fit note rather than simply supersede it which gives everyone until the end of July. I don't want you to think that I'll simply turn up at Grampian House next week without talking to you first.*
*Unless requested otherwise I'll bring the note in to the next meeting we have. If you like you can call me on 01382 801924 to discuss things."*

In the meantime Ms Illingworth was aware that the claimant was due to moving to no pay from 30 June 2014. The position was that in December Ms Illingworth had authorised that instead of the claimant dropping to half pay he should continue on full pay meantime. Ms Illingworth had required to continue the authorisation for this with the respondents' payroll department at regular intervals since then. She had written to them on 9 June 2014 stating

> *"Lets retain full pay until 30th June 2014 and then drop to no pay please".*

This was against a background where, if Ms Illingworth had not authorised full pay for the claimant, he would have dropped to half pay on 22 December 2013 and progressed to no pay from 22 June 2014. Ms Illingworth's e-mail was lodged (page 406). The respondents wrote to the claimant on 2 July advising him that he would receive no pay from 1 July 2014 (page 417). No document was lodged from the respondents advising the claimant of the transfer to no pay which pre-dated the Claimant's letter to Emma Illingworth. On balance the Tribunal accepted the claimant's position that he was unaware that he would be progressing to nil pay at the time he wrote his letter to Ms Illingworth. On 25 June Emma Illingworth wrote to the claimant. She stated

> *"Thank you for your email. I am pleased you are starting to feel better.*
> *As you are aware we carried out an occupational health assessment in October 2013 which said that you would be fit for a phased return to work "following further discussion and mediation as suggested within the management referral and when an amicable agreement is reached by all parties involved" (copy attached, the password is your payroll number).*
> *You were signed off sick by your GP on 1st July 2013 due to work place stress and have been continually signed unfit for work up until 1st July 2014. I received a Fit Note dated 2nd June 2014 declaring you unfit for work for a period of 2 months. I understand that you have since re-visited your GP and asked to be signed Fit for Work from 1st July 2014.*
> *As I am sure you are aware, following an absence of this nature /*

*duration it would not be sensible for you to simply return to work on 1st July 2014 without a structured plan.*

*I am conscious that this return to work date is in line with you moving to no sick pay and want to ensure that the drive to return to work is not purely a financial decision and that you are fit to be at work as we have a duty of care towards you.*

*I feel that it would be appropriate to do 2 things:*

*I. Refer you back to Occupational Health to understand what has changed; why your GP feels you are fit to return to the work environment and whether OH feel that you are ready / able to return to EPM.*

*II. Hold a long term sickness meeting involving case management and David Fernie. We can discuss your current health and ensure the recommendations from the OH report are put in place or are no longer required.*

*At some stage we will also need to re-visit the performance management concerns that were raised by your line manager prior to your sickness absence.*

*I have received a telephone call today from your workplace mentor, Gillian O'Reilly. She advised me that you have asked her to call me to discuss the possibility of you returning to work and be immediately secondment for a period of time outside of EPM into another business area and carry out a phased return to work. I would suggest this is discussed at your long term sickness meeting.*

*Regards".*

151. On 3 July Emma Illingworth e-mailed the claimant with a draft Occupational Health referral. This was lodged (pages 410-416).

152. By this point the claimant had been seeing Gillian O'Reilly as a workplace mentor for a period of some months. This mentorship had been set up in January by Ms Illingworth with the professed aim of assisting the claimant with communication issues. The meetings had gone well and the claimant considered that he was benefitting from them. He had discussed his situation with Gillian O'Reilly and

mentioned the issue of a potential secondment outside EPM with her. He had agreed that she could speak to Emma Illingworth about it. It would appear that after he did this the claimant had second thoughts about involving her in his work situation as he felt this went outwith the mentorship relationship and perhaps complicated it. He decided that in the circumstances he should suspend the mentorship meetings until his workplace situation was resolved. He advised his mentor Gillian O'Reilly of this in an e-mail sent on 2 July (page 618). He was also concerned that when calling Emma Illingworth Ms O'Reilly had misrepresented exactly what they had spoken about and he was also concerned that Emma Illingworth had apparently copied these thoughts to Mr Fernie and Mr Rowlinson. He also stated

> *"I'm still working through what to do but I feel that the key word in all of this is responsibility. Everyone keeps asking me what I want to do or what I want to happen. This should not be my burden as the policy against harassment at work is very clear. After I made my allegation an investigation should happen and I should be protected from victimisation and intimidation. This hasn't happened and I will be writing to the Director of Human Resources and request that the policy be followed. This is why I'm not appealing the grievance outcome.*
> *I really like you Gillian and hope that in a while we can pick up the mentor-ship again but for now I think we should suspend it."*

Ms O'Reilly responded to this and confirmed that what she relayed to Emma Illingworth was what she had interpreted from the claimant and that anything misconstrued was absolutely unintentional (page 618).

153. Having received the respondents' letter of 2 July advising that he be going to no pay (page 417) the claimant wrote to her on 3 July stating

> *"Hi Emma,*
> *I've read the documents you send. One of the comments embedded in the 1st documents says that I would move to no pay from the 1st of July. You mentioned in you last email a week ago that:*

*I am conscious that this return to work date is in line with you moving to no sick pay and want to ensure that the drive to return to work is not purely a financial decision and that you are fit to be at work as we have a duty of care towards you.*

*This is the first time you made any reference to no pay, two days after you say my sick pay has actually run out. I believe the remaining comments in the 1st document do not accurately reflect events last year and I am unsure what to do other than register a protest to this effect.*

*The last five questions seem to be okay. The second "form" seemed blank / see original referral. Is this referring back to the 1st referral submitted by yourself and David Small or the second heavily amended one as this was the original form? The comments are incorrect and very similar to the "original" referral form (it's a little confusing). I did not "raise a grievance" I made allegations which are yet to be investigated. Grievances aren't even recognised in the policy. This is not my responsibility and I have no more input into the allegations or the policy other than to ensure that the allegations are properly and quickly investigated in accordance with the Policy Against Harassment at Work.*

*Specifically with regards to my decision not to appeal the grievance outcome I believe that an unusual amount of manipulation has occurred with regards to how the bullying and harassment policy for SSE is followed. This grievance outcome was the final part of this. I am still awaiting a meeting with HR to discuss events and have had no face to face meeting with HR this year except for the grievance hearings which shouldn't even have any HR representation according to the grievance process outlined.*

*I have also still to receive an acknowledgement of my email which I sent to the Director of Human Resources, John Stewart requesting that I receive protection as stated under the policy."*

154. The claimant's reference to the respondents' policy against harassment at work is a reference to the document PO-HR-010. The relevant policy was lodged by the claimant at C37. Somewhat confusingly the respondents lodged a document at page 151 which they indicated was the policy however it is clear that this policy

document was issued in July 2015 and that the one lodged by the claimant was the one in force at the time. This is a much shorter document than the grievance policy. The first two paragraphs simply set out that the respondents wished to promote a good working environment and will not tolerate harassment. Under the heading "PROCEDURE" it states

> *"If a member of staff wishes to make a complaint or allegation against this sort of behaviour, they should talk to their immediate manager, or if this is not appropriate, contact Human Resources. If they wish, staff can write directly and confidentially to the Director of Human Resources.*
> *All allegations will be treated in confidence and will be properly and quickly investigated.*
> *Initially informal action, for example, explaining to the alleged harasser that the behaviour is offensive and unwanted, may be sufficient for it to be stopped. This shall include third parties not employed directly by SSE.*
> *Where complaints are substantiated, the Disciplinary Procedure will be invoked for those alleged to be responsible; the full range of penalties will be available, including dismissal in serious and proven cases. Where the harasser is a third party appropriate action will be taken.*
> *Staff will be protected from intimidation, victimisation, or discrimination for filing a complaint or assisting in an investigation.*
> *Counselling will be made available by the Company to staff who have been victims."*

155. On 2 July the claimant wrote to Emma Illingworth (page 420) stating

> *"Thank you for your last email. You raised a number of points and I'm unsure exactly how to proceed on some of them. I have decided to write to the Director of Human Resources to see clarity on a range of concerns that have been troubling me and will do so later today. Some of these concerns are highlighted in your email.*
> *With regards to my mentor I've decided that at this time I should suspend the mentor-ship programme.*

156. The claimant wrote an e-mail to John Stewart, the respondents' Director of Human Resources on 2 or 3 July. When he did so he understood that he was doing so in terms of the Bullying and Harassment Policy. In addition to the "bullying and harassment policy" providing that he could write to the Director of Human Resources on a confidential basis he had in mind another document lodged by him at C39. This document is headed "Whistleblowing Policy: Speaking Up With Confidence". It also provides that a confidential report can be made to the Director of Human Resources. It was not, however, any part of the Claimant's pled case that his e-mail to John Stewart was a protected disclosure. This e-mail was lodged (pages 589-590). It is not clear whether it was sent on 2 or 3 July. It is as well to set it out in full.

*"Dear Mr Stewart,*

*I am sure you are aware of some of the background regarding my case. If this is not the case I'm sure Emma Illingworth can help provide this for you.*

*Just under two weeks ago I received a letter from Keith Stainfield with details of a grievance outcome. I am concerned that allegations that I made by email to Emma Illingworth regarding bullying and harassment at work were treated as a written grievance. The statement should have been treated under the Harassment at Work Policy and it was my understanding over the last six months that this was being done. The allegations should have been properly and quickly investigated under the guidance of the policy and not placed under a grievance process. The grievance process doesn't have any investigative requirement and even if it was a suitable course to choose the hearings shouldn't have been attended by HR. The allegations are therefore still waiting to be properly and quickly investigated as described in the policy.*

*The procedure states that I can write directly to you in confidence. I feel that I'm under incredible pressure to accept a high level of victimisation and intimidation (both protected by the policy) as permanent conditions of my employment. I believe this is being justified after a long investigation into my conduct in the workplace, the finding of which were not formally disclosed. The investigation led by EPM management and*

*supported by HR was simply dropped 12 months ago without explanation, even though there were two items in the investigation which arguably should be reported under the Whistle-blowing scheme. I am confident that there were at best limited findings that could be determined to be poor conduct issues relating to my behaviour at work and that subsequent actions by members of EPM management were disproportional and lack integrity.*

*I hope that the company will properly and quickly investigates my allegations presented to Emma and until the outcome of the investigation is known protect me from current and further victimisation (over the last five pay awards I have received three pay freezes and two below inflationary pay rises, my bonuses over the last two years have been cut significantly, my EMC "special bonus" seems to have simply disappeared) and from intimidation (the end of my sick pay period resulting in no pay, the proposed personal development plan, etc). Over the last 16 years I have contributed significantly to SSE and the EMC are in particular. Before I cam directly under David Fernie and Martin Pibworth's management structure I was well regarded by other managers in Energy Trading, including APD who personally awarded several pay rises and increments for my contribution. These performance awards have effectively been taken away even though my performance has improved not degraded. Even now under what can only be described as incredible pressure I find myself working for the company on a level that almost none are aware of.*

*I regard myself as being open and honest and have the ability to compromise on a range of issues. Unfortunately though I'm being portrayed as a person determined to pursue EPM management to a bitter conclusion and as someone who isn't flexible or aware of the significance of his actions. I don't have any relevant personal feelings towards the named individuals and only want the allegations investigated and to go back to work at SSE. My involvement in all of this could have ended by now and it should be for the company to shoulder the responsibility to bring about a successful conclusion for all."*

157. Mr Stewart forwarded the e-mail to Emma Illingworth on 3 July (page 589).

158. On 4 July the claimant wrote to Emma Illingworth (page 425AA). He stated

*"I received a letter today dated the 02/07/14 from Craig Reid saying that from the 01/07/14 under the Joint Agreement that I have 'run out of sick pay'. That from the 1st of July I will receive no pay.*
*I would like to draw your attention to the following points.*
*1) I am on a Personal Contract, not the Joint Agreement.*
*2) that from the 01/07/14 I declared myself fit and able to work but the company seems reluctant to even see me.*
*3) that over the last 12 months I will have no doubt have built up a substantial bank of holiday entitlement over the last two holidays years.*
*4) that moving me to no pay is a continuation of the victimisation that I have suffered over a significant period of time.*
*5) that I have made a direct appeal for the Director of Human Resources to intervene and protect me from such victimisation and he is on holiday until next week.*
*6) that receiving no pay from July will put me into considerable financial hardship.*
*7) that it appears that the company is deliberately stalling my return to work through enforcing that procedure is strictly followed.*
*8) that the last few weeks that I was on shift before the EPM management began their action against me that I made an individual profit for the company in excess of £1.5 million pounds. Surely the company can put my salary for the next month or two against this.*
*9) that no notice has been given with regards to receiving no pay and that under the terms of my contract such changes should be notified at least 3 months in advance.*
*10) that I want to return to work and do not want to claim any more sick pay.*
*Will you please at least consider me on holiday from the 1st of July or speak to Tom Bent with regards to point 8."*

159. Emma Illingworth was on holiday from around 4 July until 15 July. In her absence the claimant contacted Dale Cargill who was her manager and an arrangement was made whereby the claimant would receive holiday pay for the period from 1 July. Subsequent to this the claimant raised Tribunal proceedings in which he claimed that the pay he received for 20 days in July should not have been regarded as holiday pay and these proceedings were subsequently compromised. For this reason I will not refer further to this point in this Judgment.

160. On 15 July the claimant wrote to Ms Illingworth (page 425A). He stated

> *"Hi Emma,*
> *I'm really sorry I reacted in the way that I did before you went on holiday. I'm clearly feeling under a lot of pressure and that I'm lurching around from this. I meant what I said to Gillian and to John and feel that an informal meeting would be better forum for SSE to more fully understand what's going on in my head. I can even come down to Ferrybridge if you want and promise to keep a calm head and that it won't be confrontational.*
> *With regards to the points in my emails please don't spend any time trying to respond to them. They are written to counter events and statements. I genuinely don't want to keep a conflict going with you and know that you are only doing your job.*
> *Cheers".*

161. Emma Illingworth replied on the same day

> *"Thank you for your email. I also received your note yesterday confirming you have a date to meet Occupational Health on 28/7/14.*
> *I am just back from my holiday and starting to catch up.*
> *I will look at my diary and arrange a meeting. I would suggest we hold this after you have seen Occupational Health.*
> *To avoid any misunderstanding, I would like to be clear on your expectations. You mention below that I should not spend any time trying to respond to your emails. Are you referring to the matters you have*

*raised in your email to John Stewart on 02/07/14 or the email to me on 04/07/14?"*

162. On 17 July the claimant wrote to Ms Illingworth (page 429). He said

*"I have an OH assessment next week. The advice is to bring along any information which would be relevant to the assessment.*
*Would it be possible to send out in the post a copy of the Company Sickness and Absence Policy, a copy of my terms and conditions of employment including details of current shift working requirements (ie the current shift pattern that I'd be going back to)? I'd also appreciate a job description for the role of Shift Trader so that he will be able to more readily understand what my job is. Perhaps you could include the daily task sheets for the gas desk as this will illustrate the specifics of what my job entails.*
*Nearly a year ago we talked about the fatigue index and health assessments. Can you confirm if staff in the area are being offered health assessments as per company OH requirements (I believe that it was just 3 hours of night shift working that staff had to do "regularly" in order to qualify for this) and how the current shift rota performed in the fatigue index that you informed me about when we first met.*
*I believe that all this information will be quite relevant for my assessment with the doctor."*

163. Emma Illingworth replied on 17 July (page 428). She confirmed that she would arrange a date for a meeting. She said

*"At this stage I do not believe you will need the documents you are referring to below for the OH meeting. This meeting is about understanding how you are feeling after been off work for over 12 months. You have received a copy of the referral and have the questions I have asked them to discuss with you.*
*I have attached the documents which I can easily access."*

164. The claimant responded later that day.

165. He said

> *"I've attached a document from Working on Wellbeing which sets out what we should expect from the assessment and what details the OH Doctor and I will be going over. As I'm expected to return to shift work the doctor will have to have details of the current working arrangements. It would seem a bit daft not to be fully prepared. I didn't think the documents would trouble you too much and I could probably do with them for future reference anyway.*
>
> *With regards to the emails could you set up a meeting please with a sense of urgency as I believe this would be the best forum to discuss them. I have already had a partial curtailment to my pay and have financial commitments which I'm likely to struggle to meet. It can be informal if you want, with or without prospect. They are quite busy and don't really need to be involved for every routine meeting. I said in an earlier email I can even make the trip to Ferrybridge if you want and offer this again.*
>
> *Would it be possible to get a networked laptop from the company? My old computer is now unsupported and dangerous to use. I can't trust accessing emails at work. The computer that I'm working from has very limited capability and is only good for Gmail and the internet. I can't use it to access anything else. I know this sounds daft but could you get IT to set up a new email account for me. The old account is now of limited value and has "legacy issues" which I'm keen to move on from. A brand new account could be valuable in the crucial early days of my return."*

166. On 24 July Emma Illingworth e-mailed the claimant suggesting a meeting on 1 August. The respondent e-mailed Emma Illingworth later that date stating

> *"The Working on Wellbeing OH health doctor said on Monday that I should be able to return now but I've already agreed to take 20 days holiday (see email from Dale Cargill). These 20 days take me to Monday the 28th of July next week so to avoid losing any pay I guess I have a start date on Tuesday the 29th July.*

*I'm guessing again but I'll probably be in Grampian House anyway so meeting up on Friday shouldn't be a problem. Could you let David Small know and could I ask for a contact from both HR and SSE OH who will be around next week?*
*It feels a bit weird that no one has made contact with me with regards to my return but I'm sure it will all be fine."*

Ms Illingworth then responded to the claimant stating

*"Hello Donald*
*I have not received any correspondence from Occupational Health yet. I am uncomfortable arranging a return to work until we have the report and you, Malcolm and I have met.*
*Please come to Inveralmond House reception on Friday 1st August at 11am (Malcolm may want to meet you earlier, please contact him to discuss this).*
*Don't worry about your pay, we can discuss that next week."*

167. Anne Douglas had indicated in May that she was no longer dealing with the claimant from the union point of view and that another full time official, Malcolm Currie would be dealing with him from now on. Accordingly Ms Illingworth had arranged that Malcolm Currie be present at the meeting on 1 August.

168. The claimant's understanding was that the meeting on 1 August was to be a return to work meeting under the absence procedure. He felt this was what he had been led to expect from Ms Illingworth's letter of 25 June 2014. Emma Illingworth herself did not see this as simply a return to work meeting. Prior to the meeting she decided to set out her views on paper and produced a document entitled 'Donald Nutt – Case Review' on or about 28 July. This document was lodged (pages 624-627). The first page sets out the history of the matter. It is as well to set out some of the paragraphs on the second page in full.

*"At this stage,(December 2013) based on the allegations of bullying and harassment and the mediation outcome it was discussed that a return to*

*work in EPM for Donald would not be possible irrespective of the grievance outcome and an alternative suitable role should be found for Donald. Donald was provided with access to SSE's Applicant Tracking System (ATS) so he could search for suitable alternative roles. In addition Emma arranged to email Donald weekly job vacancies and arranged for the recruitment team to provide advice on how Donald's CV could be updated.*

*The grievance was investigated by Keith Stainfield, Customer Services Manager. The findings were verbally communicated to Donald on 18 June 2014. In summary the allegations were not upheld.*

*On 26/06/2014 Emma Illingworth received an email from Donald confirming he did not wish to appeal the grievance investigation outcome.*

*Emma Illingworth received a Fit note from Donald dated 02/06/2014 signing him unfit for work for a period of 2 months.*

*On 24/06/2014 Emma Illingworth received an email from Donald advising that he had been to see his GP and had been signed fit for work and wanted to discuss his phased return to work. On the same day Emma received a telephone call from Gillian O'Reilly. Donald and Gillian had met and discussed the planned return to work. Donald asked Gillian to call Emma to discuss the possibility of a secondment outside of EPM.*

*Emma contacted Donald via email and highlighted that a formal sickness absence meeting should be held prior to a return to work as well as an Occupational health referral.*

*John Stewart (HR Director) received an email on 02/07/2014 from Donald:"*

Emma Illingworth then went on to paste in a substantial section from this e-mail. She then discusses how the claimant was due to move to no pay from 1st July.

169. On page 3 she produces a document called Summary. It states

*"During the course of the welfare meetings and email exchanges between Emma Illingworth, Donald Nutt and his TU rep Jeff Rowlinson,*

*Donald has been inconsistent regarding his comments and views of working in EPM. It is clear to Emma that Donald has a fundamental breakdown in trust and respect for his line manager and senior manager. This was clear at the work place mediation.*

*During welfare meetings when Emma discusses with Donald his line manager or senior manager and their professional relationships he becomes angry and emotional. From a duty of care perspective Emma is unwilling to return Donald to his work environment as there is no evidence that Donald has adjusted his opinions or demonstrated a willingness to take direction from those in authority. Donald also fails to recognise that his behaviours are unacceptable."*

It is to be noted that at this stage the last meeting which Ms Illingworth had had with the claimant was in September 2013. Ms Illingworth is also clearly referring to the workplace mediation despite the fact that the claimant has been told this could not be referred to in his grievance as it was confidential. Ms Illingworth then goes on to quote from the letter the claimant sent to Gillian O'Reilly. She then goes on

*"It has also become clear over the last 13 months that Donald, whether intentionally or not has the ability to aggravate his work colleagues. Donald has a strong opinion on certain matters and is unable to take on board views of others. This was also highlighted during the grievance investigation process. A number of colleagues were interviewed as part of the investigation that highlighted Donald can be argumentative and cause conflict in the workplace.*

*Following the referral to Occupational Health by Emma Illingworth on 17/7/14 (Donald was emailed a copy of the referral form) Donald received an appointment to meeting Dr Freddie Westbrook on Monday 21st July 2014. Prior to the appointment Donald asked Emma Illingworth for:"*

It then goes on to quote from his letter where he is seeking various company policies and the fatigue index. She goes on to state

*"This email is of concern. The primary purpose of the OH is to establish Donald's health and wellbeing.*

*However Donald's email suggests / intimates he wishes to continue with his concerns about shift working. This is something that was discussed and answers provided almost 12 months ago.*

*On 25/7/2014 Emma Illingworth received the OH report which in summary confirmed Donald was fit to return to work on a phased return to work programme.*

***Next Steps***

*It is clear from reviewing the case that Donald has a clear desire to return to his substantive role and intends to do so. The OH Doctor has flagged no reasons following his assessment why Donald cannot return to his role.*

*However, the discussions between Donald, Emma and his TU rep, the mediation and recent emails show that Donald still has issues with perceived bullying and harassment in the workplace and has been unable to attend any informal or formal meetings with his line manager or senior managers. Donald also remains adamant that he has no capability / behavioural issues. It is unclear why he has these strong views about perceive bullying and harassment, yet a clear desire to return to the same working environment.*

*SSE have tried to resolve this via mediation and provided the support of a mentor.*

*SSE have also provided Donald with CV writing support via the recruitment team and provided access to alternative roles via redeployment over a 6 month period. We have also talked at length about moving to a different team / role in SSE. In addition due to the continued, unproven bullying and harassment allegations there is a break down in trust and confidence."*

This document was not shared with the claimant or his union advisors or indeed anyone else prior to the meeting on 1 August.

170. The claimant duly attended the meeting fixed for 1 August 2014. He was accompanied by Malcolm Currie, a full time official for Prospect Trade Union. The meeting was attended by Emma Illingworth and also by Dale Cargill, Head of HR Operations who is Ms Illingworth's Line Manager. The meeting was recorded and a transcript of the meeting was lodged by the Respondents (pages 628-641). The Claimant also lodged a transcription of the recording (pages 681-700) with numbered paragraphs but indicated that there were a number of errors in the original transcription and listed these paragraph by paragraph in a document lodged at pages 700A-700D. The Tribunal listened to the recording in private and considered that the claimant's corrections to the transcription were well made. We did consider that the transcript at pages 681-700 when read along with the corrections at pages 700A-700D provided an accurate record of what took place at the meeting. Given that there is a transcript there is no need to specifically describe the whole conversation however it is as well to mention the following features.

171. At the outset of the meeting Ms Illingworth stated that the main purpose of the meeting was to talk about how the claimant was feeling. She stated that she wanted to understand if the claimant felt he was ready to come back to work but also said that she had done a review of the case so far and that there were a couple of things she wanted to go through as well.

172. The claimant made the point that Mr Currie was not an employee of SSE and that there was concern the discussion might stray into matters which were highly confidential or commercially sensitive so far as SSE was concerned. The claimant was reassured on this point by Ms Illingworth and by Mr Currie. Ms Illingworth then went on to ask if the claimant felt ready to come back into his substantive role in EPM as a Shift Trader working for 'the management team that we have in there'. The claimant's response was

> *"Obviously a bit anxious. I have been off for 12 months. I have been through two processes and the mediation and the well, it turned out to be a grievance hearing rather than that I expected it to be in the beginning which was an investigation, and I feel okay. I do not know, I*

*am getting the feeling from the other side that they may be not very well receptive to me coming back and in your first e-mail to me after I agreed to sort of like stop everything and just move back seemed to indicate a rewind back, that I am going to go back and have to discuss the performance management concerns and so forth. I felt slightly confused a little bit with that and immediately jump back into the bullying and harassment policy what is the protection and that sort of thing. So I feel okay physically, I mean a lot of the time off it has not been great even, been quite an anxious position all the way through. I have tried to return a couple of times within that period but I have been getting a feeling that I am just not ready."*

173. Ms Illingworth's first response to this is to state

*"I have to challenge you on that because I have seen no examples of you being keen to come back to work."*

The claimant then referred to a couple of telephone calls which he had had with Ms Illingworth and stated that he had got the strong impression from Ms Illingworth and from Prospect that he couldn't return. Ms Illingworth then agreed with the claimant stating:

*"Not when you had serious allegations about bullying and harassment and I have a duty of care that when somebody raises such allegations with me that I go and make sure that they are investigated on your behalf and until that's investigated and a conclusion made one way or the other it's not safe to put someone back into that work environment especially when the GP is still signing you unfit for work."*

Ms Illingworth then made the point that matters had moved on; the claimant was now saying he was fit and both his GP and Occupational Health had confirmed this. She then went on to say that the performance issues which had existed before the claimant went off sick would require to be re-addressed stating

*"… so it was your understanding that you would come back to work and they would have disappeared?"*

174. The claimant made the point that the grievance outcome at point 1 stated that the disciplinary informal warning was to be rescinded. Ms Illingworth then clarified that the disciplinary warning had been rescinded but that what she was talking about was repeating the year end performance review. She then went on to say with regard to this that *"but those were issues and concerns that the management team have albeit you have been away from the business for over a year it's still there"*.

175. The claimant then clarified his understanding to the effect that stating

*"So you still feel very clear about the concerns that lead up to the informal warning are still there."*

Ms Illingworth asked the claimant to stop talking about the final warning but repeated her view that what she was talking about was the year end review. She went on to say

*"Now obviously my role is to support you back into the workplace but it would not be fair of me not to say to you that the management team are still at that level of understanding of your, you know your work performance and behaviour as it they were at to your last year-end review."*

The claimant's response to this was

*"Right."*

Ms Illingworth then stated that the business didn't have issues with the claimant's work performance but did have issues with his behaviours and stated that the business had to be looking at what the claimant's objectives were. The claimant agreed with this. The claimant then set out his view (paragraph 33). He stated

> *"Okay. Two of the things that came up in my appraisal I would regard as whistleblowing event, health and safety and financial wrongdoing with the contract which I am quite reluctant to talk about in front of Malcolm. That was a big part of what happened about the performance management concerns."*

176. The claimant's rationale in stating this was simply to re-state his position which was that the reason he had received a low score was because of the two issues which he alleged during the course of these Tribunal proceedings were protected disclosures; namely the fact that he had written to Martin Pibworth and his view that this had then led to the shift rota debate (the health and safety issues) and the comments he had made to Mr Small about the WFFT contract (the contract). Paragraph 35 in the original transcript does not properly quote the claimant. What it would appear he has said from the tape is

> *"And I don't understand why that has not gone to Audit team to investigate properly. I don't think Keith Stainfield was an audit person or that this was not part, this is why I expect it to happen and I don't understand how I am supposed to go back into the workplace and do that without that actually happening and we are talking about millions of pounds. There is a lot of money in those . . ."*

Ms Illingworth then raised the point that she has specifically asked the claimant to set out his concerns in a grievance. The claimant stated he disagreed stating that Ms Illingworth had asked him to provide a time line of events and not to raise a grievance. He stated it was very specific (para 37). Ms Illingworth accused him of semantics (para 38). There was then a discussion about the reasons why the claimant had gone off. In paragraph 41 he states that there was a conflict between what he was being told by Prospect which was that management were going to do as Ms Illingworth stated and what management were actually saying which was that this was not going to happen. Ms Illingworth then asked the claimant if he felt well enough to go to EPM. Paragraph 43 on the transcript is not correct. The claimant's response was

> *"I do. I feel well enough. I don't feel these things that I've raised should be my responsibility. I said that in a letter to John Stewart. I don't feel these are my responsibilities. I feel I've handed them over and it's up to you. I mean if somebody goes out and crashes a car because he has been asked to work 12 nightshifts you know in a role by management that's not my responsibility now that's yours."*

Ms Illingworth then asked the claimant if he was satisfied that the issues he raised, his grievance, his allegations of bullying and harassment against David Small, David Fernie and Martin Pibworth had been investigated and that the process was now closed. The claimant's response was

> *"I don't know. I really don't understand what happened with the grievance, it's six months long, it was a long time and right at the end I was warned that my sally would come to nothing and that's how that actually happened very, very quickly and I feel, I feel I was being put under quite a bit of pressure to just move on however that said with pressure I am happy, I don't care, I really don't care about these people I am not trying to get them or anything like and I want to move on Emma I don't want to have this constant thing."*

177. Ms Illingworth then tried to raise again the issue of the grievance and the claimant's statement that he did not want to appeal. She asked if it was properly, truly closed or if it was going to keep coming back round. The claimant responded

> *"I don't want to keep discussing this."*

The next section of the meeting was subject to differing interpretation by the claimant and the respondents' representatives. The respondent's position was that the claimant kept harking back to his grievance and his issues. The claimant's position was that Emma Illingworth was *"like she was poking me with a stick"* and kept pressing him to give a different answer. Whenever the claimant said that he simply wished to move on and get back to work Emma Illingworth would raise some other issue and put it to the claimant that he was not really putting these

matters in the past. The Tribunal considered that the claimant's version of events was the correct one. It is clear from the transcript that at numerous points Ms Illingworth is the person who seeks to raise the claimant's issues and is simply not prepared to accept the claimant's position which was that whilst he still believed he was in the right he was prepared to put the matter behind him and simply go back to work. It is also fair to say that generally, because the claimant wished to curtail discussion on these issues which he no longer wished to pursue, the various references which he did make to these issues were probably difficult for Ms Illingworth or Mr Cargill to understand. Responses were often staccato and moved from topic to topic with bewildering speed. One example is at paragraph 74 where the claimant refers to the WFFT alleged protected disclosure. Ms Illingworth said she did not want to go into the details of this but raised the issue of him complaining about going to no pay. The claimant raised the fact that he had only received notification of going to no pay by a letter dated the day after it had happened. Ms Illingworth made the point that it was not what the claimant said but it was how he said it. The claimant then made various points about his contribution to the business.

178. There was then a discussion about sick pay where Emma Illingworth sought to justify the respondents' position. In fairness Ms Illingworth's position was one which would probably be held by most HR professionals which was to the effect that the claimant had been extremely fortunate to receive full pay for a period of almost a year when his contractual entitlement was to full pay for only six months. She felt that the claimant failed to appreciate just how well he had been treated in this regard and that it was down to her involvement. The claimant's position was that, not being an HR professional or familiar with company practice, he did not see the continuation of full pay which he had received as anything unusual and his concern was that the company had only told him they were stopping his pay after they actually did it. He also expressed concern that having been told this and having tried to raise the issue with Ms Illingworth to be told that she was going on holiday with the impression that she didn't seem to want him back. Ms Illingworth then indicated (paragraph 101) that what she had seen first hand was that when people had given the claimant an instruction or 'articulated from him' as she did about his return to work his reaction was sometimes rude and sometimes

aggressive quite a lot of the time argumentative. He then steps back to think about it and comes back to apologise but that the damage has been done. She indicated that 'this was some of the feedback which she had from the management team in EPM that they were trying to give you before you went off sick'. She then asked

> *"… what I need to understand going right back to the beginning of the meeting is are you able to come back into EPM as a shift trader and accept direction from your leadership team even if sometimes on occasion you don't agree with it?"*

The claimant's answer to this point (paragraph 102) was

> *"What do I do if they ask me to break the law? They have asked me to do that before and they have asked me to do that several times and when I rejected them I've said ….. they've moved on to the next trader laughing as they've done it. What am I supposed to do about that Emma? They are a difficult set of people I'm sorry, I am really sorry, it's just . . ."*

At this point the claimant's union representative asked for a postponement which was granted. After the postponement Dale Cargill who up to that point had not said anything made a lengthy intervention. He claimed that the claimant had not given a clear yes or no answer to anything. He stated that the claimant required to be

> *"accepting of the grievances, accepting that you are going to go back to management, accepting that we are going to have to do performance reviews and appraisals and deal with performance issues. That has to be what happens when we go back. He said the ending pay seems to be the point, that put the icing on the cake from your own perspective is the issue that you had no pay?"*

He expressed the concern the claimant was being driven back to work because of the pay issues

*"… rather than you are comfortable to go back to work in this organisation because you've resolved your issues against the workplace with what you have been seeing today and we have not really got any axe to grind with you with how you are performing in your role …. but the guys that you have been dealing with and you have got difference of opinions on how they dealt with your performance and dealt with the points really. What is a working relationship going to be like when you return? …*

*So far I am not convinced about it from how you said that you are accepting any of these findings. I am just concerned we have been the right drivers here are we getting to the point because the relationship between some of the things that you have said which are the company's point of view on how they manage policies, procedures, how they manage processes etcetera you have not been in agreement with almost everything that I have heard so far and what we have done as a company to try and take this forward which none of that in particular makes me feel keen that you are in the right place to get back into this workplace to do this role, that you are trying to get in to, and that was just my observations in this short period of time on just some of the comments that have been going back and forth between myself and Emma, just from a listening perspective. I just wonder, well, what is your view on that because that is how I would summarise where we are right now."*

179. The claimant then responded (para 114) stating

*"I do not know if this answers the question. I like SSE. I have worked for SSE for 15-16 years, has been my main job right after I graduated. In that particular area of the company I feel that I have excelled though you might not say that when given the terms of what we have been discussing and not presenting myself at my best. I came up with a £100 million savings – I just mentioned it is about reporting efficiency. I believe that I have got a very strong ethical point on how the role should be and I believe that it possibly also saved another £100 million. The*

*very first year I saved £1 million, pretty good at the time, you know, is when hydro electric."*

180. Mr Cargill then indicated that he did not consider the claimant was answering the questions. The claimant then said

*"What I am trying to say is I feel I can do anything in the company I am really good I am a good employee. Something has gone wrong with these managers and I cannot explain it all I can do is just highlight it and if you take my points that's fine if you feel you cannot or have not I do not feel you have taken my points then I cannot do anything more. …."*

Conversation appears to have gone on in this vein until the claimant indicated that he felt that as he had support from Prospect the management had support from HR. Mr Cargill then stated

*"I will just stop you on that there. Are you saying we have not supported you?"*

Mr Cargill then indicated that he felt Emma Illingworth had spent a great deal of time on the claimant. The claimant accepted this but made various points relating to the mediation and raised the point about the mediator tweeting after the mediation. Mr Cargill asked the claimant if this was the first time he had raised this point and the claimant said it was. Mr Cargill then made a point about the mentoring agreement and the claimant agreed he had suspended this. There was then a further conversation which ended with Mr Cargill asking the claimant several times if he still felt he had been bullied in the workplace. The claimant answered

*"Well the only answer to that is yes because you cannot simply take away allegations. I mean I sat there crying in that meeting room with you. I cannot put the tears back in."*

Ms Illingworth asked if the claimant was comfortable that she had ensured an impartial investigation into the allegations had taken place and the claimant said he

was not sure (para 155). There was then a further discussion during which the claimant made the point that the grievance outcome does not mention bullying and harassment. Ms Illingworth pressed him to indicate whether he felt that his allegations had been properly and fully investigated or not. The claimant then specifically was asked by Emma Illingworth (para 166) that if he was happy working with David Fernie and David Small. He was told that the claimant would be on days and specifically asked if he was happy working with them and taking management instructions from either of them. The claimant said

*"I should be okay."*

There was then a further discussion with Ms Illingworth essentially pressing the claimant to say the opposite. In due course the claimant raised the issue about having asked for time off during his father-in-law's illness. He stated (correctly) that this had never been investigated. Mr Currie then intervened (paragraph 176) stating

*"What I am taking from that is, if that is going to happen, Donald is going to go back in there it strikes me there is going to have to be some kind of exercise of mutual trust building because it sounds like that you are asking questions that are based around whether or not you trust the way that Donald will behave when he comes back in, but Donald is indicating that he has concerns about – and therefore has a trust issue in how behaviours will be towards him when he is coming back in here. Is there some kind of facilitation that comes up you will be there."*

Ms Illingworth then indicated that that would be her role but went on to state

*"What I am just trying to understand today is – when we meet going forward we are not revisiting the past all the time that the grievances and the allegations that have been made have been investigated and closed because we have to start with a fresh piece of paper and not keep reverting back to the old. Now I do not think I have anything else I wanted to ask. Have you anything else Dale that you want to?"*

Mr Cargill then stated

> *"No, I just think that trust is a two way thing and that it is fundamental to the relationship so anybody that is working in the company and that is just going back and forth and back and forward so I am just. The point I raised there that I will stand by in my observation, I am not sure that we are where we really need to be if I am going to be true and honest."*

The claimant then asked what was proposed and Ms Illingworth stated

> *"I think that what we need to do is ask Malcolm if you have got any more questions before we finish and yourself Donald and then I would like to end the meeting and I would like to go and do a review. As I said at the beginning I am going to write a letter and summarise what we have discussed and I will contact you on Monday with what I think the next steps are."*

Mr Currie then spoke at para 181. He indicated that it would appear that the respondents had doubts about the claimant going back in to his previous role and stated

> *"... that raises questions in my mind as well what scenario planning have you been doing in terms of the other things, being an option and what do they look like."*

Mr Currie raised the prospect of perhaps conciliation. Ms Illingworth said they would look at that but was not keen. She also raised the issue of redeployment (para 187). The claimant made the point

> *"Give me a desk anywhere in the company, I am sure I will contribute. Seriously, I am not stupid. I am understanding that force me back into that area could end up maybe bounced out again."*

The claimant asked about his pay. Ms Illingworth said that that would be part of her review. The claimant made the point that he would be available on the phone to discuss anything. The claimant's representative also raised the issue about the claimant's pay given that he was no longer on sick pay and was told again that this would be a matter dealt with at the review. The claimant's final words were

> *"I just want to reinforce this as being a very difficult time. I don't feel that I'm able to make brilliant decisions. I feel that I have a lot of scrutiny placed on me a lot of pressure. I am very anxious all the time so the e-mails that I have sent can lurch around a lot. I am a good person I know I am a good person. I know I can work hard and I know I can contribute to the company. This being an unfortunate thing that has happened here but I do not blame SSE for anything. It has been a good employer and I know it is very difficult thing that is going on here and I just wanted to say that."*

181. Following the meeting Ms Illingworth discussed the matter with Mr Cargill. Both reached the view that they should commence a disciplinary process against the claimant. They agreed that rather than have an independent manager carry out an investigation that Emma Illingworth as the person who had been dealing with the claimant steadily since August of the previous year, should act as the "Investigating Officer" and carry out a "fact finding investigation".

182. In the meantime the claimant was to be suspended on full pay. Ms Illingworth wrote to the claimant on 4 August 2014 advising him of this. The letter was lodged (page 648-649). The letter stated

> *"SUSPENSION*
> *Following on from our meeting on Friday 1st August 2014, I am writing to confirm that based on our discussions, I am writing to confirm the Company's decision, that with immediate effect and until further notice, you are suspended from your duties.*
> *REASON FOR SUSPENSION*
> *The reason for your suspension is that:*

- *You have failed to accept the findings of your recent grievance investigations, which you choose not to formally appeal against.*
- *You have referred to concerns which would be covered under Whistle Blowing, but have failed to declare these to SSE.*
- *The relationship, trust and confidence between you and SSE have broken down. This was demonstrated during your mediation session and subsequent meetings with me.*
- *You fail to demonstrate SSE values. You challenge colleagues in an aggressive and confrontational manner and fail to accept feedback.*

*You should be aware that in the event that these allegations both collectively and each in their own right could, if found to be substantiated constitute dismissal due to Some Other Substantial Reason (SOSR) and or gross misconduct in terms of the Company's disciplinary procedure, which may result in the termination of your employment with / without notice or a payment in lieu of notice."*

The claimant was advised that whilst suspended he would receive full pay but should not attend work or contact anyone in their capacity as work colleague, manager, supplier, contractor or customer during the period of his suspension without the permission of Ms Illingworth. The claimant was barred from entering company premises or accessing the company's IT account without the permission of Ms Illingworth. The claimant was advised that

*"The Company will contact you when the management investigation is complete and will advise you at that time if a disciplinary hearing is to take place to consider the allegation made against you. If following the investigation the Company decides to arrange a disciplinary hearing you will be required to attend this in accordance with the Company's disciplinary procedure."*

183. On 29 August the claimant was sent a copy of the recording of the meeting with Ms Illingworth and Mr Cargill on 1 August (page 650).

184. Although the claimant's letter of suspension referred to there being an investigation Ms Illingworth decided, with the agreement of Mr Cargill, that in fact no further investigation was required. She therefore produced a report dated 20 August 2014 entitled Fact Finding Report. This document is lodged (pages 663-666). The report is in identical terms to the document produced by Ms Illingworth on 29 July before the meeting of 1 August entitled Case Review and lodged at pages 624-627. Prior to preparing this report no witnesses were spoken to by Ms Illingworth specifically for the purpose of producing the report although she may have had ongoing day-to-day contact with members of management in energy trading in the normal course of business. A number of documents were attached to the report listed in the appendices at page 667.

185. On 1 September 2014 Holly Wishart of the respondents' HR department wrote to the claimant. This letter was lodged (pages 701-703). The letter invited the claimant to a formal disciplinary hearing which was to take place on 10 September. It stated

> *"I am writing to you in connection with your conduct. Following the fact finding investigation carried out by Emma Illingworth, HR Business Partner, I can confirm that you are required to attend a formal disciplinary hearing. I write to confirm the details.*
>
> *It is alleged that:*
>
> *1) You have failed to accept the findings of a recent grievance investigation, despite having not appealed against the findings.*
>
> *2) You have referred to concerns which would be covered under Whistle Blowing, but you have failed to declare these to SSE.*
>
> *3) The relationship, trust and confidence between you and SSE has broken down. This was demonstrated during a mediation session and subsequent meetings with Emma Illingworth.*
>
> *4) You have failed to demonstrate SSE values by challenging colleagues in an aggressive and confrontational manner and failed to accept feedback.*
>
> *In the view of the Company, your alleged conduct breaches Employee Rules:*

*1) Observe their contract of employment in every respect*

*2) Conduct themselves in a manner consistent with the proper and professional performance of their duties and the maintenance of good working relationships*

*4) Perform their duties as directed by Managers and Managers authorised deputies*

*And is given as an example of gross misconduct in Section 2 of the Employee Rules as follows:*

*9) Refusal to comply with a proper instruction or insulting behaviour towards a manager or a managers authorised deputy*

*I have enclosed a copy of the Company's Employee Rules which describe in detail the above quoted rules / examples.*

*Please note that if Gross Misconduct is proven, the result of the disciplinary hearing may be the termination of your contract of employment. …..*

*We are aware that you have previously been represented by Malcolm Currie, Full Time Officer from Prospect Union. We have been advised that he is currently on annual leave until 7 September 2014. The hearing has therefore been arranged for 10th September following his return. Malcolm is aware of this date and has confirmed that he is available to attend should you choose to be represented at this hearing. …."*

The letter went on to confirm that the claimant would not be permitted to attend work or contact colleagues. A list of documents was attached as per the list attached to Ms Illingworth's "fact finding report". The list included a copy of the SSE disciplinary procedure and the SSE employee rules. These documents would appear to be the disciplinary procedure lodged at pages 136-138 and the rules lodged at pages 148-150.

186. Following the receipt of this document there were various e-mail exchanges between the claimant and Holly Wishart. Some of these e-mails were lodged however some were not. At a very late stage in the proceedings the claimant sought permission to lodge these e-mails late. This was strenuously objected to by the Respondents and the Tribunal did not allow the additional documents to be

lodged given that by then the Tribunal had heard around three weeks of evidence without them being mentioned. It appeared to the Tribunal that it was likely that some of the matters which were apparently referred to in those e-mails ought to have been raised in cross examination of Emma Illingworth and by this time her evidence had been completed. It is unfortunate that the matter was not raised earlier since the Tribunal was in little doubt that some of these documents (which we never saw) would have been relevant however given the requirement of the overriding objective to take proportionality into account and the overall interests of justice the Tribunal did not consider that it was appropriate to allow the documents to be lodged at this late stage.

187. Around the beginning of September 2014 the Claimant arranged to obtain independent legal advice from a solicitor. When he advised his trade union of this they advised that in those circumstances it was no longer possible for them to represent him. Accordingly the claimant was in the position of requiring to find an alternative representative to accompany him at the hearing. The claimant requested the contact details for various individuals to allow him to arrange this and these were provided by Holly Wishart. He also asked for a job description for a representative so that he could advise a potential representative of what was involved. He asked for permission to provide information about the allegations against him to his representative on a confidential basis. Ms Wishart did not provide him with a job description for a representative but did agree that he could provide information about the allegations to such a representative on a confidential basis.

188. On 3 September the claimant e-mailed Holly Wishart. This e-mail was lodged (pages 705-706). He indicated that he was trying to get a copy of the February grievance tapes for some time. He indicated that the speed of the management investigation had taken him by surprise.

189. He asked for various documents including

1) a copy of each appraisal/performance review detailing the scores/comments.

2) a copy of each salary award.
3) a copy of each bonus award detailing the breakdown of each award.
4) a copy of each EMC special award.

He then went on to state

*"With regards to submitting evidence I sent a significant volume of material to Lorraine Hamdani in two batches for the two Grievance Hearings earlier this year. I don't think I should send a duplicate of this material but I believe all of this should be made available to be referenced at the Disciplinary Hearing. Could you please arrange for a copy of all this material to be made for the Disciplinary Hearing.*

*The two Disciplinary Hearings were likely to be transcribed. Could you please get a copy of these for the Disciplinary Hearing (and send me a copy too if you can) together with a copy of the tapes and also a copy of the Grievance Outcome. I would also like a copy of the tape that Emma made and have the ability at the meeting to play all three tapes so will need an audio device.*

*Finally my Lotus Notes account was deleted. This was easy to reference and contained many, many emails which I should be able to reference ahead of the disciplinary hearing. My discussions earlier in the year with IT indicated that it was technically possible to rebuild this account but that it was difficult o do. I felt I didn't need to task IT with this as I had a substantial amount of material so didn't press them for it. With the charges set against me and the recommendation that these be considered to be gross misconduct I believe I should now have access to this account. It is a record of my work over the last 16 years and should be considered crucial to my defence. Could you please request that IT rebuild my Lotus Notes account in full paying particular attention to the last 7 years of emails sent to colleagues Energy Trading."*

190. On 4 September Holly Wishart responded to the claimant indicating that if he wished a copy of his personnel file he should complete a data access request and pay an administration charge of £10. She noted that in accordance with the Data

Protection Act a response to the request should be made as soon as possible but within 40 days.

191. For the avoidance of doubt this response telling the Claimant to submit a subject access request and wait 40 days was sent six days before the disciplinary hearing.

192. The claimant contacted Emma Illingworth to see if she could help with the provision of the transcripts which he needed and she advised that he required to go back to case management (page 704).

193. On 5 September Holly Wishart wrote again to the claimant confirming that to comply with Data Protection Act requirement they required the formal payment to be submitted before they would provide copies of the information. She also went on to state

> *"To be clear, we do not provide transcripts of meetings. We only provide audio CD's and these have already been submitted, we discussed yesterday that the CD labelling does not necessarily relate to the date of the meeting and so I understand now that you have all meeting audio CD's.*
> *For the avoidance of doubt, Rodney Grubb's role next week will be to look at the allegations made through the SSE formal disciplinary procedure. This will not be an opportunity to discuss the previous grievance raised, an outcome was made in relation to the grievance and you did not appeal against that outcome."*

194. The claimant wrote to Ms Wishart later that morning (page 712). He stated

> *"I'm confused. The grievance process states that the process is "designed to ensure there is a consistent and fair treatment of individuals". Are you saying that the company can decide what evidence I can or cannot submit to the hearing. The documents submitted by Emma Illingworth and Case Management refer to previous processes and meetings and events of the past 2 years. I believe I need to have*

*this documentation at hand in the meeting and am very concerned that you quote the Data Protection act and a 40 day lead time.*

*In addition to this section 8.g) states "If the employer does not admit the misconduct, the Manager will consider the situation in light of all the information available, including witness statements, relevant documentary and other evidence. A decision will be made or further investigation carried out. If the Manager is satisfied that misconduct has occurred then he or she will impose an appropriate penalty".*

*With regards to penalties in 9.a) states "In all cases penalties should be commensurate with the degree of seriousness of the misconduct: and account must be taken of the employee's service, work record, previous behaviour and other extenuating circumstances".*

*For the avoidance of doubt are you informing me that I cannot submit my own witness statements, relevant documentary and other evidence as described in section 8.g)? Are you honestly telling me that I have to pay £10 and wait 40 days to get even basic information for my case and that the only witness statements, documents and evidence to be considered will be the ones chosen by Emma Illingworth or Case Management?*

*I also made a specific request for a rebuild of my Lotus Notes IT account. Are you informing me that I will not be allowed to look at this from the context of my defence in the disciplinary hearing. This is complete different to the Grievance hearings and the outcome would appear to be of much greater consequence.*

*I also have further requests to make of SSE but am concerned about the responses I've received from case management so far for what I would assume are routine and easy to locate documents. My further requests are more complicated but am concerned if I should be sending them to case management or not."*

195. On 8 September the claimant had met with an employment solicitor and received certain advice. He was advised of the existence in the ACAS Code and the requirement that if he was unsure or it was not obvious what the allegations are that had been made against him then he should write to the employer for

clarification. His solicitor suggested that in relation to the allegation regarding aggressive behaviour towards colleagues he should ask for details such as which colleagues were involved, when this is alleged to have happened and what it is he is alleged to have done. The solicitor noted that the claimant had previously asked for this information without success and suggested he do so again.

196. On 9 September the claimant also wrote to Lorraine Hamdani. He asked for a postponement of the hearing setting out 5 grounds. This e-mail was lodged by the claimant (C3-4). Ground one was that due to the prohibition on contacting any work colleagues he had been unable to arrange a representative. In the second he referred to the ACAS Code and said that he had not been given enough time to prepare his case. His third ground indicated that he believed there should be another referral to occupational health as the situation was now entirely different from that envisaged by them on his last visit where they had discussed him receiving 'support' to return to work. The Claimant referred to his 'cross examination' from Ms Illingworth and his suspension. In the fourth ground he again referred to the ACAS Code and the requirement that an employee must be given sufficient information about the alleged problem. He said he had repeatedly asked for information from case management and been 'ignored/stone walled/told that the request is covered by the data protection act and I have to send £10 and wait 40 days. The fifth point was that:

> "*I do not understand the allegations made against me and they are not clear enough to mount a reasonable defence against. Some of the allegations do not state when the incidents occurred and with whom. There is no detail on which concerns I've referred to or which SSE values I have failed to demonstrate. The allegations refer to the finding of a recent grievance investigation but don't state what those findings were (I'm not either even after reading the grievance outcome several times). I'm expected to challenge these allegations to the best of my ability but can't even be sure what they are."*

197. This e-mail was sent by the claimant at 14:50. At 15:17 the claimant sent a further e-mail stating

*"I will not be attending the hearing scheduled for the 10th September 2014. I will be able to provide a note from my doctor and will send it to you at the earliest opportunity."*

198. Lorraine Hamdani responded to the claimant at 16:43 on 9 September. It would appear from the terms of this e-mail that there had been an additional e-mail from Lorraine Hamdani prior to this and indeed there may also have been a further e-mail from the claimant but these documents were not lodged. Ms Hamdani's e-mail timed at 16:43 stated

*"Donald*
*Thank you for your emails, my response to you must have crossed over at the same time as your further e-mail and I can confirm that it was not a pre-prepared response but directly dealt with your points raised.*
*In response to your e-mail sent at 14:50, the charges against you are clear, you have had since 1 September to prepare your defence and it is not appropriate to obtain a medical report on the grounds you stipulate.*
*In response to your e-mail sent at 15:17, I can acknowledge receipt of your confirmation that you will not be attending the disciplinary hearing tomorrow on the grounds that your doctor has signed you off as being unfit to attend a disciplinary hearing. I would request that you send your fit note through as soon as possible and before the end of the week.*
*For the avoidance of doubt, the disciplinary hearing will still need to go ahead in the interests of both parties. We have allowed one postponement to the hearing, however the next arranged meeting will go ahead and a decision will be made – you will either be expected to attend, provide a written submission of your responses to the allegations or send a representative being either a fellow employee or an accredited representative of a recognised Trade Union.*
*We will be in touch in due course with a revised date for the hearing."*

199. The claimant responded. The e-mail was lodged at page 720. The time and date of the e-mail lodged with the Tribunal was omitted from the copies lodged but it would appear to have been sent on 15 September. He stated

*"Please treat the following email and its content as private and confidential.*

*I don't understand your responses to my earlier emails and I cannot follow your advice without breaking the terms of the suspension unexpected imposed on me by Emma Illingworth. The timing and comments of your emails have not cleared up anything at all. Clarity on the allegations is essential when dealing with gross misconduct and I don't understand. For instance you state that I can disagree with comments made about my performance but I was under the impression that this was all about my conduct and that my performance was sound. You also state that I can provide witness statements but that I can't contact anyone at the company to get them. I've been isolated from my colleagues at SSE for well over a year now which will make this task difficult. It's all really confusing what I can and can't do to allegations that I can't possibly understanding let alone defend myself against.*

*You also stated that I've known about the allegations since the 1st September but have not conceded that they are quite complex and difficult to interpret. I still don't know if the allegations wholly relate to Emma Illingworth or the time-frame of each allegation. With regards to disagreement with the witness accounts of meetings surely there are minutes of these meetings that I should be made aware of ahead of a disciplinary hearing. Is the disciplinary chair aware also that it was Emma Illingworth who set up mediation, that she supported EPM management on the day and that I made an allegation to Emma Illingworth immediately after mediation that I had been "wrong footed" with regards to the mediation outcome and that the problems with EPM management were "deep rooted" and beyond my influence.*

*I had good reasons for requesting a postponement and the reasons all came from the ACAS code of practice with regards to disciplinary and grievance procedures. The allegations are after all recommended to be treated as gross misconduct by Emma Illingworth, which seem to be heading towards my dismissal. You have made almost no reference to these and seem to have stated that there would be no postponement regardless of anything I say. I really need a proper response to the*

*reasons I stated when I requested a postponement and will forward them again for individual clarification.*

*I like to point out that my email account was destroyed by Emma Illingworth and this only became known to me once the earlier grievance process had already begun. Less than 0.1% was eventually restored just a day or two ahead of the first hearing despite written assurance from Emma Illingworth that I would have plenty of time to go through it. I spoke to IT at the time and they seemed to find it incredible that such an error could have occurred in the first place but Emma took full and sole responsibility for it in an email earlier this year. My email account contained many emails / documents which were relevant to the grievance hearing which were denied to me and could have swung the outcome, regardless of whether the grievance process was valid or not. These emails should not be denied a second time when the allegations made against me are much more serious and could lead to my dismissal. You state that it is a big ask for so many years worth of data and say that my requests for information are unreasonable. If the account had not been destroyed by Emma Illingworth my information requests would be minimal. It feels as though case management are being quite unfair having first destroyed my email account and then to deny me the full restoration of the account and other information, especially in light of the fact that the allegations could lead to my dismissal.*

*I'd like you to know that I was known in Energy Trading to be a considerable contributor to the profits of SSE with many of my "spots" arguably amounting to many millions of £'s. I actually calculate this to be in the region of £250 million. I need to be able to properly account for this sum and am confident I can do it with my email account. Just one spot, Foyers efficiency being 85% and 65% rather than a flat 75%, could be worth over £100 million over the like of the station alone. I'd expect the cost of restoring my account to be significantly less than £1 thousand, perhaps even in the low £100's. It seems unfair to me that SSE has not taken this into account and seems to want me to be as unprepared as I was for the grievance hearings. Emma Illingworth does*

*not seem to have said much on this subject at all and has concentrated on communicating damaging false statements which harm my reputation in the workplace.*

*I'm also very unclear what is confidential or not. For instance I remember you distinctly preventing any discussion taking place at all with regards to mediation on these grounds at our first meeting. In contrast you seem to be quite happy for Emma Illingworth to discuss mediation openly in support of her allegations. Why is it okay to talk about mediation now and not earlier in the year? It feels that the same people are manipulating the disciplinary process as did the earlier grievance process. I believe this has destroyed the integrity of both of the processes. I've also stated that one of my emails to you was confidential and would like to know if it was treated as such as I feel I can't be sure of anything any more. Many of my allegations, emails and meetings with Emma Illingworth, that were understood to be confidential at the time, now seem to have no protected status at all. It feels that my openness and honesty over the last 12-18 months have ultimately been used against me by Emma Illingworth and case management.*

*I believe case management have put me into an impossible almost intolerable position with regards to the disciplinary hearing and that SSE are not paying any consideration to my health as recommended in their own commissioned OH reports. Is there anyone I can speak to at SSE with regards to this dreadful unfolding situation?*

*It is stated that you are the procedural advisor, surely you can see that the disciplinary process is being prevented from operating as it naturally should and that it is your duty to notify the disciplinary chair / other manager of this allegation.*

*With regards to all the above are you really sure that I should be the one in a disciplinary hearing?"*

200. It would appear that following this Ms Hamdani raised the issue of the claimant's e-mails with Emma Illingworth. This resulted in Emma Illingworth writing to the respondents' IT department on 17 September (pages 465-466). She stated

*"Hello Joel*

*I have just spoken to Alan on the service desk.*

*I have been managing an Employee Relations case relating to Donald Nutt.*

*A little while ago one of my team raised a CIRTIS on my behalf (204706) requesting that Donald Nutt's IT account be reinstated. Donald had been off work for a long period of time due to ill health and at some stage his account was deleted.*

*My understanding is that following my request the account was reinstated as much as it could be. I would appreciate it if IT could confirm if this was the case. Could you also explain why IT were unable to fully reinstate the account?*

*Finally, do IT work to guidelines that state if an account has been dormant for x period of time it will be deleted? Donald is of the opinion that his account was singled out to be deleted."*

201. On 9 October the respondents' IT department responded in the terms already mentioned above

*"Hi Emma,*

*The following has been sent back from the messaging team:*

*This account was deleted on 20th Jan 2014.*

*Which suggests to us that the account was left unchecked 4 months prior to this date. We have no information suggesting it was a Cirtis request to delete the account, so we are assuming we have used our housekeeping process to delete the account.*

*His account was re-created on 28th of February and has been locked out ever since, we have fallen behind on our account deletions because of heavy workload, but he would have been deleted again after June. He has now been migrated to exchange.*

*As far as a proportionate amount of data recovery is concerned, our backups only go back 3-4 weeks, if he has not used his database in a long time then most would get removed.*

*Hope this helps your enquiry.*

*If you need any more, please let me know."*

202. In the meantime (prior to the response coming in from IT), it would appear that a decision was made to add to the disciplinary charges being made against the claimant. The Tribunal was unable to establish with certainty who made the decision to add an additional charge. The respondents wrote to the claimant on 25 September inviting him to a further disciplinary hearing which was fixed for 7 October 2014 (pages 724-726). This letter was in similar terms to the previous letter of invitation however as well as the original four allegations the claimant now faced a fifth allegation which was:

> *"You have made allegations against Emma Illingworth including she misled you on the mediation process and that she destroyed your email account."*

The claimant was also advised that the hearing would be conducted by Derrick Allan, Head of Ventures & Development with the respondents rather than Rodney Grubb. There was enclosed with the letter the same documentation as in the previous letter with the addition of a copy of the claimant's e-mail to Lorraine Hamdani dated 15 September 2014. The claimant was advised that if he failed to attend the hearing then the company might deem it reasonable to hold the hearing in his absence. He was advised that the outcome of the hearing may be the termination of his contract of employment.

203. On 29 September the claimant wrote to Case Management again. He raised the issue that 7 October was not a normal working day for him and he also asked if the terms of his suspension could be lifted so that he could contact a number of named individuals with a view to having them accompany him. He questioned why the hearing was in Dundee. Holly Wishart of Case Management responded to the claimant on 1 October 2014 (page 729) and confirmed that the claimant was expected to attend the hearing on the date fixed. She indicated that the respondents would be happy to make contact with the named employees and *"once we have found someone who is happy to represent you, we will ask them to make contact with you to discuss your case."* The claimant was advised that the

hearing had been fixed to take place in Dundee to suit the claimant as he had previously advised Lorraine Hamdani that he had a medical appointment at Ninewells Hospital in the afternoon. The claimant responded to this on 2 October (page 728). He made the point that his medical appointment was a private affair and given that he was not meant to be working on this date he should not have required to raise it with Lorraine Hamdani. He noted that the respondents wished to contact the named employees he had listed. He went on to say *"I did not ask you to do this and this could not have been a miscommunication on my part. I need to make contact myself. If you are contacting people could you please stop and forward the names of the people / emails that you have already sent out. It is a statutory right of an employee not the employer to choose their representative and I find it most alarming that you would have done this on your own initiative."* The claimant then set out the terms of an e-mail which he wanted sent to the people on the list. He then went on to state

> *"For the avoidance of doubt I am taking all reasonable steps to attend this interview (and the earlier interview date) but feel I cannot attend or present my case without my chosen representative. This is an absolute minimum requirement and I have extensive communication detailing this and other requests made in a timely manner. The constant delays and postponements are therefore completely down to the company and its repeated misunderstanding of these relatively simple issues."*

204. Holly Wishart responded later on 2 October (page 727). She confirmed that as yet they had not contacted anyone on the list. She stated that they were happy to allow the claimant to make contact with the individuals named in his e-mail of 29 September but requested that Lorraine Hamdani was CC'd into any correspondence made with SSE employees in order to meet the terms of the suspension. They indicated that the venue was being moved to Perth.

205. The hearing duly took place on 7 October 2014. In advance of the disciplinary hearing the claimant wrote out a document entitled final response to the allegations dated 6 October 2014. This document was lodged (C12, 13, 14). The claimant read out various excerpts from this document during the disciplinary hearing. The

document was e-mailed by the claimant to himself for reference purposes. It was not copied to the Respondents. In the transcript, sections where the Claimant read out from this document were not recorded in detail. The Tribunal accepted that the whole of this document was read out in instalments during the hearing. In attendance at the hearing were Derrick Allan the respondents' Head of Ventures & Development and Lorraine Hamdani. Mr Allan had not conducted a disciplinary hearing before. He had been with the respondents for many years as a manager. He had never acted as the claimant's Line Manager or in the same department as the claimant although they may have had some few interactions over the years. Emma Illingworth also attended to present the respondents' case via a video link from her office in Leeds. The claimant was accompanied by John Ross, a colleague. Mr Ross was due to attend a work related meeting at 10:00 am and no steps were taken to ensure that he would be available for the full period of the disciplinary hearing which started at 8:30 am.

206. The meeting was recorded and a transcript of the meeting lodged (pages 737-779). At the outset Emma Illingworth set out her fact finding report and when asked stated that there was nothing she wished to add. Mr Allan then indicated that he wanted to take the allegations one at a time. Mr Nutt asked Mr Allan if he had seen the grievance outcome documents. Mr Allan had in fact been given a copy of Keith Stainfield's grievance outcome letter (pages 584-587). He had not been given a copy of the claimant's grievance nor did he have access to a transcript or recording of the grievance meeting. When the issue was raised at the disciplinary hearing Lorraine Hamdani intervened to state that Mr Allan had seen a copy of the grievance outcome but went on to say

> *"I think to get context to this, he needed to read it but we're not looking to go into the content of that, it is more to understand why you didn't appeal and why you then chose to go to John Stewart."*

207. The claimant provided an explanation set out on page 739. Essentially he indicated that he felt that the outcome was imperfect but one of the findings was that measures were being taken to remedy the unfair performance review and this was something which he wanted to happen.

208. He then clarified subsequently that the findings of the grievance were not particularly clear to him. Lorraine Hamdani then intervened subsequently to state that (page 742)

> *"Derrick's role isn't to assess the outcome of the grievance, Derrick's role here today is to look at whether or not you have followed process and to understand why you didn't appeal against the decision yet saw fit to then email John Stewart about what we would see part of the appeal."*

209. The claimant referred again to the policy against harassment at work document and made the point that the grievance process was not mentioned in this document. Emma Illingworth was then asked to respond and she stated that she had met regularly with the claimant's union representative. She said she had put two proposals forward one was mediation and the other was a full grievance investigation. Originally Donald and his union representative both agreed that the workplace met mediation. She then went on to say that it was clear by the end of 2013 that that route wasn't going to bring the relationship back on track and that she had had a conversation with Jeff and Anne Douglas and they had suggested that because the bullying and harassment allegations kept rearing their head that we would go down the grievance investigation. She said she had asked the claimant to put things in writing over the Christmas period (page 743). The claimant then indicated (page 744)

> *"….. Emma has said … repeated the word grievance probably a dozen times there. I do not really remember the word grievance appearing in any documentation ahead of this. There really wasn't, I haven't spoken about somebody . . . a seasoned investigator who was going to go off and investigate this . . . that was what it was, it was an investigation in line with the policy against harassment at work and then suddenly it became a grievance process with somebody who had barely been in the company for 3 years, had he ever done an investigation?"*

Lorraine Hamdani then intervened

> *"Right, I will stop you there because again you are now, from a trust and confidence perspective challenging whether or not we have appointed the right person and I think there is a trend coming out here Donald."*

210. There was further discussion. The claimant put forward his point of view which was that he understood from the grievance outcome that the disciplinary warning was to be rescinded and that the performance review was to be re-done which he was happy with but that then he subsequently received an email from Emma Illingworth which suggested things were being wound back. He said he had written to John Stewart as he felt concerned that he was going right back to the beginning of the process without having any of the protection of the Bullying and Harassment Policy.

211. The meeting then adjourned (page 747). It was at this point that the claimant's representative Mr Ross left for his work related meeting and did not return.

212. When the meeting reconvened the claimant made the point that the letter he had been sent inviting him to the meeting indicated that Emma Illingworth would simply be presenting her report. He was concerned that having already presented her report she was still participating in the meeting. Mr Allan ruled that this was perfectly appropriate. This followed a further intervention from Lorraine Hamdani. Matters finally moved on to point 2 which Mr Allan summarised on page 748 as being

> *"Point two: you've referred to concerns which will be covered in the whistleblowing, but you failed to declare these to SSE. Now obviously again it's a procedural thing, Donald, as you understand. Whistleblowing we take very seriously. We have a whistleblowing register. We don't have anything covered on the whistleblowing register that's been noted by you, certainly since before you went off sick. I appreciate subsequently that access for that would be difficult, but there is nothing been formally raised on whistleblowing. So from my perspective, you referred to allegations in some of the meetings, but why did you fail to declare these formal case?"*

213. In referring to the whistleblowing register Mr Allan was referring to a confidential register which it would appear SSE keep in respect of all employees who raise whistleblowing concerns. The existence of this register is not disclosed in SSE's policy documents but is known to senior managers such as Mr Allan. Prior to the meeting Mr Allan had asked Lorraine Hamdani to check the whistleblowing register and she had done so and indicated that there was no record on this of the claimant making any whistleblowing report. Mr Allan saw this as conclusively showing that the Claimant had not raised any 'concerns' covered by whistleblowing.

214. In the event it would appear that the discussion on stage 2 never reached the stage where the claimant clarified in any way what his whistleblowing concerns were. Mr Nutt sought to refer to the whistleblowing policy and indicated that he had raised matters with Mr Small about WFFT and health and safety. Mr Allan did not know what WFFT was and appeared to be of the understanding that the claimant was referring to an entirely different matter when he had referred at the meeting on 1 August to being "asked to break the law". There was then a period of what can only be described as farce where the claimant appeared to be asking Mr Allan what whistleblowing concern he was referring to and Mr Allan being of the view that the problem was that the Claimant had never clarified them. Ms Illingworth chipped in to clarify that the allegation related to the meeting on 1 August where she alleged that the claimant had raised whistleblowing concerns but had not been prepared to divulge them further. The claimant's position was that the whistleblowing matters he had referred to on 1 August were the ones he had brought up previously relating to the shift rota and WFFT. The claimant again made the point that he had not wished to go into a great deal of detail at the meeting on 1 August in front of Malcolm Currie who was not an employee of the company particularly where the information was commercially sensitive. There was further circular argument regarding alleged whistleblowing matters. Whilst it would appear that the claimant was of the view that there were two matters which were the ones which eventually became subject of his Tribunal claim it would appear that Mr Allan was of the view that there was something else as well which the claimant had refused to give details of. Eventually on page 752 Emma Illingworth intervened to say that matters had rather moved off track. Mr Allan then sought to move matters back on track by saying that in the company no-one would

expect anybody in any circumstances to break the law. The claimant then made the point that his statement about being asked to break the law on 1 August had come at the end of a period when in his words *"This is Emma, with a big stick, jabbing me and jabbing me and jabbing me. In that job it's very easy to get confused."* There was then a further circular discussion about the allegations where amongst other things the claimant indicated that there was no obligation on him to blow the whistle.

215. Mr Allan's view of this was that this demonstrated that there was a huge barrier to the claimant being able to return to work for SSE. Mr Allan took the view that this showed the claimant had a lack of trust in SSE. Mr Allan's view was that by this point he felt that the lack of trust and confidence was the common thread running through all of the allegations. Although allegation 3 which mentioned trust and confidence related specifically to "the mediation and subsequent meetings with Emma Illingworth" Mr Allan wanted also to talk about the claimant's relationship with his managers in EPM. Mr Allan was aware that he had not been given any information about the mediation and his evidence was that he had no interest in discussing this. He felt that the only relevant point was the claimant's attitude to the people involved in the mediation.

216. The claimant made the point that he had asked Case Management to clarify whether the allegations of misconduct related to pre-1 July 2013 when he had gone sick or after that. He said that he had not had anything back from them and had assumed that the allegation related to his relationship with Emma Illingworth. He made the point that the time frames were not clear. Lorraine Hamdani stated that what the respondents were talking about was what was referred to in the fact finding investigation transcript. Lorraine Hamdani then clarified this further stating

> *"Let's put this in a bit of context Derrick: we've talked today already, Donald, about the fact that you've got concerns about the way in which your performance review was conducted. You're not satisfied with management, that they've done a good job in respect of that. You're not satisfied that the organisation that the organisation have addressed your whistleblowing issues. You're not satisfied that the company have*

*addressed your bullying and harassment through the correct policy. Then you've challenged the grievance chair and whether or not he was the correct person or length of time within the organisation to look into your grievances properly.*

*You've got a situation with the mediation: you've got a situation with Emma Illingworth. You've got a situation where you've challenged me personally on my understanding of policies and procedures. The whole way through this, Donald, we're getting an understanding that you have an issue with everybody that you've dealt with throughout each of the processes that we've addressed."*

217. The claimant responded making the point that his union official had been told prior to the mediation session that EPM management did not want him back. He stated that Mr Rowlinson had also been told this by Emma Illingworth during the grievance investigation. He indicated that if there had been any breakdown this was due to the respondents. There was then a brief discussion regarding the redeployment steps which had been taken. Mr Allan then intervened (page 757) stating

*"Mediation, Donald, is obviously about bridging that gap. I think in this case in terms of bridging the gap in terms of trust between management and yourself in terms of your day-to-day working relationship with them that didn't work that fundamentally broke down so that makes it very difficult to bridge . . . There has obviously been a big gap and big tension there and mediation was supposed to bridge that gap. I'm guessing that was something that figured in Emma's mind when she offered the redeployment option that actually it was going to be very difficult to regain that trust, that management-employee type of relationship that actually in your interests of wanting to get back to work it would have been better to be redeployed that's obviously something you never really considered or was it?"*

The claimant then stated

*"I'm not sure. I did apply for a few jobs through Emma. One of them was in regulation, it was already gone. I saw some other jobs but they were in energy portfolio management and it was clear that it was not going to be anywhere in portfolio management not just going back to my desk it was the whole shop floor that I couldn't go into. I felt I was under pressure to relocate. I felt it would do them damage if I didn't go back I don't have anything against these people but they clearly don't want me back. I think they've shot themselves in the foot with forcing me out and that's up to them I can't do anything about that."*

The claimant then made reference to other allegation of bullying against another individual which he said Emma Illingworth also chose not to investigate. Mr Allan then stated that he did sense that there had been a breakdown in trust between the claimant and the EPM team over a period of time. He went on to state

*"I think the mediation has obviously failed in that and I think from your side I can see why you would be able to regain that trust in the way that's been challenged but as I said I think the mediation failed on that it takes two to participate in that process, so . . ."*

The claimant then made the point that he had done research into mediation before he agreed to go. He said that it was not a magic bullet and it was unfair to simply say well that's failed, that's the end of the relationship after 15, 16 years of employment. Mr Allan then tried to move on to the next point stating

*"You failed to demonstrate SSE values by challenging colleagues in an aggressive and confrontational manner and failed to accept feedback. This comes up to the hierarchy of the relationship: do what managers ask you to do. The point made earlier on about managers asking you to break the law, for example. That to me is a very, very serious allegation that you would accuse managers of doing that."*

The claimant then intervened to say

> *"This is again going back to not clarifying these allegations clearly. I have taken this to mean the aggressive, confrontational manner with Emma Illingworth. Unless you're prepared to show me documents relating to the earlier investigation done by Tom Henery and David Small into my conduct, which later resulted in an informal warning being rescinded because there was no weight to it I assume then I'm only going to talk about this and the relationship with Emma if that's okay."*

Lorraine Hamdani intervened to say that Mr Allan should be allowed to put his questions. By this time Mr Allan was already setting out his views on the matter and criticised the claimant for over-challenging behaviour. During this time Mr Allan formed the view that the claimant was confrontational in his responses to Emma (page 760). During this exchange Mr Nutt stated that he felt he was correct to challenge SSE's HR processes in this manner as he thought they had been set up *"very appallingly".*

218. Mr Allan saw this as another example of the claimant's over-challenging behaviour and did not seek to investigate any of the claimant's allegations as to the way he had been treated by HR. Mr Allan in fact immediately defended Ms Illingworth's handling of matters. The claimant also indicated that he had expected his union Prospect to challenge matters more. Mr Allan noted the fact that the claimant was not represented by Prospect at the hearing and considered that this was another example of the claimant being unable to sustain a relationship with individuals who were attempting to assist him. The claimant's position was that his relationship with Prospect was something that was between him and his trade union and not a matter which his employer was entitled to enquire into. Mr Allan did not accept this. Mr Allan then asked about the claimant's relationship with his mentor. Again Mr Allan formed the view that this relationship had broken down because of the claimant. Mr Allan then moved on to discuss the allegations the claimant had made in his e-mail to Lorraine Hamdani (pages 720-721). He said he was raising this

*"Again similar to the last point Donald it's about these accusations you make on staff. Your way of doing that your timing of doing that I'll hand this one over to you first and then let Emma come in if she desires."*

The claimant responded regarding the mediation process. He made the point that he thought that it was set up with David Small and he only found on the day that it was David Fernie. He noted that no preparation had been done. He made various comments regarding the mediation and then went on to say that he felt he had been wrong-footed and that Emma had then shrugged her shoulders as though she was helpless to influence what had just happened in the session (page 765). Ms Illingworth then commented. She indicated that she decided it would be better to use an external provider and then that she then sought the services of Rowan House and *"quite frankly I then left it in their professional hands to run the process on behalf of SSE"* (page 766). She said that she knew that the claimant had assumed that David Small would be in the mediation but that he had not asked for clarity as to who would be in attendance. She accepted that he was surprised that it was David Fernie but made the point that the claimant had not actually asked for clarity as to who would be there. The claimant then made a general point about him feeling that Ms Illingworth had breached the confidentiality of certain things he had said to her. Mr Allan then sought to raise the e-mails point. The claimant indicated he still wanted to talk about the mediation and why it failed. He said that he had gone into it with very good intentions and then when it had failed he was being blamed. He made various points regarding the mediation which indicated that in his view Mr Fernie had been responsible for the breakdown of the mediation. He offered to give a more detailed account of the whole mediation process at which point Lorraine Hamdani intervened to say that that was not what the allegation was about. The claimant again made the point that he felt there was no confidentiality in the mediation process. Mr Allan asked Emma Illingworth about confidentiality and she referred to the fact that in advance of the mediation the mediator had indicated she would not be producing any report for SSE nor would she be prepared to give evidence. Ms Illingworth said she had no idea what was discussed in the session but had been told that the mediator did not recommend further mediation sessions. There was a further discussion in which the claimant accepted that he didn't believe that Emma Illingworth had misled him on purpose

regarding the mediation but he made the point that it had not worked out as he believed it would. Mr Nutt made the point regarding the tweet which the mediator had made after the session. Mr Allan formed the view that he could not understand why the claimant would say that Ms Illingworth had misled him. Mr Allan again made the point that he was not prepared to listen to what had actually happened at the mediation. He accused the claimant of breaking the rules of engagement by trying to mention what had happened. Mr Allan then tried to move on to the second part of the allegation which was that the claimant had accused Ms Illingworth of destroying his e-mail account. The claimant referred to an e-mail which Ms Illingworth had sent in March 2014 where she stated

> *"I did not realise that a Cirtis needed to be raised if someone was on long term sick. I will flag this to each HR team as I think this needs detailing in our sickness and absence procedure."*

The claimant indicated that he had put these comments directly to IT. He said that they had not taken the comments from Jeff Rowlinson well and that IT had pointed out that the reasons for suspending accounts are well-known in HR management circles. The claimant made the point that IT referenced hundreds of Cirtis requests generated each year for people going on maternity leave as an indicator of how HR know that e-mail accounts are routinely suspended. The claimant stated that the responsibility for his e-mail account instruction was seen to be contested between IT and Emma but pointed out that Ms Illingworth *"has already seemed to accept that it was her responsibility"*. The claimant then went on to say

> *"I am pleased that the company finally recognises the deletion of my IT account should be investigated, even though the concerns were raised over six months ago."* (page 773)

Ms Illingworth was then asked by Mr Allan for an explanation. She said that they had found out that the account had been suspended the time they had tried to institute working from home and later found out that some of it had been deleted. Ms Illingworth stated

*"I wasn't aware at that time that it's actually the line manager's responsibility to raise a Cirtis to make sure that an inactive account doesn't get deleted. That's where the point that Donald just quite rightly raised now, is it's not actually referenced in our sickness absence policy that that is a line manager's responsibility. So if a line manager hasn't experienced that before then they don't know what they don't know. That's why I think we need to make it clearer in our policies because quite honestly – and I've said this to Donald – as a senior member of the HR team I didn't even know that that happened. So I think there's a little bit of an education process that we need to go through."*

There was then a discussion regarding the Cirtis request which had been raised. Ms Illingworth did not refer to the fact that she had written to IT or spoken to them recently or that she was awaiting a response to her letter of 17 September. Mr Allan believed that this was another example of the claimant behaving inappropriately. During the discussion Ms Illingworth asked if the claimant had a copy of the e-mail he had referred to in March 2014 and he said that he did not have it with him. He referred to IT difficulties he had working from his home system.

219. At around 11:45 am John Ross the claimant's representative came back into the room his meeting having concluded. The claimant then referred to some of the difficulties the deletion of his e-mail account had caused. Mr Allan then said that he thought that they had been through all five points and he would ask if there were any other points either the claimant or Emma Illingworth wished to make (page 777). The claimant indicated that he still wanted more information about allegation 4 and that if this referred to his relationship with his colleagues prior to going off sick he required some more information regarding this. He said that he understood that there had been a previous investigation of this but not seen any material. Mr Allan then indicated that he would not be looking at any further material but would be making a decision based on what he already had. The claimant was advised that he would receive a copy of the recording in due course. The meeting finished at 11:50.

220. After the disciplinary hearing Mr Allan considered matters in discussion with Lorraine Hamdani. He took the view that at the hearing the claimant had questioned authority in relation to various matters. This included in relation to the guidance he had received from HR on SSE policy and procedure, the qualifications of the person appointed to hear his grievance or conduct the mediation and even his trade union. He considered the claimant had reacted defensively when pressed to explain these accusations. Mr Allan felt that whilst the claimant was trying to suggest that SSE had acted in a manner designed to target or deliberately disadvantage the claimant Mr Nutt was not in a position to provide any explanation of this and when pressed not give any specific information. Mr Allan's belief was that far from there having been a campaign against the claimant as he seemed to believe, that a different picture of significant effort having been made by his managers in EPM had arisen.

221. Mr Allan did not interview any individuals or examine any further documents. He formed these views based in large part on the behaviours which he considered the claimant demonstrated at the meeting with him. Mr Allan's view was that the way the claimant behaved at the meeting was something which had happened throughout the various processes which had taken place. Based on his experience of the claimant at the disciplinary hearing and having reviewed the pack of documents that he had been given by Case Management Mr Allan concluded that the relationship between the claimant and SSE had broken down irretrievably. He believed that the claimant's trust issues were not just connected with a certain individual or group of managers within SSE but he believed the claimant no longer trusted anyone who was in any way associated with the company. He decided that the claimant should be dismissed on the basis that there had been a total breakdown in trust and confidence sufficient to amount to some other substantial reason. In deciding that the claimant should be dismissed on the basis of some other substantial reason rather than gross misconduct he relied on discussions with Lorraine Hamdani. Mr Allan discussed with Lorraine Hamdani what he believed should be in the decision letter and Ms Hamdani drafted it.

222. Mr Allan sent a letter to the claimant on 9 October 2014 confirming the outcome. The letter had been drafted by Lorraine Hamdani but the final version was

approved by Mr Allan. Although Mr Allan had made his decision based on an overall assessment the letter does deal with the individual allegations. With regard to allegation 1 Mr Allan's view was that he had no confidence in the claimant being able to move on and accept the outcome of the grievance investigation that Keith Stainfield had carried out. He based this on what the claimant had said at the meeting on 1 August and at the disciplinary meeting. He believed that whilst the claimant would say he was ready to move on he would also claim he was being put under pressure to accept an unfair outcome. Mr Allan formed the view that the claimant did not think that Keith Stainfield had done a good job and believed that in that situation the claimant should have appealed. Mr Allan also based his decision on the content of the claimant's letter to Mr Stewart. In respect of allegation 2 Mr Allan's position was that he did not see the health and safety issue or the WFFT raised by the issue as being "huge whistleblowing issues". Mr Allan made this point several times while giving evidence. He believed that there was an additional incident which the claimant was referring to when he discussed breaking the law at the meeting on 1 August. He believed that from a business perspective he could not see why the claimant would have allowed such serious issues to go unchecked. It is entirely unclear what Mr Allan considered the serious issue was. He also believed this demonstrated the claimant's lack of trust and confidence in SSE.

223. Mr Allan did not refer to the formal whistleblowing policy at any point in his deliberations but believed that in terms of the policy the claimant was under a positive duty to speak up and whilst Mr Allan acknowledged the claimant had raised issues with management it was Mr Allan's view that if he was dissatisfied he should have escalated matters further.

224. Mr Allan referred to the transcript of the meeting of 1 August and the claimant's comment of; 'what do I do if they ask me to break the law?' He then in his letter repeats the incorrect version of what was said next which was given in the transcript despite the fact that he had listened to the recording and the recording shows that the words said were slightly different. He did not at this point have any idea from the claimant as to what was being referred to. With regard to allegation 3 Mr Allan's impression was that the claimant did not have anything positive to say

about SSE or anyone connected to it. In the letter he listed a number of individuals with whom the claimant raised issues and saw that this as evidence that the claimant's relationship with SSE as an organisation had broken down. With the exception of Emma Illingworth and Lorraine Hamdani Mr Allan had not spoken to any of these individuals before coming to this conclusion. Mr Allan considered that the claimant's request that Lorraine Hamdani and Case Management provide him with proper specification of the allegations against him was an example of the claimant's unreasonableness and he considered that one of the justifications for his decision was the claimant's questioning the external mediator in respect of her adherence to the terms of confidentiality. Mr Allan concluded that it would not matter who the claimant was working with but that if he did not agree with their opinion on a position on a matter or if he was challenged by them there would be concerns raised about their ability and conduct etc. With regard to allegation 4 Mr Allan decided that the claimant had failed to demonstrate SSE values by challenging colleagues in an aggressive and confrontational manner and failing to accept feedback. As evidence for this he considered that the fact the claimant had not accepted his annual appraisal was justification for this decision and as was the meeting on 1 August and the claimant's e-mails to John Stewart and Emma Illingworth and also the mediation process. It would appear that despite the fact that he had not allowed the claimant to discuss what took place at mediation Mr Allan believed that the claimant had behaved in a confrontational and aggressive manner and failed to accept feedback at the mediation meeting.

225. With regard to allegation 5 Mr Allan noted that during the hearing the claimant indicated that he did not think that Ms Illingworth had deliberately misled him however he referred to the concern expressed at the meeting about the tone and manner in which the claimant had written this e-mail and that it had been interpreted as very direct and accusatory. Mr Allan found this to be confirmation of the claimant's generally confrontational approach. Mr Allan's view was that regardless of what the claimant intended to convey he needed him to recognise that his use of emotive language could cause unnecessary problems with colleagues and managers. At the end of the day Mr Allan's decision was that although his brief had been to review whether he believed there was sufficient evidence to uphold allegations of gross misconduct he would not in fact do this.

He decided that the root cause of the issue was a breakdown in trust and confidence between the claimant and SSE and that the claimant should be dismissed for this reason. The claimant was therefore dismissed with 12 weeks' notice.

226. The letter of dismissal was lodged (pages 781-785). It was sent on 9 October, the same day as the hearing and received by the Claimant on 13 October. The claimant was advised of his right of appeal. He was also sent on 27 October 2014 a copy of the recording of the disciplinary hearing.

227. On 20 October the claimant wrote to Holly Wishart of the respondents' Case Management section appealing the decision. In preparing his appeal the claimant referred to the disciplinary procedure which he had been sent on two occasions by Case Management during the course of the disciplinary proceedings. The appeal process in this document states

> *"**Right of Appeal***
> *Following a disciplinary interview, an employee has the right of an appeal against the decision of the Manager, and/or against the severity of the penalty imposed.*
> *a) If the employee wishes to appeal, written notice, stating the ground for such an appeal, must be sent to the specified Manager within five working days of receipt of notification of the decision.*
> *b) The appeal hearing shall be heard as quickly as possible following receipt of the notice of appeal.*
> *c) The appeal will be heard by a higher management official, not previously involved in the proceedings, who will be able to confirm or revoke the original decision and confirm, revoke or vary the original penalty.*
> *d) Where the appellant is a member of a recognised trade union, the higher management official shall be assisted by two assessors nominated respectively by, and wherever practicable from, the Company and Trade Unions' Members of the JNCC.*

e) *The result of the appeal shall be confirmed in writing to the individual within three working days."* (page 138)

228. The claimant assumed from paragraph 10 d) that his appeal would be heard by a member of senior management assisted by two assessors nominated respectively by the company and the trade union members of the JNCC.

229. The claimant's letter of appeal was lodged (pages 791-793). He set out a number of points. It is probably as well to list these.

*"1. The confusion that has ensued over a period of over 18 months*
*The events leading to the hearing were a confused by the simultaneous operation of a number of processes. I think the record amply demonstrates that nobody involved had a clear understanding on matters such as which process was operating at different times and in relation to our correspondence, the roles and responsibilities of the parties involved. Views were expressed by different persons on the assumption of the protections and expectations of one process, only to emerge elsewhere in the context of different processes.*
*2. Proof required to justify penalty*
*The Disciplinary Hearing established five charges which were required to be "proved" to amount to gross misconduct.*
*Even if they could be proved, the penalties are required to be proportionate and there is a range of penalties available. Clearly, dismissal would be considered to be a severe penalty and implies gross misconduct of the most severe nature.*
*It is very clear from the Outcome Letter that the Disciplinary Hearing has failed to prove gross misconduct. If it had done so, it would have been clearly asserted as the grounds for a penalty, and then a proportionate penalty would have been imposed (subject to appeal).*
*The Disciplinary Hearing had practical challenges in seeking to demonstrate that any of these tests had been met and I have responded to individual points below. In addition, the Outcome Letter's failure to acknowledge any mitigation is disproportionate and unjust as "penalties*

*should be commensurate with the degree of seriousness of the misconduct: and account must be taken of the employee's service, work record, previous behaviour and other extenuating circumstances".*

*3. The legitimacy of the decision*

*Instead of asserting that gross misconduct has been proved, the Outcome Letter seeks to justify a penalty thus: "it is very clear to me that SSE's relationship with you has reached a point where there has been an irretrievable breakdown in trust and confidence and I feel that your position with SSE is untenable".*

*This is not a legitimate reason for imposing a penalty. The stated criteria of the Disciplinary Hearing and confirmed in the Outcome Letter is: "if Gross Misconduct was proven, the result of the disciplinary hearing may be the termination of your contract of employment." As gross misconduct has not been proven, the penalty does not apply.*

*The Outcome Letter states: "it is very clear to me that SSE's relationship with you has reached a point where there has been an irretrievable breakdown in trust and confidence". I wish to make it clear that this may be SSE's position, but it is not mine. I was willing to return to work after my sickness absence.*

*Please note that if SSE has lost confidence in me, this does not amount to gross misconduct by me and this alone fails to justify any penalty being imposed on me.*

*4. The tests*

*Regarding the tests required to be proved in order to support a penalty:*

*1) You have failed to accept the findings of a recent grievance investigation, despite having not appealed against the findings.*

*This is not true. I have accepted the findings and this is on record. I believe there is an issue with SSE's interpretation of correspondence "about process" being mistakenly read as correspondence "in process".*

*2) You have referred to concerns which would be covered under Whistle Blowing, but you have failed to declare these to SSE.*

*This is not true and I believe SSE is still suffering from confusion over multiple processes resulting in ambiguity over roles and responsibilities.*

*3) The relationship, trust and confidence between you and SSE has broken down. This was demonstrated during a mediation session and subsequent meetings with Emma Illingworth.*

*As I mentioned above, this is not my position and I demonstrated this when I planned to return to work. SSE has not demonstrated that its position amounts to misconduct by me.*

*4) You have failed to demonstrate SSE values by challenging colleagues in an aggressive and confrontational manner and failed to accept feedback.*

*I do not believe this has been demonstrated to the extent that SSE can justly classify anything as gross misconduct, or that dismissal is proportionate. There is an onus on SSE to identify specific examples of behaviour which is outwith the bounds of behaviour which can be expected from time to time in business, and that behaviour was intentionally harmful to SSE.*

*5) You have made allegations against Emma Illingworth including she misled you on the mediation process and that she destroyed your email account.*

*I do not believe SSE has demonstrated this to be gross misconduct. This was expressed in private correspondence, in the circumstances where my GP saw fit to sign-off sickness absence for stress. It would ordinarily be categorised as a misunderstanding and an explanation given – SSE has done this and I have accepted. Even if SSE considers this to be misconduct, it is not demonstrated that this is "gross" or that dismissal is an appropriate penalty.*

*The allegations were missing from the initial investigation, not mentioned in the fact finding report produced and presented by Emma Illingworth and given this why further investigations into the allegations were not carried out, as per section 6 and 8 of the company's disciplinary process. These allegations were identified as "a serious issue, which would indicate, if proven that the relationship is untenable between the Company and you as an employee. Making a false allegation in bad faith is an act of gross misconduct warranting dismissal in its own right" by Lorraine Hamdani on the 19th of September and*

*again by her during the disciplinary hearing. At the hearing the allegation regarding my email account was accepted as both being true and not at all made in bad faith.*
*Would you please confirm your receipt of this email.*
*I look forward to hearing from you soon."*

230. Shona Williams of the respondents' Case Management department wrote to the claimant on 21 October acknowledging this.

231. On 3 November the claimant wrote to the respondents seeking copies of various policy documents he also indicated that he had put in a subject access request. He said that he needed the documents with regard to key points raised in his disciplinary hearing. This e-mail was lodged (page 795).

232. At some point around 16, 17 or 18 November the claimant was in correspondence with Case Management and enquired as to who the assessors were going to be to assist the manager. This prompted a response from Case Management in the form of an e-mail dated 19 November 2014 from Holly Wishart. She stated

*"Hi Donald*
*Apologies, the disciplinary procedure sent over was incorrect and applies for joint agreement staff. Please see attached standard conditions document for personal service agreement staff which details a disciplinary procedure.*
*You will notice that up until the point of appeal section both policies are exactly the same and we have accurately followed the disciplinary procedure. The only difference in the two policies is the JNCC appeal section. For the avoidance of doubt, personal agreement staff are not entitled to a JNCC panel appeal".*

The document attached was a copy of the respondents standard conditions which are attached to personal service contracts. These were the standard conditions which applied to the claimant since he was on a personal contract and was not governed by JNCC terms and conditions. So far, in the whole process since

before the claimant went off sick all of the policies and procedures which had been handed to him by HR and management were those which applied to JNCC staff and not his personal contract. With regard to disciplinary procedure this is set out on pages 7, 8, and 9 in 10 numbered paragraphs. The paragraphs are not identical to the paragraphs set out in Appendix 2 Disciplinary Procedure lodged by the respondents at page 136-138 which is the document that was sent to the claimant during the disciplinary process against him. The provision of the personal contract policy regarding investigation is set out in paragraph 5

*"Where misconduct is suspected an initial investigation into the circumstances surrounding the incident shall be undertaken. Where this involves one or more employees, the individuals will be informed of the reasons for the investigation. If the company is satisfied that misconduct has occurred then a disciplinary interview will be arranged.*

***6. Immediate Suspension from Duty***

*In particularly serious cases where the company considers the alleged misconduct is incompatible with the individual remaining at work the individual may be suspended immediately pending a disciplinary interview. The question of payment for the period of suspension shall be determined by the outcome of the formal interview.*

***7. Disciplinary Interview***

*(a) Prior to the disciplinary hearing the individual concerned shall be notified in writing at least three working days in advance of the nature of the allegations and informed that they have the right to be represented by a fellow employee or a Trade Union representative.*

*(b) At the interview the alleged misconduct shall be explained to the individual and they will be given the opportunity to present an explanation of events.*

*(c) Should the individual at this stage admit the misconduct the company will determine the penalty imposed which will depend on the seriousness of the misconduct.*

*(d) If the individual does not admit misconduct the company will consider the situation in light of all the information available including witness statements, relevant documentary and other evidence. A decision will be*

*made or further investigations carried out. If the company is satisfied that misconduct has occurred then an appropriate penalty will be imposed."*

233. Under right of appeal the document states

*"(a) Following a disciplinary interview, an employee has the right of an appeal against the company's decision and/or against severity of the penalty imposed.*
*(b) The appeal will be held by a higher management official, not previously involved in the proceedings who will be able to confirm or revoke the original decision and confirm, revoke or vary the original penalty."*

There is no provision for assessors to sit with their manager.

234. Interestingly the standard conditions for personal contracts also contain a section on grievances which is considerably different from either of the two policies which it would appear the respondents had adopted to date (pages 139-140 and pages 476-477). The grievance procedure is short extending to only three paragraphs and states

*"If an employee had agreements about any matter relating to his employment he should in the first instance raise the matter with his immediate manager.*
*2. Failing a settlement of the grievance a more formal discussion should be arranged involving the employee and a manager nominated by the company. The manager nominated by the company will normally be a more senior manager and or an HR manager.*
*3. If the employee is dissatisfied with any subsequent action or decision taken as above then the matter can be referred to a further formal discussion with a higher level of manager than involved previously as nominated by the company."*

235. In any event it would appear that Mr Allan and Ms Hamdani had understood at the time of the decision to dismiss the claimant that they were acting under the policy set out at pages 136-138 and not under the actual policy which applied to the claimant.

236. It would also appear from the evidence of Ms Illingworth that the respondents' normal procedure is that even in a disciplinary appeal where the JNC terms and conditions apply the relevant paragraph regarding appeals is interpreted as meaning that assessors will only be appointed where the employee is a trade union official rather than a trade union member.

237. On 18 November, the day before writing to the claimant to advise him that the new policy would apply, the respondents wrote to the claimant inviting him to a disciplinary appeal hearing. It was to take place on 21 October 2014 before Alan Broadbent who at that time was the respondents' Director of Engineering. Once again Lorraine Hamdani was to be in attendance as procedural adviser. The letter of invitation was lodged (page 796-797). The claimant was advised of his right to be accompanied. Although the date of the hearing was said to be 21 October this was in fact inaccurate and the claimant was advised by Case Management that the actual date was 20 November.

238. Lorraine Hamdani asked Alan Broadbent to deal with the appeal. He had had no previous contact with the claimant and no knowledge of having had any contact with Mr Small or Mr Fernie. He was a senior member of the respondents' staff having responsibility for around 300 engineers. These included control room staff who worked on a shift pattern.

239. In advance of the hearing Lorraine Hamdani sent Mr Broadbent a pack of papers. These included Emma Illingworth's fact finding report with the various attachments lodged the e-mail from the claimant to Lorraine Hamdani (pages 720-722). Interestingly, although Mr Allan had understood this e-mail was sent on 15 September Mr Broadbent's understanding was that it was sent on 9 September. For some reason the e-mail appears to have been copied to each of them without the date information and the date information was not provided to the Tribunal. He

was also provided with the letter inviting the claimant to the disciplinary hearing, the disciplinary outcome letter, the claimant's e-mail setting out his points of appeal and the letter inviting the claimant to the hearing. Interestingly he was also provided with the SSE's disciplinary procedure for JNC staff (pages 136-138) and the employee rules. At no time prior to the appeal hearing was he advised by HR that in fact they had now come to the view that the disciplinary procedure which applied to the claimant was different from the JNC procedure since he was on a personal contract.

240. In advance of the hearing Mr Broadbent read Mr Allan's decision letter. His understanding was that Mr Allan dismissed the claimant because he believed there had been a fundamental breakdown in the relationship of trust and confidence between the claimant and SSE. He believed that Mr Allan had not dismissed the claimant on grounds of gross misconduct. Mr Broadbent had not come across this approach before and in advance of the hearing he asked Lorraine Hamdani if this was an approach which Mr Allan was permitted to take. The advice he received was that it was permissible for a disciplinary hearer to take a decision to dismiss owing to a fundamental breakdown in trust and confidence if that was the conclusion that they reached having considered all of the evidence. He also asked if it was acceptable for Mr Allan to take into account evidence which only arose at the hearing and he was told that this was also permissible.

241. The appeal hearing duly took place on 20 November. Lorraine Hamdani attended along with Mr Broadbent. The claimant did not bring a representative and was not accompanied. The meeting was recorded and a transcript of the meeting was lodged. The Tribunal generally accepted this to be accurate with the exception of a number of paragraphs where the transcriber was unable to follow the conversation.

242. At the outset Mr Broadbent asked the claimant to present his appeal points along with any additional evidence which the claimant wanted Mr Broadbent to consider. The letter inviting the claimant to appeal had not indicated that he was entitled to lead evidence. The claimant advised that he had not thought that he was going to be required to present and expressed concerns regarding the format of the hearing. He made the point that he had not been given proper information about

SSE's procedures including the grievance, disciplinary and appeal. He also mentioned that he had only recently discovered that he was on a personal contract and that the JNC procedures did not apply. Lorraine Hamdani intervened to indicate that the procedures were essentially the same (page 800). She said the only difference was that he was not entitled to a panel appeal hearing because he was not in a joint agreement contract but on a personal contract. The Tribunal would record that in our view the two policies are clearly different. The claimant then made the point that there were large differences between the grievance process under the personal contract and under the JNC contract. Lorraine Hamdani's response was *"we are not here to talk about your grievance"*. The claimant made the point that it was relevant to the appeal if the entire grievance process had been flawed from the beginning Mr Broadbent indicated that he had not received the e-mail from Holly Wishart which was quite recent but said that he would be basing his decision on what the claimant had actually written based on the letter he received in terms of the outcome of the disciplinary hearing. Mr Broadbent did not take account of the fact that whilst the claimant had written his letter on 20 October he had only been advised by Case Management on 19 November that in fact the JNC procedure did not apply. The claimant made the point that he felt the processes were unclear and that he had not been treated as per the processes in his personal contract during the process possibly right the way back. The claimant then went on to advise that he felt there had been utter confusion for the last 18 months and that this had materially affected the outcome of the disciplinary process. He made the point that part of the disciplinary process was to talk about the grievance outcome and noted that the processes were entirely different under the personal contract conditions (page 801). The claimant then made the point that what the personal contract procedure says is that if an employee is dissatisfied it can be referred to a further formal discussion with a higher level of manager. He said this was entirely different from an appeal under the JNC procedure. Mr Broadbent asked the claimant if he could say if the outcome would have been different if a different procedure had been followed. The claimant said that he could not speculate.

243. At the end of the discussion Mr Broadbent formed the view that it was hard to get a clear answer from the claimant and difficult to follow what he was saying. The

claimant then made the point that he had made allegations of bullying and harassment which he said had occurred because he had raised concerns about health and safety and about financial irregularities. Mr Broadbent at that point did not know what the claimant was referring to. The claimant then started talking about the audit committee. He also said that his concerns had not made it on to the whistle blowing register. Mr Broadbent was unaware of the existence of a whistle blowing register and was also unclear what, in general, the claimant was talking about. The claimant then made the point that these concerns had not been properly dealt with and again made the point that it would appear the wrong procedure was being followed. Mr Broadbent tried to ascertain why if the claimant was dissatisfied with Mr Stainfield's grievance outcome he had not appealed. The claimant indicated that he had decided to make a leap of faith. He indicated he had been told in the grievance outcome that things were going to be re-wound and sorted out and that he could go back to work on that basis. He indicated that he felt that two days later he had received an e-mail which seemed to reverse that and left him feeling exposed. Mr Broadbent tried to burrow down into the claimant's reasons but was still unable to understand what the claimant was saying. He felt the claimant was moving backwards to talk about the procedures again.

244. During the process the claimant made a reference to Emma Illingworth's fact finding report and stated that he did not consider that this was impartial. He made the point that it was headed "Against Donald Nutt". He did this in the context of dealing with the policy where it states that the investigation will be carried out by an impartial manager. There was then a somewhat fruitless discussion where the claimant was making the point that under the personal contract policy the manager did not have to be impartial whilst under the JNC policy the manager was supposed to be impartial. The claimant again made the point that although Holly Wishart states that the disciplinary process in the JNC agreement and the personal contract are the same up to the appeal stage this is not correct and the grievance procedure was entirely different.

245. Mr Broadbent then asked the claimant if he had received advice from the union about what he was entitled to in terms of appeal processes and disciplinary procedures (pages 809). The claimant indicated that he considered this to be

private and confidential. Mr Broadbent indicated that the claimant was at an appeal hearing and that he would bear this response in mind.

246. There was then a discussion about the fact that Mr Allan had dismissed the claimant on the basis that he believed trust and confidence had broken down rather than for gross misconduct. The claimant again made the point that he was willing to come back and work. Mr Broadbent indicated that in his view it was clear that the reason the claimant had been dismissed was because Mr Allan came to the view that *"it is very clear to me that SSE's relationship with you has reached the point where there has been an irretrievable breakdown in trust and confidence"*. The claimant then indicated that to confirm his position regarding the grievance investigation they would have to talk about the grievance investigation. Mr Broadbent stated that he could talk about it but it was not necessarily relevant. He felt they had already spoken about it. Mr Nutt made the point that Derrick Allan had not allowed him to talk about the grievance. There was a discussion about whether or not Mr Allan and/or Mr Broadbent had read the grievance document. In this part of the hearing the claimant made the point that matters were fairly complicated. Mr Broadbent did take from the discussion that the claimant's understanding was that the issues raised in his 2012/13 performance appraisal would be put aside and that he would be able to go back into the workplace and start again from scratch but that it would appear this would not be happening. The claimant made the point that he did not think SSE had adequately investigated his concerns about fatigue in the EMC team. The claimant referred to the fatigue index and also referred to the whistle blowing register and the fact that his raising the subject was not on it nor had it been referred to the audit committee. He made it clear that he did not feel his concerns had been properly investigated. Mr Broadbent indicated that in his view it was clear from the documents that the matter had been investigated and closed down (page 817). The claimant also mentioned WFFT and the Infinis contract. By the time the claimant was asked if there had been an investigation he said that he had been off 12 months and didn't know. He confirmed that he was pretty sure (80%) that he had told Keith Stainfield and believed he had raised it with Emma Illingworth. The claimant went into a degree of detail regarding his conversation with David Small over the Infinis contract (page 818). It is not clear whether, at the time, Mr Broadbent considered

that the claimant was saying he had made some sort of protected disclosure in connection with this.

247. Mr Broadbent then moved on to the issue of trust and confidence. The claimant made the point that he had been with the company since 1998 and had never had any warnings or disciplinaries but the issues had happened on the back of management change.

248. Mr Broadbent then moved the conversation on to the fourth allegation about the demonstration of SSE values. The claimant referred to a presentation he had made to David Small and David Fernie some years previously about SSE values but he had not taken it with him. The claimant made the point that the meeting on 1 August was supposed to be a back to work meeting. He indicated that he felt that it had some other motive. He was asked what he thought the motive was but indicated that he didn't want to speculate because it could sound as though he was making an allegation. The claimant made the point that his union rep was also concerned about the way the meeting went and Mr Broadbent asked why his union rep was not with him today if that were the case. The claimant asked if Mr Broadbent was querying his relationship with the union and Mr Broadbent stated "not at all" (page 821). He did indicate that he thought the union representative might have been here today to support your appeal (page 822). The claimant made the point that there were things which were contractual and private and he didn't feel that he could say and he also said that he might be prepared to say more if Lorraine Hamdani was not in the room and he knew that Prospect had a business relationship with HR.

249. Mr Broadbent then moved on to the fifth point. He said that he could not understand what the claimant was getting at with the two paragraphs he wrote about that. The claimant made the point that this allegation had been added by Case Management without there being any process of investigation or a fact finding report. He indicated that there were lots of inconsistencies in Emma Illingworth's fact finding report and that *"if you matched the events with what has actually happened and even in the report there is lots of inconsistencies"*. He made a number of criticisms of Emma Illingworth and pointed out she had been

involved right from the beginning. He said that what he said about the destruction of his e-mail account echoed what Mr Rowlinson had said and that he had used the term *"the unwarranted destruction of Donald Nutt's IT account"*. Mr Broadbent asked where this had been said and Mr Nutt indicated it was in an e-mail to Lorraine Hamdani but that he had not lodged it. He said that Mr Broadbent ought to be able to find it and also look at what Jeff Rowlinson said in the hearing. He said that there was no tone in his e-mail to Lorraine Hamdani but that he had simply said what had happened. He made the point that he said he was misled about mediation. He also made the point that as someone who was regulated by the FCA he understood that the respondents were under an obligation to keep his e-mail records for six years. He could not understand why they could not be reproduced. He accepted that Ms Illingworth had not gone into delete it but that she was responsible for stopping its destruction and that she didn't do this (page 824). Mr Nutt mentioned mediation and indicated that he felt that *"I don't think people are as well trained as maybe they might try and tell you that they are …"* He said he didn't want to be critical of the mediator because she has her own contract with SSE. He gave the history of how mediation was first discussed. He said that the advice he received from Jeff Rowlinson was that if he went into an investigation *"your career will be ruined, your relationship will be over with these people and it will be awful. It will be difficult for you"*. He said that the mediation was set up as an alternative to an investigation. He said that was the choice he had been given. He referred to his initial meeting with Emma Illingworth. He indicated that he had broken down in tears. He said she had given him the choice of investigation or mediation. He said he thought he was going to be mediating with David Small who was his line manager but that it was David Fernie. He said that that was important for a lot of reasons. He made the point that the person who is in mediation has to have the power to dissolve the dispute but that at that point his dispute was with David Small. He made the point that what it was supposed to be about was a personality clash with Mr Small and that he had been told it was a relationship breakdown. Mr Nutt indicated he didn't want to go into the mediation in detail but could if Mr Broadbent wanted him to. Mr Broadbent said that he did not want any particular detail. He said that there was e-mail correspondence between himself and Emma and Jeff and that he had done research as to what he would be agreeing to. He understood there were lots of things which one should

do ahead of mediation and none of these things were done. He indicated that having come back and agreed to mediation Mr Rowlinson then made a crack about having to go and check what it meant and in the conversation that followed his view now was that neither Mr Rowlinson nor Emma Illingworth knew all that much about mediation. Mr Broadbent pressed him as to what he meant by saying that Emma Illingworth misled him and the claimant said he thought he was going to go with David Small and he got David Fernie. He agreed that she had not specifically said David Small. He then went on to say there was *"a bit more to it than that"* (page 827). He made various points regarding the mediation.

250. The discussion moved on to the claimant's Occupational Health records and he expressed concern that they had been made available to Mr Broadbent and Mr Allan. He indicated he felt it was a misuse of data. He asked Mr Broadbent to take on board his points regarding whistle blowing and the fact that his job was regulated by the Financial Conduct Authority. He said he believed there was a lot of contractual law that had gone wrong and that he was confused and had been ill. He said there was no reference in the decision to his 16 years of service or to his illness. Mr Broadbent asked him what his expectation was and the claimant indicated that he was preparing for an Employment Tribunal and he believed he had a very strong case because a lot of wrong things had happened. He felt both the decision and the penalty imposed on him were wrong. He said he felt he had a lot to offer the company and that his skills were in energy trading. He was asked what would be his preferred option and he said

> *"I don't think these people are horrible you know. They did something horrible. There's a lot of pressure on that department. We had to, we were already on what could be called not a shoestring budget but a tight ship. We had to get tighter under the cost reduction that the company put out there. That therefore is difficult for managers to implement and difficult for employees to receive regarding workloads, regarding stresses, aspirations, you know there might be less management jobs so I don't blame them and I think they have all been caught up… all four of us have been caught up in this horrible cycle of destruction and unfortunately because I am the trivial one out of the whole lot I have had*

*everything put on me and I actually fell that it would have been really good to just get me back in there and show the world, show energy trading that the company took a lot at itself and said something went wrong and we brought it back. What I am conscious twitchiness peoples discomfort and I am pragmatic and I like to think I could move on elsewhere but I don't know, I genuinely don't know what transferable skills I have. …..*

*And, so, I was naturally pushing to get my old job back, it was the only thing I had was the contract so I don't know. There's a lot in that particular question you asked me and I don't know what is best for them, best for me, the best for SSE or energy trading."*

251. Mr Broadbent advised the claimant that he would consider matters and that he would also replay the recording and that he would give the claimant a decision in writing. The meeting ended at 13:20 having started at 11:30.

252. After the meeting Mr Broadbent considered what had been discussed. He read the disciplinary and grievance procedures for both the SSE joint agreement contracts and personal contracts. He was already familiar with the JNC procedure and had his own copy of the personal contract terms and conditions because he is on a personal contract. He did not speak to anyone else or carry out any further investigation. He decided to uphold the original decision. He advised Lorraine Hamdani and Holly Wishart in Case Management of his decision and a letter was prepared which he approved. The letter was dated 28 November 2014 and was sent out to the claimant. Mr Broadbent's view was that, based on the evidence he had seen together with the discussion he had had with the claimant at the appeal hearing he believed that there was more than enough to demonstrate the continuing relationship between the claimant and SSE was untenable and that trust and confidence had irretrievably broken down.

253. The letter dated 28 November 2014 was lodged (835-838). Mr Broadbent went through each point of appeal. He indicated that he was satisfied that the principles and processes of both the JNC agreement and the Personal Services Agreement in relation to Grievance and Disciplinary Procedures were the same and that there

was no material effect on the outcome of either. With regard to the second point he stated that

> *"It is my understanding from reading this that he has chosen to dismiss you for some other substantial reason, which is categorised as one of the 5 potentially fair reasons for dismissal.*
> *This is suitable in circumstances where there have been personality conflicts which significantly impact on the team dynamics, working environment and these conflicts have a negative effect on work and morale.*
> *From reading the evidence presented and considering the mitigation presented specifically in relation to the list of relationships which have been detrimentally affected, I agree with Derrick Allan's findings that he had no trust and confidence that if you did make a return to work in a different business area that the same type of issues would not appear again with other members of staff, therefore dismissal was the only alternative."*

With regard to point three he indicated that his response to point two covered this point. With regard to point four he indicated that he did believe there was documentary evidence which demonstrated the claimant had not accepted the findings of the grievance. He referred to the claimant's letter to John Stewart and the transcript of the meeting of 1 August. He went on to state

> "**Regarding allegation 2 – *You do not believe that you failed to declare concerns which would be covered under Whistle Blowing and you believe that SSE is still suffering from confusion over multiple processes resulting in ambiguity over roles and responsibilities.***
> *I have investigated the concerns you raise within this point and you were unable to provide me with any substantive evidence detailing the alleged breaches of the law during the hearing that would counter argue this point."*

He then went on to deal with the claimant's assertion that the relationship of trust and confidence had not broken down and stated

> *"From reading through Derricks findings on the matter in relation to the number of relationships that have been negatively portrayed by you and significantly impacted, there is sufficient evidence for me to agree with his opinion that there was no trust and confidence on your part in these individuals and there was no trust on SSE's part that if you did make a return to work that the same type of issues would not appear again with other members of staff."*

254. With regard to the point made by the claimant that he did not believe that his challenging had been demonstrated to the extent that SSE could justly classify anything as gross misconduct Mr Broadbent stated

> *"As I have previously mentioned in Point 2, these was detailed in Derrick's findings as a break down in trust and confidence as opposed to an act of gross misconduct which I agreed with."*

With regard to the point made by the claimant that

> *"**relating to making allegations against Emma Illingworth including that she misled you on the mediation process and that she destroyed your e-mail account, you again do not believe that SSE has demonstrated this to be gross misconduct.***
> *… As I have previously mentioned in Point 2, this was detailed in Derrick's findings as a break down in trust and confidence as opposed to an act of gross misconduct, which I agree with."*

255. He then went on to say

> *"I do find the allegations against you well founded, I have considered each one and find that each one is a serious issue in its own right, but accept if there was the first allegation by itself it may have been a*

*different outcome of a final writing warning, but each of the allegations show the relationship is untenable because of your behaviours and views, and the employment relationship has broken down. We can no longer trust you as an employee and I uphold the decision to dismiss for some other substantial reason and I note you were paid notice."*

256. There was no further right of appeal. The claimant was paid twelve weeks' notice. The hearing did not hear evidence regarding the claimant's mitigation of loss since this will be dealt with at a future remedies hearing.

**Matters Arising from the Evidence**

257. The Tribunal accepted that all of the witnesses were genuinely trying to assist the Tribunal by giving truthful evidence as they saw it. There were a number of instances where the evidence of various of the respondents' witnesses changed after cross examination. The Tribunal considered that this was usually because of a genuine difficulty in remembering the precise details of something which had happened, in many cases, a considerable time previously and also the fact that at the time these matters had not seemed particularly important to that witness. It was also clear that many of the witnesses who we would have expected to maintain good and clear records to assist their recollection had not done so. In general terms we found the evidence of the claimant to be credible and reliable. It was clear that these matters had been central to the claimant's thought processes for a considerable period of time and, as the Tribunal went on, it became clear to us that in most circumstances the claimant's recollection of events was more accurate than that of the respondents' witnesses. On these few matters where there remained any factual dispute we preferred the evidence of the claimant to that of the respondents.

258. With regard to the various meetings that were recorded we have the benefit of the transcripts however during the course of listening to the recordings and comparing them with the transcripts it became clear to us that in some instances the person transcribing the recording had made an error in transcription. Most of these errors were inconsequential. The claimant had gone through the exercise of producing a

full list of errors of the transcription of the meeting on 1 August. We considered the claimant's amendments to the transcription lodged by the respondents to show the correct position. The claimant did not go through this exercise in respect of the grievance hearing, the disciplinary hearing or the appeal hearing. Where appropriate and where the matter was raised in cross examination the alterations were marked on the Employment Judge's copy of the transcription and in the few cases where the difference was of any relevance this has been mentioned in our finding in fact.

259. One issue which the Tribunal became extremely conscious of as the hearing went on was that it was clear that during much of the process, and certainly during the later stages of the process, the members of management tasked with looking in to the claimant's complaints were labouring under the difficulty that they were coming in to the process halfway through and in many cases had absolutely no idea what the claimant was referring to when he raised various issues. The Tribunal panel, having had the claimant go through a case management exercise and having heard many days of evidence had the considerable advantage, in interpreting the transcripts, of some prior knowledge of what it was that the claimant was getting at. The Tribunal was conscious that it would therefore be unfair to make any criticism of those managers dealing with the claimant at the later stages on the basis that they did not understand the claimant's case. The Tribunal quite accepts that we had the advantage over them in having spent many many hours hearing from the claimant.

260. With regard to specific points made in our findings in fact it is probably as well to basically summarise our view on the evidence given by each witness.

261. Mr Small was the first to give evidence. He spoke of his background in SSE and having done the claimant's previous appraisal whilst David Fernie was his Line Manager. He spoke of taking over as EMC Manager. Discussing the previous appraisals he stated that from his recollection Mr Nutt would sometimes challenge things and would argue for argument's sake. He said that sometimes the claimant trying to get the point across would not come across clearly and that it might be long and convoluted. With regard to the 2010 appraisal he spoke that there were

sometimes moments of a lapse in standards and grumblings of work not being completed or overrunning handovers. He had absolutely no recollection of the conversation with the claimant regarding WFFT. He was however able to advise the Tribunal of the background regarding the WFFT contract. He took us through the e-mail exchange relating to shift work and passed on his view that Mr Fernie had checked with Mary Powell of "Occupational Health" and that the shift pattern was legal. He indicated that the claimant's e-mail after the process was complete was somewhat typical of the claimant and he believed that it showed the claimant was unwilling to accept findings. He had not been aware of Martin Laing's e-mail. He mentioned the period after he took over as one where things were somewhat unsettled. He said that several team members came to him and raised concerns and that the claimant also came to him and raised concerns. He referred to people finding the claimant was argumentative. He specifically mentioned Martin Laing and Angie Kennedy. He then went through the steps he had taken to advise the claimant of his concern and the appraisal process. He made clear that he was acting on what he believed were instructions from Mr Henery of HR. He indicated that he wanted to be sure that he was carrying things out in the correct manner. He referred to various meetings with the trade union and Mr Henery. He referred to the various e-mails about the fridge issue and indicated that he considered this was a trivial issue. His understanding was that David Fernie had made the decision to remove the claimant from shift work. His understanding was that the reason for this was that David Fernie could see relationship problems between the claimant and Mr Small and there wasn't much time to sort things out with the claimant's shift pattern. He made clear this was to be a temporary solution to give him access to management and to his union and HR. He gave evidence regarding the claimant's personal difficulties at this time and his lack of knowledge of the reason for the claimant's request for a shift change. He was unable to say who it was who had made the decision that the informal warning was to be rescinded but indicated that it was not him. He referred to the grievance process instigated by the claimant. He stated that following the claimant going on sick leave there was virtually no contact and that thereafter the Claimant was managed by Emma Illingworth. He said that he had completed the Occupational Health form. He indicated that he had prepared the second appraisal document but that he was not sure what had happened to this. He denied telling the claimant he should not

appeal the appraisal outcome. He felt that by the time the claimant had gone off there had been little progress since January. Mr Small's cross examination took place after the evidence in chief of Martin Pibworth due to difficulties with Martin Pibworth's availability. In cross examination he was taken through the shift debate. Much of his evidence responses to the detailed questions by the claimant was that he could not recall. The claimant put to him a number of his concerns about the shift rota and took him through various documents. Mr Small, other than saying that Mr Fernie had checked matters, was unable to say why it was that the shift traders were not entitled to a medical check by the company and was unable to respond to much of the documentation put to him by the claimant. He confirmed that there were no further incidents after March but complained that there was still no recognition from the claimant or acceptance by him of his previous inappropriate behaviour pattern. It was put to him that he had tossed a copy of the Disciplinary Procedure to the claimant at the end of the appraisal meeting and that this was the document at C251 and he agreed that this was a document which he had been told to give the claimant. He accepted that he had sent an e-mail to the whole team and asked them to complete the pre-appraisal form and that the claimant was not the only person who had not completed it in advance. He was questioned about a process within SSE called Licence to Innovate and accepted that his understanding was that it was a company-wide initiative to promote innovative ideas amongst staff but that his view was that the claimant spent too much time on Licence to Innovate and that it was detracting from his day to day work. He was questioned extensively about the FCA and the claimant's contention that there were FCA rules which would have application in the WFFT matter. In general he was clear in his evidence that he was unaware of the e-mail which the claimant had sent to Martin Pibworth although he was aware of the shift rota debate. With regard to the new appraisal he had met with HR after the claimant went off sick to re-do the appraisal. His understanding was that it was to be a fresh view and that he saw no reason to change the score. His view on the claimant returning to work at EMC was *"I could handle it."* He then went on to say it would not be easy.

262. Mr Pibworth's evidence, relevant to the subject matter of the case was in fairly short compass. He gave evidence regarding his own background and that of the

EMC. He spoke of his initial conversation with the Claimant. We accepted his evidence that he had passed the email to Mr Fernie but that other than that he had not discussed it with anyone. He spoke of his understanding of the shift rota debate. He gave some background evidence re WFFT but was unaware of the Claimant's conversation with David Small. He was of the view that the WFFT contract with Infinis was not one where the FCA regulations had any relevance. He did accept that in general terms the Respondents would be acting inappropriately if they *"short changed"* the counterparty to a contract such as this but he did not believe there would be a breach of any legal regulation. He was heavily cross examined by the Claimant relating to this point but at the end of the day the Tribunal accepted that Mr Pibworth knew more about the extent of FCA regulation than the Claimant, although we did accept that the Claimant genuinely held the opposite view. Mr Pibworth gave evidence regarding his meeting on a Saturday morning with the Claimant when he had discussed the appraisal. Mr Nutt initially put to him that there had been two meetings but at the end of the day seemed to accept there had been only one meeting post appraisal. We accepted that Mr Pibworth was giving his honest recollection regarding this. Mr Pibworth said he had not been involved in any of the subsequent matters and we accepted this.

263. Mr Fernie gave general background evidence. His position was that WFFT was not regulated by the Financial Conduct Authority. He was questioned extensively by the claimant regarding FCA regulation and the WFFT contract. He confirmed that Emma Illingworth had at no time spoken to him during the disciplinary investigation she carried out. He discussed some of the claimant's appraisals in the past. He indicated that he had spoken to Mary Powell and Sandra McDonald and gave the account mentioned in her findings in fact of how he had looked in to the health and safety issues around the shift pattern. The claimant put it to him that he had attended a safety family meeting and Mr Fernie's position was that he struggled to remember that it was his understanding the claimant had not gone to the meeting. There were various questions about processes within EMC. He gave evidence regarding TIRs and indicated that he understood that some of them were related to activities outside the shift team. He indicated that he had not been at the meeting between Tom Henery and David Small. He indicated that the process of contacting Tom Henery in advance was unusual within SSE. He did say he was

aware through David Small that he was speaking to HR. He could not recall any detail of when these discussions had taken place. He did indicate that Mr Small had expressed to him some concerns about dealing with the performance appraisal and disciplinary warning in one meeting and issuing an informal warning. His understanding was that the appraisal appeal had been escalated to a more formal process. He said he had made the decision to remove the Claimant from shift working and did not mention any recommendation from Emma Illingworth. With regard to Ms Illingworth's e-mail in September he was asked what was meant by 'exit discussions' and he indicated that this could be exit from the EMC but could also be exit from the organisation. He said he had not been involved with the meetings the Claimant had in August and September with Emma Illingworth. He could not recall any formal meetings with Emma Illingworth. His understanding was that the matter had gone from being a locally managed concern to an HR issue. He had got feedback from Emma Illingworth from time to time and she would speak to him on occasions she was in Perth. He had not seen Emma Illingworth's disciplinary fact find. He said he had not been involved in any concrete discussions about redeployment. He did say it was not common within SSE for a Business Manager to call up other managers and ask them to take someone. He could not recall any complaints from other staff about him.

264. Emma Illingworth gave evidence next. Her evidence covered virtually the whole of the matters covered by our findings in fact. In general terms we formed the view that she had very little detailed recollection of what had taken place at various meetings and we preferred to go on the basis of the contemporary documents. Her evidence regarding the meetings in August and September 2013 was particularly unimpressive given that initially she gave evidence that the notes of the September meeting were in fact notes of the August meeting and vice versa. Her evidence in relation to mediation was that she had known in advance that David Fernie was going to be attending. She said that she had not told the claimant this in advance. Her position was that although the documentation bore her name it was Mr Henery who had been responsible for the initial Occupational Health referral along with Mr Small. It was her position that Mr Fernie had removed the claimant from shift work at her suggestion. Her evidence as to the reason changed during her evidence but would appear to be the reason given by Mr Fernie

although at other times she indicated there were issues with safety. She was entirely unable to say who it was who had decided that the informal warning was to be rescinded and the appraisal re-done. She said she had not been involved in this decision. She could not point to any document advising the claimant of this but her position was that he should have known. She was unaware that Mr Small had prepared a second appraisal document with the assistance of HR. She had not been involved in the first grievance the claimant issued which was dealt with by Mr Small. Her position was that she could not see any problem with Mr Small dealing with a grievance against himself. She indicated that she had received a complaint from the union about Mr Henery's handling of the case. She accepted that Mr Henery had made a bit of a mess of things and had not handled things properly. She believed that the informal warning may have been an appropriate thing to do but that the timing of it was entirely inappropriate. She accepted that during the period the claimant was off sick the respondents did not apply their sickness absence policy. This was because she felt that his absence was due to the grievance related issues. She accepted that the language used in the first Occupational Health referral was inappropriate and she could quite see why Jeff Rowlinson and the Claimant were not happy with it. She said that she was also not happy. She indicated that she felt that Mr Small was out of his depth managing the claimant after he went off sick which was why she took over.

265. With regard to the e-mail sent by her in September to Mr Small and Mr Fernie she was adamant that when she was talking about exit discussions she was meaning exit from the EMC. Her evidence was that she believed from an early stage that there was a breakdown in relationship between the claimant and Mr Small. She accepted that with the benefit of hindsight it had been inappropriate for her to include reference to mediation in the disciplinary charges to be faced by the claimant. She indicated that she was unaware of the e-mail to Martin Pibworth and although she accepted the claimant had mentioned WFFT and the Infinis contract it was clear to the Tribunal that up until the Tribunal itself she had no real idea as to what this was.

266. It was clear to us that from an early stage she was aware that one of the difficulties in this case was the claimant's perception that he had received a bad

appraisal because he had raised health and safety concerns in the *"shift debate"*. It would appear that although she had had lengthy meetings with the claimant in August and September the notes of these meetings had not been typed up and there had been no communication with the claimant as to what she was taking out of these meetings. We accepted her evidence that she had assumed that when the claimant opted for investigation this would be under the grievance procedure. She referred to having discussed matters with Anne Douglas who was the claimant's union representative at the time but she had not discussed this with the claimant. He was aware of the appraisal process and what was going on. She was aware of the subsequent meetings between David Small and Mr Henery of HR and the union but had no detailed knowledge of this.

267. She accepted that in advance of the meeting on 1 August she had concerns about the claimant's ability to return to work and believed that trust and confidence between him and Mr Small had broken down. She accepted that she had not had any specific discussion about the matter with David Small regarding the Claimant since she took over managing matters. She had never discussed with Mr Small how he would deal with the Claimant returning to EMC.

268. Mr Stainfield gave evidence which was interposed with that of Ms Illingworth. There was very little exceptional about his evidence other than that it became clear to us that he had not fully understood any of the claimant's concerns. As mentioned in the pre-amble to this section we think that we cannot really blame him for this since although with the benefit of our experience in the hearing we can interpret what the claimant is referring to at various points it is entirely understandable that Mr Stainfield did not. In any event we were satisfied that Mr Stainfield was unaware of the e-mail sent to Martin Pibworth and apart from the specific points raised by the claimant was unaware of what the claimant meant by WFFT. We accepted Mr Stainfield's evidence that he had little experience of conducting a grievance hearing. He was unable to give us any good explanation as to why, as part of the claimant's grievance, he had only interviewed people who had raised complaints about the claimant. It appeared to us that he had been guided extensively by Lorraine Hamdani of HR in his general approach to the matter.

269. Mr Allan gave evidence by way of a witness statement. He was extensively cross examined but at the end of the day all this really established was that Mr Allan had not understood where the claimant was coming from in many of the points which were raised by the claimant. Mr Allan gave the evidence mentioned regarding the whistle blowing register. His evidence was that the respondents do keep such a register and that it is not mentioned in the policy but that because he is a senior manager he is aware of this. It has to be recorded that when Mr Allan was asked (with some incredulity) by the panel whether he could see anything sinister or untoward in a major listed company keeping a secret register of those employees who had raised whistleblowing concerns he could see absolutely nothing wrong with the practice. He was asked about the existence of the register several times and his evidence on the point was absolutely clear and to the effect that the Respondents keep a *"whistleblowing register"* which is kept secret from most staff but the existence of which is known to senior management and that HR will make the contents of this known to managers such as himself who are conducting disciplinary hearings. He felt that the fact that he had asked Lorraine Hamdani if the Claimant was on the whistleblowing register and her reply that he was not was sufficient evidence to show that the Claimant had not made any whistleblowing disclosures. He also expressed the view that the matters raised by the Claimant were not *"whistleblowing events"*.

270. He indicated that he had not carried out any investigation himself after the hearing. He confirmed that his decision was based largely on the way that the Claimant had conducted himself at the hearing. He felt it was entirely appropriate to make assumptions about the Claimant's relationship with his trade union and mentor despite not having any direct evidence from them. He was clear in his evidence that he had not dismissed the Claimant on conduct grounds but had done so because he believed that trust and confidence between the Claimant and the company no longer existed. He did, however indicate that he had found all the allegations proved.

271. Mr. Broadbent's evidence was also given by virtue of a witness statement and once again, despite extensive cross examination by the claimant all that could really be established from this was that he had probably quite understandably, not

appreciated where the claimant was coming from in a lot of the comments the claimant made. His evidence was that he had been concerned about two matters in the initial decision quite apart from the issues raised by the claimant. The first of these related to the fact that Mr Allan had relied not on evidence as to what had happened in the past but specifically on the way the claimant had performed and what he had said at the disciplinary hearing. The second point was that he was unaware that it was possible to fairly dismiss on trust and confidence grounds and not make findings relating to gross misconduct. He accepted his evidence that he had been assured by Lorraine Hamdani of Case Management on both occasions that there was absolutely no difficulty with either of these propositions. We did feel that Mr. Broadbent failed to engage with the Claimant's cross examination in some respects and in particular we were unimpressed with his continued assertion that there was no difference between the JNC disciplinary policy and the personal contract policy when clearly there is.

272. We should also mention the witness who did not give evidence. It became clear as the case progressed that the Claimant had a number of criticisms to make of the Respondents' HR Case Management section who managed the disciplinary process and in particular of Lorraine Hamdani who had played a key role in the grievance and disciplinary process. Despite the fact that Lorraine Hamdani was assisting the Respondents' counsel and in attendance throughout the hearing she was called on by neither party to give evidence.

273. The claimant had agreed following one of the many adjournments in this case that he would also give his evidence in chief by way of a witness statement. It has to be said that his witness statement is not a model of clarity and refers to other documents which he had already prepared for the hearing. Even looking at all of these other documents, the witness statement has a number of omissions. Many of these were dealt with in cross examination and in general we accepted the claimant's evidence however there were some points which the claimant had himself raised in cross examination of the respondents' witnesses where his own witness statement was silent and where the matter was not raised in cross examination. In that situation we have made no finding of fact or, where appropriate, have based our decision purely on the evidence of the respondents'

witness. The claimant generally stood up fairly well to cross examination and it was clear to us that he was carefully considering his answers before giving them. He made a number of admissions and accepted various matters and we considered his evidence to be truthful. As mentioned above we felt that he had a slightly more accurate recollection of events than many of the respondents' witnesses given that the events were central to his life over a period of time and that he could remember them. There were also a number of instances where the claimant's evidence was backed up by something in the contemporary record albeit that the contemporary record without the benefit of the claimant's evidence was not particularly clear.

274. The Respondent's representative made a number of detailed criticisms of the Claimant during submissions. He suggested the Claimant's evidence was unreliable and at times incredible. We did not accept this. He referred to documents created by the Claimant during the process which, when held up to the glare of the tribunal spotlight were not 100% correct. He refers to the Claimant's suggestion in the statement prepared for the disciplinary hearing that it had been *"accepted that his scores were 'unjustly low' "*. It is true that the Respondents had at no time said they accepted this however Mr Nutt can be forgiven for including this in his statement in circumstances where the Respondents at no time ever formally told him what had been decided regarding his appraisal. The Respondents position appears to be that the truth was whatever Emma Illingworth said it was from time to time. Mr Small also had a totally different version of what had been agreed from that of Emma Illingworth and indeed Mr Stainfield in his grievance outcome appears to go further than what Emma Illingworth said at the hearing had been agreed. Given that, in a tribunal lasting 34 days, the respondents were entirely unable to provide cogent evidence as to who had made the decision regarding what was to happen to the first appraisal the Claimant can't be blamed for getting it wrong and, indeed, producing a statement which bends things in his favour.

275. Contrary to what is stated by the Respondent's representative, we did not find the Claimant unwilling to accept simple and often fairly non-contentious propositions put to him. The Claimant was naturally careful in his answers and sometimes

wanted a question clarified before he answered it. Our understanding of his evidence regarding *"breaking the law"* was that he worked in a highly regulated and complex area. Part of his role was to ensure he and the company did not break the law. He would sometimes get instructions which, if followed literally, would result in the law being broken and in those circumstances it was part of his job to decline. We felt that he responded perfectly properly to continued questioning on the subject by the Respondent's agent who seemed to be quite deliberately failing to accept this evidence.

276. The Claimant did appear to be measured in some of the answers he gave but our view was that in many situations he was simply trying to give a full answer which reflected the complexity of the subject matter. Sometimes he was asked apparently simple questions about situations which were actually fairly complex and nuanced. In those circumstances he acted correctly in refusing to give a simple yes/no answer.

277. It was also put to us that, during the hearing, the Claimant showed many of the personality traits which were commented upon by the Respondents' witnesses. In particular it was suggested that the Claimant over challenged and refused to let go when an issue had been decided against him. Our own view was that the Claimant presents as a somewhat naïve individual who expects his listeners to do a lot of his work for him. He will say things which are not at all clear and expect to be fully understood. He will expect his listeners to have detailed background knowledge and investigate what he is saying and provide their own evidence to back him up. Later on, when it becomes clear that he has not been understood he will attempt to come back and repeat what he said the first time in a more understandable way and refer to the evidence he should have referred to the first time. He did this several times in the course of the case. It caused him particular difficulty as an unrepresented party. With the benefit of hindsight, had the tribunal been possessed of all the information available to us at the end of the hearing when we were making case management decisions at the outset, some may have gone more in the Claimant's favour. We did however find that, in the Tribunal context, the Claimant was prepared to accept our rulings and move on. The Tribunal did

however accept that this trait of the Claimant might well be interpreted by others in the workplace as him refusing to move on.

**Discussion and Decision**

**Issues**

278. The first issue which required to be determined by the Tribunal was the issue of time bar in respect of the claimant's claims under Section 47B of the Employment Rights Act 1996. The Tribunal required to determine the date of the act or failure to act in respect of each complaint of detriment or if the act or failure was part of a series of similar acts or failures in terms of Section 48 of the Act. In the event that a claim in respect of the act had been presented after the end of the period of three months beginning with the relevant date then the Tribunal would require to determine whether it had been reasonably practicable for the claim to be presented in time and if not if the claim had been presented within a reasonable time thereafter. The Tribunal required to decide in respect of the claimant's claims to have suffered detriment as a result of having made a protected disclosure whether the claimant did make such disclosures and whether they were qualifying disclosures in terms of Section 43B of the 1996 Act. The Tribunal required to determine whether the claimant had indeed been subject to any detriment and if so the Tribunal required to determine whether the act or deliberate failure to act was done on the ground the claimant had made a protected disclosure. So far as the claim of unfair dismissal was concerned the Tribunal needed to determine whether or not the dismissal was automatically unfair in terms of Section 103A of the 1996 Act. This required determining as above whether or not the claimant had made protected disclosures which were qualifying disclosures and if so was the reason or the principal reason for the dismissal because the claimant made such protected disclosures. The Tribunal also had to determine what the reason was if we found that the reason or principal reason was not because the claimant made a protected disclosure. We had to determine whether or not the dismissal was fair in terms of the "ordinary" unfair dismissal provisions at Sections 94-98 of the Act. In the event that we found the dismissal to be unfair we did not require to determine remedy since this would be dealt with at a subsequent hearing. We did however indicate

that we would determine the issue of whether the claimant's conduct caused or contributed to his own dismissal and whether a deduction should be made to any basic award and or compensatory award as a result of this. We would also decide whether any award of compensation should be reduced to effect the likelihood that the claimant would have been dismissed in any event in terms of the "***Polkey***" principle. We did not hear any evidence regarding mitigation of loss and if the respondents' position is that the amount of compensation payable to the claimant should be reduced on just and equitable grounds because of his failure to take steps to fully mitigate his loss this would be a matter to be determined at the remedies hearing. The claimant also included various other claims. By the end of the hearing we understood the outstanding breach of contract claims to be whether the respondents breached the claimant's contract of employment by failing to include shift allowance in the calculation of his payment in lieu of notice, whether they had breached his contract of employment by failing to pay him an additional four days' notice pay calculated from 9 to 13 October 2014. This was on the basis that the claimant did not receive the letter giving notice of his dismissal until 13 October 2014 but he received notice pay running from 9 October 2014. We also required to determine whether the respondents breached the claimant's contract of employment by not awarding him a pay increase and by not awarding him any bonus payments. The claim for payment of additional pay was also framed as a claim of unlawful deduction of wages and we required to deal with this also.

279. We shall deal with these matters in turn.

**Time Bar**

280. The detriments relied upon by the claimant are set out in his further and better particulars which were provided as part of the case management process and lodged at pages 57-61. The claimant's ET1 claim form was lodged on 11 February 2015. He had previously applied for an early conciliation certificate on 12 December 2014 which was issued on 12 January 2015. The Tribunal agreed with the calculation of the respondents' agents that any act or deliberate failures relied upon in support of the detriments claim which pre-dated 13 September 2014

were *prima facie* out of time. The Tribunal approached the matter by trying to establish in respect of each detriment the date on which time would start to run and whether this was before or after 13 September 2014. The relevant statutory provision is set out in Section 48(3) and (4) of the Employment Rights Act 1996. This provides

> *"(3) An employment tribunal shall not consider a complaint under this section unless it is presented –*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(4) For the purposes of subsection (3) –*
>
> *(a) where an act extends over a period, the "date of the act" means the last day of that period, and*
>
> *(b) a deliberate failure to act shall be treated as done when it was decided on*
>
> *and, in the absence of evidence establishing the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."*

**Detriment One**

281. Detriment one is in respect of the informal warning given to the claimant at the end of his appraisal. This was something that happened in March 2013. It is clearly outwith the three month period.

**Detriment Two**

282. Detriment two relates to the negative scoring the claimant received during his appraisal on 18 March 2013. Again this is clearly outwith the three month period.

**Detriment Three**

283. Detriment three relates to an alleged change in attitude towards the claimant at his appraisal on 18 March 2013. The claimant refers to this change in attitude as being something which continued following protected disclosures. He describes this change in attitude as significant because in his view it turned out to be the platform for the respondents to initiate the disciplinary proceedings that led to the dismissal. The Tribunal considered that a change in attitude is something which happens at a specific point in time. It may be that actions are taken subsequent to the change in attitude which depend on the change in attitude and if these actions themselves amount to detriments then they would be in time. The change in attitude however is something that on the claimant's own case happened prior to his appraisal in March 2013. The Tribunal therefore considered that this had to be regarded as something which had happened outwith the three month period.

**Detriment Four**

284. This was described as a financial sanction. The claimant states that as a result of the negative appraisal in March 2013 the claimant was subject to a financial sanction in that the claimant's pay was frozen following his appraisal for 2012. It appeared to the Tribunal that this was a continuing act. The evidence was that the claimant would normally have received his increase from April 2013 onwards. He received no bonus as a result of his appraisal. He continued to be paid at this lower rate right up to the date of his dismissal. The detriment therefore continued up to his dismissal which the Tribunal considered took effect from 13 October. This claim was therefore in time.

**Detriment Five**

285. Detriment five related to the alleged failure to revisit the appraisal. The Tribunal considered that there was an issue here as to whether this constituted a continuing act given that the appraisal was not in fact revisited before the claimant's dismissal and that this continuing act continued up until his dismissal on 13 October. The alternative interpretation was that it was an omission and that it was deemed to have occurred when it was decided on or in the absence of such a decision when an act inconsistent with the failed act was done. The difficulty is that there is no evidence that the omission was ever decided on and in fact considerable evidence to the contrary. The respondents' position was that if the claimant had not been dismissed but had returned to work then his appraisal would have been revisited. We therefore consider that this claim could be regarded as in time.

**Detriment Six**

286. Detriment six was described as the production of the conduct list. This happened in April 2013, again the Tribunal's view is that this was well outwith the three month period.

**Detriment Seven**

287. Detriment seven related to the claimant's removal from duties/demotion. This referred to the claimant being removed from shift and this was an act which occurred on 16 May 2013; outwith the three month period. In his pleadings, although not in evidence, the claimant referred to a subsequent demotion happening in June 2013 when he was told that when he returned from holiday he would be going on the *"Prompt Planning Desk"*. If the claimant's claim was of a separate detriment in relation to this then this was something that happened in or about June 2013 and again as well outwith the three month period.

**Detriment Eight**

288. Detriment eight was in relation to the deletion of the claimant's e-mail account. Having heard a considerable amount of evidence it would appear that at the very latest this happened in February 2014. The respondents' IT department produced a number of dates and this is the latest one which they provided. Again this is well outwith the three month period.

**Detriment Nine**

289. Detriment nine is referred to as a breach of contract. This refers to the respondents treating his absence from work in July 2014 as annual leave. The Tribunal having considered the evidence carefully were of the view that the actual detriment occurred when the claimant received his final pay after his dismissal when he would have received the payment in respect of holidays accrued but untaken and that figure he received was reduced to take account of the fact that there was a period in July when he was treated as being on annual leave. We considered that this claim is in time although we would observe that the Tribunal in any event does not consider that the claimant would be entitled to any compensation in respect of this given that he already claimed for this sum in a previous Tribunal action which was compromised and the terms of the compromise preclude him claiming for the same sum again even under a different head.

**Detriment Ten**

290. Detriment ten was described as the initiation of unjustified disciplinary proceedings. This happened on 4 August and again is clearly outwith the three month period.

**Detriment Eleven**

291. Detriment eleven relates to a medical records issue. During the course of the hearing the claimant confirmed that this was no longer an issue so far as he was concerned and we therefore do not make any finding in respect of whether or not this was time barred.

292. It is therefore clear that out of the eleven detriments claimed by the claimant our view is that all apart from three were submitted outwith the initial three month period. The Tribunal heard no evidence so as to suggest that it had not been reasonably practicable for him to bring these claims to the Tribunal before he did. The law on the subject is fairly clear and presents a high hurdle to a claimant seeking to argue that this exception should apply. It is not nearly enough for an employee to simply assert that they were still in employment and hoping to sort matters out. The law provides that an employee suffering a detriment who believes that this is as a result of having made a protected disclosure has a very narrow window of opportunity to raise the claim. In the absence of some specific feature which renders it not reasonably practicable for him to do so the claims are time barred. The Tribunal's view therefore was that the only claims which could proceed on the issue of time bar would be the claim in respect of detriment four, five and nine. With regard to detriment nine the Tribunal considered that this was a claim in respect of holiday pay and was covered by the claimant's previous Tribunal claim which had been compromised. As a result of that compromise the Tribunal did not have jurisdiction to entertain the claim of detriment in respect of detriment nine either. The only detriments we could therefore consider were four and five.

293. There were no issues of time bar in relation to the claimant's claim of automatic unfair dismissal in terms of Section 103A nor his claim of unfair dismissal and or breach of contract/ unlawful deduction from wages.

294. The Tribunal considered that the logical next step was to decide whether the claimant had made protected disclosures and if so whether they were qualifying disclosures in terms of the legislation.

**Did the Claimant Make Protected Disclosures**

295. The claimant's position was clearly set out in the pleadings following the extensive case management process which took place.

296. The respondents urged us that in our deliberations we should deal only with the claims which were properly before the Tribunal. We agreed that whilst, during the course of hearing evidence, we heard about other statements made by the claimant which might have qualified as protected disclosures it was not judicially appropriate for us to consider these as, apart from anything else, the respondents had had no notice that this was part of the claimant's case. The two matters which the claimant considered to be protected disclosures were the e-mail to Martin Pibworth and the disclosure he made to Mr Small with regard to WFFT. The respondents did not accept as a matter of fact that the claimant had made the remarks which he alleged he had made to Mr Small in respect of the WFFT matter however the Tribunal having heard the evidence of the claimant backed up as it was by the contemporary note made by him in the e-mail he prepared to send to Mr Small but eventually did not send, considered that the statement had been made as alleged by the claimant.

297. The respondents' representative referred us correctly to the recent EAT case of ***Eiger Securities LLP v Miss E Corshuniva (UKEAT/0149/16/DM)*** and also to the well known case of ***Geduld v Cavendish Munro [2010] ICR 325***. We were also referred to the case of ***Blackbay Ventures Ltd v Gahir [2014] IRLR 416***.

298. We considered it appropriate to discuss each of the two alleged disclosures in turn.

299. Regarding the e-mail to Mark Pibworth. This e-mail was sent by the claimant to Mr Pibworth on 10 August 2012 at 20:51 hours. At that time Mr Pibworth was a member of the respondents' management. The alleged disclosure was made prior to 25 June 2013 and accordingly the amendments to the legislation so as to incorporate a public interest test do not apply. It is probably as well to set out the appropriate legislation here.

> *"Employment Rights Act 1996 Section 43A*
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
> ***43B Disclosures qualifying for protection***

*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –*

*… (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*

*…. (d) that the health or safety of any individual has been, is being or is likely to be endangered,*

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

*……*

***43C***

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith*

*(a) to his employer …."*

300. It was therefore clear that one of the requirements of a qualifying disclosure is that it is a disclosure of information. The information also has to, in the reasonable belief of the worker making the disclosure tend to show one of the listed matters. It was the claimant's position as we understood it that he was stating that the e-mail disclosed information that the respondents were failing or were likely to fail to comply with a legal obligation and that he was disclosing that the health or safety of any individual had been, was being and was likely to be endangered.

301. With regard to the alleged legal obligation the claimant referred many times to his view that the respondents were under a legal obligation to provide energy traders such as himself and his colleagues who worked shifts with a free medical assessment. He was unable to provide us with a specific reference to a piece of legislation or regulation which imposed this requirement. That having been said he did lodge and refer to the HSE Guidance entitled "Managing shiftwork Health and safety guidance" at pages 157-201 of his productions. This guidance refers at page 160 to making employers aware of their legal obligations and lists these under page 161-162. Page 161 refers to the detail of the Working Time Regulations but also to the employer's general duties under the Health and Safety

at Work Act 1974 and the management of Health and Safety at Work Regulations 1999. These refer to the respondents' duty to carry out a risk assessment and to ensure that so far as is reasonably practical they require to ensure that their employees are not exposed to health and safety risks. There is a discussion of how to assess and manage the risk associated with shift work at page 163 onwards. On page 184 of this document there is a statement that

> *"Under WTR, employers are required to ensure that workers are fit for night work and must offer a free health assessment to anyone who is about to start working nights and to all night workers on a regular basis."*

On the basis of the evidence we considered that the claimant had a reasonable belief that the law in the form of the Working Time Regulations obliged employers to ensure that workers were fit for night work and to offer a free health assessment to night workers on a regular basis. We considered the claimant's belief was a reasonable one and indeed it appears to have been a generally held belief amongst other members of staff as was evidenced by the article by Richard Ullathorne in the Autumn 2014 issue of a regular magazine produced by Prospect. This states that if your shift work includes working nights you are entitled to a free and confidential health assessment. The claimant did refer to this article in cross examination but did not refer to it in evidence. It is clear that the claimant was not aware of this article when he wrote his e-mail to Martin Pibworth but in our view the fact that another member of staff of the respondents who is an official with Prospect holds the same view about health and safety estimates would tend to show that the claimant's view as to what the law was was a reasonable one.

302. The e-mail to Mr Pibworth is lodged at page 170. It is not particularly well framed. The respondents' position is that this was not a disclosure of information. The claimant's position was that it was. The Tribunal's view is that although it also does other things such as making a suggestion for improvement it also contains a disclosure of certain information. The information which is disclosed is that the company is legally obliged to offer a free health assessment under the guidance from Directgov. It contains an attachment which has been cut and pasted below it which states

*"As there are health risks linked with night work, your employer must offer you a free health assessment (normally a questionnaire) before you start working at night and on a regular basis after that."*

It is clear from the first paragraph that the claimant is of the view that the respondents are not complying with this obligation. In the view of the Tribunal the claimant was disclosing information which in his reasonable belief indicated that the respondents were not complying with their legal obligation. Even if the Tribunal is wrong in this the Tribunal considered that the claimant was disclosing information that the health or safety of an individual was being and was likely to be endangered. The claimant is clearly talking about this when he says that the long term effects of shift work are potentially dangerous. He says he is not medically qualified and can't say more than that. In the view of the Tribunal it is quite clear that what the claimant is saying to Mr Pibworth is that he is disclosing a problem. The first problem is that he considers that the health and safety of workers who are on long term night shift are put at risk and the second piece of information he is disclosing is that the company are under an obligation to provide free health assessments but aren't doing it. The claimant's explanation in evidence for the way he has framed the e-mail is that in all his training he was advised that every e-mail or communication to a manager setting out a problem should provide a solution. An email raising a problem but not proposing a solution is going to be much less welcome than an e-mail providing a solution as well as the problem. We think it reasonable to read the e-mail taking this context into account but in any event even without this it is clear that the claimant is providing Mr Pibworth with some information.

303. We also consider that the claimant was acting in good faith. It is clear that to some extent the respondents' managers believed that the claimant was somewhat of a troublemaker and tended to raise issues quoting health and safety just to be difficult. We did not find this to be established. It is clear that the Claimant, at the time, believed that what he was saying might not be very popular with his colleagues. The e-mail was not self serving. We believe the Claimant was genuinely of the view that his concerns were well founded and believed in good faith that the Respondents were in breach of the duty set out on the Directgov site

It was therefore our view that the e-mail to Martin Pibworth was a qualifying disclosure and is therefore protected.

**WFFT**

304. The Tribunal accepted that the claimant had spoken verbally to David Small in early March 2013 in the terms set out in the quotation which was lodged on page 38. This quotation was written out by the claimant as part of an e-mail which he drafted to send to Mr Small but did not actually send at the end of the day. The context was that Mr Small had accused the claimant of being someone who tried to avoid work. The claimant's position was that he was trying to work out what Mr Small was getting at and the only thing he could think of was this occasion. The claimant's position was that he had spoken to Mr Small about his belief that the work was wrongly located with EMC. The Tribunal accepted that the claimant had said these words even although Mr Small had no recollection of them. The Tribunal considered that the claimant again had a belief that the respondents were under a legal duty to provide "best value" to customers such as WFFT and that this was an obligation imposed on them by the FCA. The Tribunal accepted this albeit with much greater hesitation than we accepted that the claimant had a genuine belief in relation to the health assessment issue. We did accept the evidence of Mr Pibworth and Mr Fernie that in fact the FCA would not have jurisdiction in respect of this contract and that there was no such legal obligation enforceable by the FCA but, bearing in mind Mr Pibworth's remarks that it would be inappropriate for the respondents to short change a counter party to a contract in the way suggested, we did come to the view that the claimant had a reasonable belief that this obligation was one of the many cases where the respondents did have an obligation to treat customers fairly and that this obligation was legally enforceable at the end of the day. We considered that it was clear that the claimant was disclosing information to Mr Small which was to the effect that Infinis were being short changed on the contract because the work was being placed in an unsuitable place where the individuals involved did not have time to do it justice. Again we consider the claimant made this disclosure in good faith. We therefore considered that this disclosure is also a qualifying disclosure which is protected in terms of Section 43A.

**Did the claimant suffer detriment as a result of having made the protected disclosures complained of?**

305. Once again it is appropriate to deal with each disclosure in turn. The detriments which the Tribunal requires to rule on were those relating to the reduction in the claimant's pay and removal from duties.

306. The freezing of the claimant's pay and the removal of his bonus was due to the fact that the claimant received an appraisal score of 1 in his appraisal. We accepted that the decision on the appraisal was made solely by Mr Small and that he was not put up to it or influenced by anyone else. The evidence of Mr Small was that he had not been copied in to the e-mail which the claimant sent to Mr Pibworth or the e-mail Mr Pibworth sent to Mr Fernie in return. We accepted this evidence. It appeared clear to us that whilst in general terms Mr Small had formed a negative view of the claimant in part because of the way the claimant had behaved in relation to the shift rota debate there was absolutely nothing to suggest that Mr Small was influenced in any way at all by the e-mail to Mr Pibworth. He didn't even know about it. It appeared to us on the evidence that Mr Small's concern in relation to the shift rota debate was that after Mr Small came on the scene and the shift rota debate was, in his words, *"all finished"* the claimant sought to resurrect the issue. Mr Small saw this as yet another example of the claimant being difficult. His view was that he was aware from Mr Fernie that a significant work had been done by other members of the team to deal with the shift rota issue and that it had been put to bed and here was the claimant trying to raise the issue again and again. It was also Mr Small's view that if the claimant had had anything to say he should have said it at the correct time during the debate. The legal test which we require to consider in relation to a claim of detriment under Section 47B is one which is favourable to the claimant. It is unlawful for the respondents to subject the claimant to any detriment done on the ground that he has made a protected disclosure. This means that if the detriment is in any sense whatsoever on the grounds that the claimant made a protected disclosure then the respondents have behaved unlawfully. In this case it does appear to us that it is clear that the detriment was in no sense whatever done on the ground that the claimant had sent an e-mail to Martin Pibworth.

307. The other detriment which is still live for us to consider is the decision made by the respondents to remove the claimant from night shift. The respondents' position was that this was not a detriment at all but that effectively the claimant was still receiving his full shift allowance without having to work shifts. The Tribunal accepted the claimant's evidence that whilst in other circumstances he might well have welcomed such a situation his perception was that the decision to remove him from shifts was a detriment. He spoke of feeling embarrassed and upset. We considered that in those circumstances it is to be regarded as a detriment. Again, however the problem is that the Tribunal's view was that this was in no sense whatsoever because the claimant had sent an e-mail to Martin Pibworth. In the view of the Tribunal the decision was made for the reasons stated by David Fernie. We agree that on other occasions the respondents provided a different rationale for taking the claimant off shift but on the basis of the evidence of Mr Fernie and Ms Illingworth the Tribunal's view was that there had been some discussion between them about the difficulties which were being encountered in dealing with the claimant's complaint about his appraisal and that Ms Illingworth had recommended the Claimant be taken of shift and Mr Fernie had accepted her recommendation.. Mr Fernie made the valid point that when someone is working shifts such as the claimant there may be weeks go by without the employee and his manager being in the building at the same time. It did appear to the Tribunal that this was the reason for taking the claimant off shift. Mr Fernie was of course aware of the e-mail to Martin Pibworth and was also aware of what had gone on regarding the shift rota debate. He certainly echoed Mr Small's concerns about the claimant failing to keep to the timetable agreed by everyone else and appearing to want to hold on to the issue after it had been settled. We did not consider that this was in any sense whatsoever a belated payback for the e-mail to Martin Pibworth. The e-mail exchange between Mr Pibworth and Mr Fernie after Mr Pibworth copies him into the Claimant's email, and the actions of Mr Fernie after he receives this, were really only capable of a benign interpretation. It appears to us that the claimant has told Mr Pibworth that in his view the respondents are not complying with a legal obligation about health assessment. Mr Pibworth quite properly writes to Mr Fernie about this and Mr Fernie quite properly takes it up with the respondents' health and safety specialists who give advice that is not required. There was absolutely nothing here which would suggest that Mr Fernie would have

reason to keep this in his mind and then remove the claimant from shift some eight months later. The claimant's claim in relation to this also fails.

**WFFT**

308. So far as the WFFT disclosure is concerned the fundamental problem is that the Tribunal accepted that Mr Small genuinely has no recollection of this. Mr Small has not passed it on to anyone else. Although the claimant's belief might well have been that one of the matters Mr Small was referring to when he accused the claimant of avoiding work was the WFFT matter we accepted Mr Small's evidence that this was not what he had in mind at the time. It appeared to us from the evidence that Mr Small's view was that the claimant was a difficult employee. His view was that when the claimant was asked to do additional work he would try and find some way of getting out of it. Rather than say he didn't want to do it he would seize on some other excuse such as health and safety. Mr Small referred to the issue of the fridge. The claimant was asked along with other employees to clean the fridge which they all use. The claimant raised a health and safety issue about bacteria and indicates that he will need training before he cleans the fridge. It appeared to the Tribunal much more likely that Mr Small had this general trait in mind when he made that comment. It was therefore the Tribunal's view that the decision to give the claimant an appraisal score of 1 was in no sense whatsoever related to the conversation the claimant had with Mr Small about WFFT which we have decided was a protected disclosure. With regard to the decision to remove the claimant from shift the problem for the claimant is that, given that Mr Small has no recollection of the incident, it is absolutely clear that neither Ms Illingworth nor Mr Fernie were aware of it at the time they made their decision. We accepted their evidence that they had absolutely no knowledge of this and it is clear that even at a much later date Ms Illingworth had really no idea what the claimant was talking about when he referred to WFFT. Our view is that the decision to remove the claimant from shift was made for the reasons mentioned above and the claimant's claim of detriment fails on this ground also.

309. The Claimant's claims of detriment under s47B are therefore dismissed.

**Automatically Unfair Dismissal Section 103A**

310. Section 103A of the Employment Rights Act 1996 states

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

Having found that the claimant did make the two protected disclosures mentioned we consider that the issue which requires to be determined in order to deal with this claim relates to whether that was the reason or principal reason for the dismissal. Given that the reason for the dismissal was disputed and is relevant to the issue of general unfair dismissal in terms of Section 98 we shall deal with this claim following our discussion in relation to the claimant's claim of unfair dismissal in terms of Section 98 of the Employment Rights Act.

**UNFAIR DISMISSAL**

311. Section 98 of the Employment Rights Act 1996 states

> "*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

In this case it was the clear evidence of the respondents' two Decision Makers that the reason for dismissal was not one of the four potentially fair reasons listed in Section 98(2) but *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."* As noted above this was disputed by the claimant who believed that the reason for dismissal

was that he had made qualifying disclosures. In terms of general unfair dismissal law it is for the respondents to show the reason for the dismissal. In the respondents' submission they set out their position in paragraph 101. They refer to the claimant's conduct and behaviours both prior to and after the appraisal. Having heard the evidence the panel's unanimous view was that the respondents' position was quite simply untenable on any view of the facts. It was the view of the Tribunal that any reduction in trust and confidence which occurred was due principally to the actions of the respondents in the way they treated the Claimant and in their complete failure to follow their own procedures and processes.

312. We considered it to be clearly established on the evidence that up until 2012 the claimant was viewed as a perfectly competent and adequate employee. Whilst he no doubt presented several character traits which might make him difficult to manage he was certainly not the only person in his department who was difficult to manage and his behaviours were well within the bounds of what was acceptable in an employee. So far as the claimant's immediate managers were concerned this was shown in his appraisals over the years which were perfectly reasonable. In or about 2012 a number of things happened. The principal thing which in the view of the Tribunal led to the current situation was the change in the claimant's Line Manager from Mr Fernie to Mr Small. It was clear from Mr Fernie's evidence that over the years he had formed a view of the claimant's personality which was not particularly flattering to the claimant. That having been said he had been able to manage the claimant perfectly successfully. The Tribunal's view of the claimant was that whilst he could be what in colloquial terms is termed a *"pain in the neck"* at the end of the day he liked and valued his job which was a considerable part of his identity and indeed was ambitious and wanted to get on and make progress in the company. The Tribunal suspects that one of the early issues here was that there was a difference in perception as to what the company expected of an employee in the position of the claimant. Mr Small accepted in cross examination that various company initiatives would come out from time to time designed to encourage individuals to be challenging and not accept the status quo. It was his position that the claimant took to these more enthusiastically than was warranted and indeed our own view was that the claimant certainly believed that it was part of his job to vigorously challenge on a number of issues. It was also Mr Small and

Mr Fernie's perception that there was some issues with the claimant trying to avoid work. It was their experience that often when asked to do something new the claimant would think up 10 reasons why it was impractical and/or inappropriate rather than just get on and do it. It seemed to us that the claimant was probably unaware of giving this impression but we could certainly see where Mr Fernie and Mr Small were coming from. All of these matters were however simply part of the warp and weft of ordinary company life.

313. What changed in 2012 was that Mr Small became Line Manager and did so at a time when there was general pressure on the company and his section in particular to tighten things up. Mr Small also took over in the aftermath of the *"shift rota debate"*.

314. So far as the debate itself is concerned, our view on the evidence was that the claimant genuinely believed that he had raised an issue relating to health and safety and in particular that

(1) the respondents were in breach of their obligation under health and safety legislation to provide free health checks, and

(2) that whilst the current and suggested rota were probably convenient for employees in terms of interfering the least with their family and social lives employees were perhaps storing up health problems for the future by having all of the night shifts in one lump.

The Tribunal's view was that neither side of the debate handled things particularly well. The claimant was not at the meeting when Mr Fernie reported back regarding the issue of health assessment. Whilst the respondents were critical of the claimant for this the Tribunal accepted the evidence that such meetings were not compulsory and whilst they were arranged at a time which would hopefully suit most people it was recognised that sometimes employees would simply have other commitments and be unable to attend. There does not seem to have been any attempt to explain to the claimant the reason why health assessments were not required and the claimant appears to have been asked simply to accept that the matter was discussed with people higher up in the company who said they weren't required. Similarly the information the claimant provided regarding the health risks associated with the current rota was not dealt with other than simply telling the

claimant that people higher up in the company had looked at it and there was no problem. Even having heard as much evidence as we have in this case the Tribunal is still unaware as to why it is that the company believes they do not require to provide free health assessments. Equally we consider the claimant was at fault and certainly behaved discourteously by failing to comply with the mutually agreed timetable. It is also clear that the claimant's overall approach irritated some of his colleagues although it is fair to say that some colleagues were less than diplomatic in their dealings with the claimant. At the end of the day the outcome of the debate was that from the claimant's point of view the issues he raised at the outset had not actually been addressed and he felt free to raise the matter again with Mr Small when Mr Small took over as his manager. From Mr Small's point of view this appears to have been seen as another example of the claimant being difficult. It was clear from Mr Small's evidence that this coupled with various other minor incidents which took place in the first few months of Mr Small's tenure caused Mr Small to decide that he required to address the situation.

315. The Tribunal's view was that there was nothing wrong with Mr Small coming to this conclusion. He was a new manager taking over. He found certain behaviours of the claimant to be interfering with the smooth running of his team and he wanted to address them. We think it is clear that he wanted to get through to the claimant that when the claimant was asked to do something he was expected to do it and not come up with 10 reasons not to. We consider that the exchange of e-mail correspondence regarding the cleaning of the fridge demonstrates that Mr Small was justified in thinking there was an issue to address. Mr Small then behaved completely appropriately by discussing the matter with HR. Where things went wrong is that the HR advice which Mr Small received appears to have been poor. Ms Illingworth herself accepted that this was the case whilst giving evidence. It is not for the Tribunal to say how things should have been done but we think it would have been better if at the outset the respondents had decided whether the claimant's behaviours were competence based or behavioural. If behavioural then the appropriate way to proceed would be to deal with any issues which arose as conduct issues. This would have involved for example investigating precisely what had happened during the *"bust up"* with Martin Shaw on 13 January which had led to the claimant allegedly refusing to work with him and then taking disciplinary

action accordingly. Alternatively if the issues were competence based then the appraisal process would be appropriate.

316. The respondents' appraisal process covers matters such as team work and SSE values. The difficulty with this approach is that things like *"team work"* are very much a two-way process. It is not going to be a particularly unusual situation where the party accused of being a poor member of the team is going to blame others for what has gone wrong in the relationship. That having been said the Tribunal's view was that if the respondents had decided to deal with the matter purely on the basis of the appraisal there would have been nothing particularly wrong with this. Two things which went wrong at this early stage were that the respondents failed to carry out their appraisal process properly by failing to carry out an interim appraisal and secondly that the respondents mixed in with the appraisal process an informal disciplinary warning.

317. It was clear to the Tribunal from having heard the evidence of the parties that the appraisal came as a shock to the claimant. The Tribunal accepted that Mr Small had attempted to forewarn the claimant of the effects of his behaviours at the meeting they had in January but it is clear that the claimant did not take on board what he was being told by Mr Small.

318. The respondents in their submissions make much of the fact that in their view the claimant refuses to accept feedback and this is seen as some sort of character flaw on his part. The Tribunal accepted that the claimant did not accept the feedback he was having from Mr Small as being genuinely rooted in unacceptable behaviours of the claimant. It is not particularly unusual for employees to form this view. The Tribunal's view is that this is something which should and ought to have been anticipated by the respondents and dealt with accordingly. It would have been much easier for them to do this if they had kept the appraisal and disciplinary process separate. It would also have been much easier for the respondents to do this if they had carried out the interim appraisal which their policy requires. The Respondents should have been prepared to evidence what they were saying with reference to examples. Interestingly, in her grievance statement, one of the criticisms made of Mr Small by Elaine Harley, the HR officer who gave Mr Small

further training on appraisals was that Mr Small had *"soft soaped"* the Claimant and given him mixed messages (p536)

319. From the claimant's point of view he was faced with a situation where having received perfectly satisfactory appraisals for many years he was now being given a 1 which was, to his understanding, virtually unprecedented. We accept that at that stage what the claimant was doing was going back through what had happened over the last 12 months to find out what was the root cause of this. We think it is not at all unexpected that he came to the view that one of the reasons was that he had raised a health and safety issue and kicked off the shift debate rota. He spoke of bearing the scars of this. He also racked his brains to try to decide why it is that Mr Small is accusing him of trying to avoid work and comes up with the discussion which took place regarding WFFT and the Infinis contract. The reason that he has to try and work these things out for himself is that, apart from generalities, Mr Small has not given him any examples. The appraisal document refers mainly to personality traits and is more of an exercise in character assassination than an appraisal.

320. The claimant then contacts his Union. In the normal course the Tribunal would have then expected there to be an appeal process where the various issues can be dealt with. One feature of the case which became clear to us the more evidence we heard was that, despite the respondents having the usual plethora of policies and procedures in their Employee Handbook and on their company intranet, there appears to be a serious reluctance to actually use them. It would appear that there were various meetings between the respondents and the Union. No adequate records were kept of these meetings and, apart from one minuted meeting on 24 April, the evidence the Tribunal heard was extremely vague and unsatisfactory. At some stage the claimant asks Mr Small for a list of the actual behaviours which have caused him to receive his low appraisal and the informal warnings. This results in the document at pages 277-280. What is noteworthy about this document is that the claimant's appraisal was in March and the meeting at which Mr Small claims he went over the claimant's unsatisfactory behaviours with him was in January. Many matters in the document post date these meetings. The only matters which are said to have pre-dated the appraisal are as follows:

(1) In January 2013 it is claimed that the claimant refused to put any of his issues down in writing *"which makes it difficult for me to find any supportive evidence in your favour"*.

This appears to be a reference to the claimant giving feedback following the meeting on 21 January.

(2) Vocally refusing to work with some colleagues and creating team conflict.

This is said to have happened on 13 January and is presumably a reference to the claimant's *"bust up"* with Martin Shaw. The claimant's position is that Martin Shaw threatened him with violence. There was at no point any offer to investigate this or deal with this. There is also a reference to *"Angie"* approaching Mr Small in January asking that the claimant refrain from approaching her about a change of shift.

(3) October 2012 which is a reference to the claimant's e-mail asking for taxi expenses to be paid for other members of staff who had not themselves raised any concerns.

(4) There is a reference to 9 November and an allegation that the claimant had said he did not agree with guidance on REMIT and the EMC shift rota.

With regard to REMIT there was no suggestion that the claimant refused to carry out the guidance simply that he persisted in saying that he disagreed with it.

All of the other matters raised post dated the appraisal.

321. The claimant then submitted a grievance. Whilst the claimant himself was quite happy for this to be dealt with by Mr Small in the first instance the Tribunal's view was that at that stage most employers would have identified that there is little point in having a manager deal with a grievance against himself and that in fact this is highly unlikely to contribute to a resolution of the situation. Nevertheless the respondents decided it is appropriate for Mr Small to deal with the situation.

322. During this process, while the claimant is trying to get matters sorted out through his Union, the claimant is receiving advice that within the respondents it would not

be considered to be helpful to invoke the appeal process. This also appears to be the view of the respondents given that they are continuing to have meetings with the Union with a view to resolving matters notwithstanding the fact that no appeal has been lodged. It is during this time that the claimant is moved to work days rather than shifts.

323. At some point during this process there appears to be a realisation on the part of the respondents that matters have not been handled as well as they should be. It would appear that at some point an agreement is made between representatives of the respondents and the claimant's Union to the effect that the informal warning issued to the claimant will be rescinded. Somewhat surprisingly this important point is not formally communicated to the claimant. There is also at some point a decision made that Mr Small's completion of the appraisal form leaves something to be desired and a decision is made that the appraisal will be re-done in some way and that prior to this Mr Small will receive some coaching in how to complete appraisal forms. Once again this decision is not communicated formally to the claimant. Furthermore there appears to be considerable confusion on the part of the respondents as to exactly what it is that has been agreed. Mr Small's understanding of the position is that he was to receive some coaching about how to word critical appraisals, that he had in fact received such coaching and that he had completed a fresh appraisal form. Ms Illingworth's version which appears to have later on become the respondents' *"authorised version"* was that the appraisal was to be re-done. Even this outcome appears to have two strands. On various occasions Ms Illingworth's evidence was to the effect that although the appraisal would be re-done the scores would not change. At other points she has said that the re-appraisal will be re-done and the claimant would have the opportunity to provide evidence with a view to having the scores altered.

324. It was a matter of some concern to the Tribunal that such important matters were not properly communicated to the claimant and that indeed there appears to be no minute of a meeting at which the issue had been agreed. It is also of concern that in the face of such vagueness the claimant is later extensively criticised for effectively harping on about the appraisal score and informal warning when there has been an agreement that matters are to be resolved as per this agreement.

325. At around this stage the claimant goes off sick. It is clear that the claimant was indeed suffering some form of stress reaction to what was going on. Ms Illingworth then became involved and, on her own evidence, was unhappy about the way that Mr Henery had dealt with matters. An issue arose regarding the Occupational Health report. Once again the respondents' position lacks clarity due to the absence of contemporary records and the fact that such contemporary records as there are appeared to be completely wrong. It would appear that Mr Small was responsible for the first Occupational Health report. Although from the correspondence it appears that Emma Illingworth was involved in approving it we accepted her evidence that the correspondence is wrong and that it was Tom Henery who approved it. The Tribunal would agree with the claimant that many of the comments in this are completely inappropriate and should not have been made. The respondents do not follow their own procedure so far as the Occupational Health referral is concerned and the claimant is not sent a copy of the referral but only receives it having questioned the Occupational Health provider. Once again it is of some concern that the Claimant is later on criticised for behaving in an entirely reasonable way regarding this referral.

326. The claimant then meets with Emma Illingworth. The claimant in evidence described this meeting by saying that he spent some time *"downloading"* his concerns to Ms Illingworth. It was again unfortunate that the meeting was not minuted and that indeed up to the point of the Tribunal Ms Illingworth was completely confused as to what had been said at this meeting and the subsequent one.

327. In any event what Ms Illingworth appears to have got from the meeting was that the claimant believed that he had been treated badly by his managers in the matter of the appraisal and also that the claimant attributed to this in part to having raised health and safety issues in terms of the shift rota debate. Ms Illingworth refers to the claimant having a perception that his managers have decided that he is difficult and being *"out to get him"*. It would appear that following the first meeting Ms Illingworth decides that because of the circumstances the respondents will not follow their Absence Management Policy in respect of the claimant's absence. Ms Illingworth also decides that she will take over the line management

responsibilities for the claimant. Ms Illingworth meets again with the claimant and his Union and two ways forward are suggested one being mediation and one being *"a full investigation"*. In the view of the Tribunal a key document was Ms Illingworth's e-mail to Mr Fernie and Martin Pibworth dated 20 September 2013 and lodged at pages 387-388. In this document it is quite clear that Ms Illingworth has identified one of the issues as being that the claimant is unable to take on board the feedback he was receiving because he perceived this as bullying and that he believed that this was due to points/concerns he had raised over the last 18 months. It is also clear in the view of the Tribunal that by this stage Ms Illingworth had decided that if mediation did not work then the claimant was not going to be returning to EMC. It was also the Tribunal's view that whilst Ms Illingworth may not have thought matters through to their logical conclusion at that stage, that if the claimant did not return to the EMC then there was a very high chance that he would no longer be employed with the company. Ms Illingworth specifically states in her e-mail that

> *"(1) Mediation should involve David Small and David Fernie at a minimum.*
> *(2) That mediation may or may not work.*
> *(3) That if it did not work we may get into exit discussions."*

Whilst all of the respondents' witnesses who were questioned on this were very keen to say that by exit discussions they thought that this meant an exit from the EMC the Tribunal's view was that it was more likely than not that exit discussions would carry the normal meaning of the words and that the respondents would be discussing the claimant's exit from the business. Mr Fernie did accept in evidence that it could easily be read that way.

328. Given that Ms Illingworth was instrumental in raising the suggestion that the claimant be dismissed on the grounds of *"some other substantial reason"* around 11 months later the Tribunal considered it to be extremely significant that even by this stage Ms Illingworth is of the view that the claimant's return to work is extremely unlikely. The Tribunal's view is that by this point Mr Nutt is certainly more sinned against than sinning. The respondents had made a complete mess of

the appraisal and disciplinary process and whatever reasons they had for questioning his conduct at the outset it was the view of the Tribunal that the very most that would have been warranted was some kind of first stage warning.

329. The Tribunal ruled at a very early stage in the proceedings that we were not prepared to hear evidence about the mediation. We should say that we did though before realising that subsequently the respondents would use the claimant's behaviour at mediation as one of the grounds for dismissing him. Had the claimant brought this to our attention at the time and had the claimant wished to refer to mediation then it may well be that we would have come to a different decision. As it was it was only during Ms Illingworth's evidence that we saw the letters inviting the claimant to the disciplinary hearing and realised that whilst on the one hand the claimant was being criticised for seeking to raise matters raised in mediation the respondents were wanting to rely on this as evidencing his behaviours for the disciplinary which led to his dismissal. Quite apart from this we felt the organisation of the mediation was flawed. Crucially, despite the fact that Ms Illingworth has stated in her e-mail that the mediation should involve Mr Small and Mr Fernie at a minimum the only person who attended the mediation on behalf of the respondents was Mr Fernie. Mr Small's evidence was that he was never asked to go and that it would have caused him no problem to go. Ms Illingworth's evidence was somewhat confused but I understood her to say that she felt that by this time Mr Small was so upset that it would not be appropriate to ask him. What was clear from the evidence was that the claimant turned up at the mediation expecting Mr Small to be there and Mr Small was not. The mediation did not result in a resolution of anything. Following the failure of the mediation it would appear that there were again some undocumented discussions between Ms Illingworth and the claimant's Trade Union.

330. The outcome of this is that despite having presented the claimant and the Union with an *"either/or"* situation in September the respondents decide that matters should proceed down the way of an investigation.

331. The respondents subsequently criticised the claimant for his assertion that he did not believe that the grievance procedure was the appropriate procedure to use.

On the other hand the claimant has pointed out correctly that the documentation refers to an *"investigation"* and not specifically to a grievance. The claimant's evidence essentially was that he was unfamiliar with this type of situation and was currently off work with stress. He was relying to some extent on the Union who *"keep him right"*. His understanding of the position was that he was being asked to produce a document setting out his concerns for the investigation. So far as the Tribunal was concerned we were satisfied that at least from the stage where the claimant had his first meeting with Mr Stainfield he would have been aware in general terms that the respondents were following some sort of grievance procedure. It appeared to the Tribunal that at that stage (January 2014) the claimant was not going through the process of searching out the respondents' processes on the internet and was simply not aware of the various distinctions which he later sought to raise.

332. Having decided that the next stage is to go down the route of grievance procedure Ms Illingworth then passes management of this aspect of the case to the respondents' Case Management section and is not involved herself.

333. The grievance process which was thereafter carried out by the respondents was in the view of the Tribunal almost a complete waste of time. Partly this was due to the claimant. The claimant's initial letter of complaint is not a model of clarity. Mr Stainfield could be forgiven for only having the vaguest of ideas as to what the claimant was actually complaining about. Instead of seeking further clarity however Mr Stainfield then decides to carry out an investigation of his own however it is a very peculiar grievance investigation because instead of investigating whether the claimant's complaints against others are justified Mr Stainfield decides to investigate whether those others complaints about the claimant are justified. The Tribunal were struck by the fact that the only people that Mr Stainfield interviewed were by and large those who had raised complaints against the claimant.

334. The claimant then discovers that his e-mail account has been deleted and he is unable to provide the copy e-mail trails which he thought he would be able to rely on.

335. The Tribunal's view regarding the deletion of e-mails was that this was not a deliberate act carried out by Ms Illingworth but that (a) she ought to have known to put in a CIRTIS request as soon as it became clear the claimant was off on long term sick so as to preserve his e-mail account and (b) she ought to have taken much more prompt and immediate action to restore his account once the deletion was discovered. The claimant's evidence was that as part of their obligations to the FCA the respondents required to keep certain of his e-mails for six years. It is also clear that many of the claimant's e-mails if not all of them would have been to other members of the team whose e-mail accounts were still working. The Tribunal considered that the claimant was perfectly justified in feeling somewhat cheated that his e-mails had been deleted in this way.

336. The claimant is then given a second meeting with Mr Stainfield however after this it would appear that Mr Stainfield carried out no further investigation. Once again the claimant's statements at the second meeting were extremely woolly and unfocused and we can quite see that Mr Stainfield probably did not know what he was talking about for much of the time. Given that Mr Stainfield was supposed to be investigating his grievance however we do not think it was sufficient for him simply to leave matters at that. The grievance outcome document is peculiar. One of the few definite things which would have come out of the claimant's complaints was that he was complaining about having received a bad appraisal which he thought was unjustified. Mr Stainfield decides that this is the one thing he is not going to investigate further since in his view the appraisal is going to be re-done and the informal warning has been rescinded. When asked how he became aware of this in view of the complete absence of any documentation advising of this Mr Stainfield indicated that he had been told this by Lorraine Hamdani. With regard to the claimant's complaints about being taken off shifts Mr Stainfield concentrated on whether or not that would be seen as a demotion. Interestingly, Mr Stainfield seems to have been under the impression that the decision was being made by David Small and David Fernie whilst Ms Illingworth's position at the Tribunal Hearing was that she had made the decision.

337. With regard to the Occupational Health report Mr Stainfield again got the basic facts wrong. He seemed to be under the impression that the referral document

had not been sent to Occupational Health when in fact it had. Mr Stainfield thought the referral had been written by Tom Henery whereas it had not.

338. Interestingly, none of the *"facts"* found by Mr Stainfield relating to who wrote the Occupational Health report appear to have come from Mr Small. Mr Small's comments on the Occupational Health report at his meeting with Mr Stainfield were recorded at page 531. What he says is that

> *"the first one wasn't handled as well as we hoped but we did make him aware of the referral."*

It therefore follows that once again Mr Stainfield's information came from Lorraine Hamdani and HR.

339. The final matter which Mr Stainfield took out of the grievance was that the claimant was complaining about the mediation process (pages 586-587). He indicated that he was not prepared to address these concerns because of the confidentiality of the process. It appeared to the Tribunal that the later characterisation of Mr Stainfield's grievance outcome as a full investigation of the claimant's concerns was simply incorrect. What Mr Stainfield had in fact done was entirely side-step making any findings in relation to the claimant's key concerns. He does not address the issue of the appraisal because this is going to be done again. He does not address whether the claimant was taken off shift for an illegitimate reason but finds that this was not a detriment. He does not address the issue of the hostile Occupational Health report because he says this was re-done and finally he does not address the issue about mediation.

340. The Tribunal accepted the claimant's evidence that by this stage all that he wanted to do was put the matter behind him and get back to work. We accepted the evidence stated several times that his union had advised him that if he went down the grievance route this would effectively be the end of his career and it appeared to the Tribunal that this was a concern to the claimant. This is the background to his letter to Mr Stainfield confirming that he would not be appealing. The Tribunal considers that given the way Mr Stainfield approached the matter and given the

fact that it was now clear the claimant would not have access to his e-mail account there was really absolutely no point in the claimant lodging an appeal against Mr Stainfield's grievance outcome. We also accepted the claimant's evidence that he had for the first time received written confirmation that the informal warning that he had received had been rescinded.

341. There also appeared to be confirmation that there was no ongoing disciplinary process. During her evidence Emma Illingworth on various occasions criticised the claimant for suggesting that there had been some kind of ongoing disciplinary process. The Tribunal accepted that this would appear to have been factually correct however we did consider that the claimant was perfectly justified in wondering whether something was going on in the background given that this was what Mr Small had said in the Occupational Health report and the claimant had not been back to work since.

342. Shortly thereafter the claimant indicated that his GP had now signed him as fit to return to work. The Tribunal accepted that in those circumstances it would be entirely normal practice to refer an employee to Occupational Health before allowing them to return. It is however unfortunate that the effect of this was that the claimant was prevented from returning to work at precisely the point when his sick pay ran out. It also appeared to the Tribunal having heard Emma Illingworth's evidence that her belief was that Occupational Health would provide a report indicating that the claimant was not fit to return to work so that the *"exit discussions"* referred to by her as far back as September of the previous year could take place. It appeared to the Tribunal that Ms Illingworth was disappointed when the response came back from Occupational Health to the effect that the claimant was fit to return.

343. With regard to the issue of sick pay the Tribunal has previously indicated its view to the effect that Emma Illingworth was in fact being fairly generous to the claimant in extending full pay for 12 months however equally we believe that the claimant, who had no experience in the matter, felt that this was something routine and it was quite clear that he was shocked and angry to be told that he would be moving to no pay. In addition we accept the evidence of the emails that the Claimant said he

wanted to return to work before he received notification he was moving to no pay. There was no evidence he had been given this information by his union or anyone else before he made his decision to return. Against that background the Tribunal did not consider that his e-mails to Emma Illingworth were particularly challenging or unexpected. We also accepted the claimant's evidence that at this point he felt that to some extent the respondents were backtracking regarding what he had understood regarding the appraisal. The grievance outcome from Mr Stainfield was quite clear in stating that the respondents would *"re-do the performance management review"*. Mr Stainfield had also confirmed that Mr Small was to receive training and that the claimant should gather evidence to substantiate why he should have been awarded a higher performance rating. The logical inference from this is that the scores might be changed. This did not accord with what the claimant was now being told by Emma Illingworth. Given that Mr Small's understanding of the position was that he had already had his re-training and had already re-done the appraisal months previously it is not surprising that the claimant might have gained the impression that the respondents were back-tracking on the issue.

344. By this time the claimant was taking an interest in what the respondents' policies actually said. It was quite clear to us that his letter to the respondents' Head of HR was prompted by the respondents' stated policy on harassment at work and whistleblowing.

345. The respondents' Head of HR was no doubt aware of their harassment policy which encourages employees to write to him confidentially and their whistleblowing policy which states

> *"If you feel uncomfortable taking your concern to someone in your own management group, you can instead contact the Company Secretary (Vincent Donnelly), Assistant Company Secretary (Lilian Manderson), the MD Corporate Affairs (Alan Young), Head of Internal Communication (Susan Braid), the Director of Human Resources (John Stewart) or the Head of Asset Protection (Steve Major).*

*You can make contact with any of these people in person or by telephone, or in writing via e-mail or letter.*
*Please make clear from the start whether you wish your concern to be treated confidentially so we can respect that from the outset."*

346. We had absolutely no doubt that this was what the claimant thought he was trying to do. Mr Stewart however despite the claimant stating in the first line that he wishes the matter to be kept confidential decides that the appropriate way to deal with this communication is to pass it back to Emma Illingworth to deal with.

347. Ms Illingworth then invites the claimant to the meeting on 1 August along with his union representative. It was absolutely clear to the Tribunal that whatever the claimant had been told about this meeting this was not a *"back to work"* meeting in the normal sense of the word. There was absolutely no discussion of the claimant's Occupational Health report. It is clear from the outset that no matter what the claimant says Ms Illingworth is not prepared to accept that he is genuinely prepared to return to work under the management of his current manager. The claimant characterised the way this meeting went as *"Emma poked me with a stick"* until she got the response she wanted. The Tribunal agreed with this characterisation. It appeared to the Tribunal that by this stage Ms Illingworth at the very least had decided that the claimant was not going to be permitted to return to work. Looking at the transcript of the meeting as a whole the Tribunal considered that the claimant's reaction to the points which were put to him were entirely understandable.

348. Even the comment which the claimant makes about *"what if they ask me to break the law?"* was, in the context and in the way which we believed the claimant intended it, a not unreasonable thing to say. The claimant has been off with depression for a period of around a year following difficulties at work with his manager. Whilst he is off the respondents had addressed these issues but in an entirely cack-handed manner which had not resulted in their resolution. Nevertheless the claimant is facing reality and has decided that he wishes to return to work. He is a professional person and when pushed again and again requires to point out that he is not prepared to give his employers a completely blank cheque.

Although it does not appear to have been appreciated by Ms Illingworth or Mr Cargill the claimant's position was that he worked in a highly regulated environment where he required to take personal responsibility for his actions and any management instruction would, it almost goes without saying, require to be dealt with bearing this in mind.

349. It appeared to the Tribunal that the respondents' purpose in holding the 1 August meeting was to provide them with sufficient ammunition to start proceedings to formally get rid of the claimant. Having achieved this, the meeting is then brought to a close without there having been any discussion about the claimant's return to work.

350. The respondents then institute disciplinary proceedings. Contrary to long-established ideas of fair process it is decided that Emma Illingworth should produce the *"fact finding report"* rather than have an independent person appointed.

351. At that time it would appear that the respondents were working on the basis that the JNC disciplinary procedure applied to the claimant although it would appear that this is incorrect. The JNC procedure specifically provides that the manager shall be independent. On the other hand the Tribunal note that there is no such requirement in the personal contract procedure which, as a matter of law, would appear to be the procedure which they ought to have used whilst dealing with the claimant. The Tribunal did not consider that this made any difference. It would have been clear to any reasonable employer that in a case such as this there was a requirement to have someone independent to look at matters. Emma Illingworth herself would have been aware that as far back as September she had already been reporting to the claimant's managers that if mediation failed then exit discussions would ensue. She had also indicated in the letter which she had prepared but not sent to Mr Rowlinson the previous November that in her view the situation was irrecoverable. Having already expressed these views then it was completely inappropriate for Ms Illingworth to take on the task of producing the fact finding report. Irrespective of that it would have been clear to any reasonable employer that she was far too involved in the matter to take on this task.

352. The Tribunal did not accept the respondents' argument that Ms Illingworth was the appropriate person to do the fact finding because of her close involvement in the case. The *"fact finding report"* itself was not prepared in the conventional way. Emma Illingworth did not interview anyone. It is clear that she had in fact written the fact finding report before the meeting on 1 August in the form of her own *"notes"*. All she appears to have done in order to produce the fact finding report is put a new heading on her notes. It is interesting that the fact finding report was written prior to 1 August given that the Decision Makers in the case placed great store on the behaviours demonstrated by the claimant at the meeting on 1 August.

353. As well as preparing the fact finding report Ms Illingworth also prepared the allegations which the claimant was to face. These were set out in the letter written to the claimant on 1 September. The Tribunal found these allegations to be somewhat curious and their link with the respondents' published Employee Rules to be somewhat tenuous. The only rule which it is said the claimant has breached which is an example of gross misconduct is stated to be rule 9

> *"Refusal to comply with a proper instruction or insulting behaviour toward a manger or a manager's authorised deputy."*

None of the five allegations mention any proper instruction which the claimant has allegedly failed to comply with. The only thing which could with the wildest stretch of the imagination come into the category of insulting behaviour is allegation 4 which is

> *"You have failed to demonstrate SSE values by challenging colleagues in an aggressive and confrontational manner and failed to accept feedback".*

It is clear however that there is a considerable difference between challenging colleagues or over-challenging colleagues and refusing to accept feedback and insulting behaviour. The link to the other breaches of the rules is also tenuous. At the very highest the allegations if proved could possibly amount to a breach of the obligation that employees *"conduct themselves in a manner consistent with proper*

*and professional performance in their duties and the maintenance of good working relationships"*. Even this link in the view of the Tribunal was extremely doubtful and could not be applied to what the respondents believed the claimant actually did.

354. The allegations are also hopelessly lacking in specification. Whilst it is accepted that employers are not under a duty to draft allegations with the same specification as a legal document there is a requirement that the allegations be drafted in such a way that the employee knows what he is being accused of. None of the allegations meet this simple and straightforward criterion.

355. The claimant is accused of *"failing to accept the findings of a grievance investigation"*. This might refer to his letter to John Stewart but might also equally have applied to something else. On one level it appears that the claimant is being accused of thought crime. This is a completely inappropriate allegation to form the basis of disciplinary action against an employee. Even if the allegation had been properly specified so as to include a reference to the claimant's letter to John Stewart the fact of the matter is that the letter to Mr Stewart was written on terms of confidentiality which the respondents' own policies had said they would respect.

356. The second allegation is in many ways the most bizarre in that the claimant is accused of not whistleblowing when he was supposed to. None of the respondents' witnesses could say what it was that the claimant was supposed to have reported. There is also absolutely nothing in the whistleblowing procedure to say that employees are under a duty to report whistleblowing concerns. As it stands this allegation was one which it would be impossible for anyone to respond to in a rational way.

357. The third allegation on the face of it does not appear to be an allegation of misconduct at all. It is simply a statement that

> *"The relationship, trust and confidence between you and SSE has broken down."*

It is not misconduct for a relationship to break down if the fault for the breakdown is with the employer. Leaving that aside for the moment what the claimant is supposed to have done is allegedly evidenced by two matters. The first of these is the reference to the mediation session. It was completely inappropriate for any reference to the mediation session to be included in a disciplinary allegation such as this. The first reason being that the claimant had been told it was confidential and the second reason being that the respondents' position as set out by Mr Stainfield was that they would not look into what happened in the mediation from the point of view of the claimant's grievance. During evidence Emma Illingworth admitted that it was inappropriate to include this reference. The second matter which is supposed to have evidenced the breakdown is *"various meetings with Emma Illingworth"*. There was absolutely no statement as to which meetings, when they took place or what the claimant was alleged to have said or done at these meetings. Furthermore it must have been clear to Emma Illingworth when she was drafting this allegation that clearly, if there was to be any sort of investigation, the person who would be a witness would be Emma Illingworth. This was therefore a further reason to ensure that Emma Illingworth was not the person preparing the statement of facts and representing the respondents' case at the disciplinary hearing.

358. The final allegation was *"you have failed to demonstrate SSE values by challenging colleagues in an aggressive and confrontational manner and failed to accept feedback."* Once again this allegation is hopelessly inspecific. What colleagues? When? What is he supposed to have done? Given that by this stage the claimant had been off since 1 July of the previous year it was probably inevitable that the claimant would believe that this was some kind of reference to his relationship with his managers prior to him going off. Apart from this there is absolutely no specification as to what the claimant was supposed to have done. It is also somewhat strange that, at the time the claimant had gone off sick, his conduct appears to have been such that the respondents at the time felt he merited an informal warning which they later agreed to rescind. If the respondents were now intending to rely on this behaviour as grounds supporting gross misconduct this was entirely inappropriate.

359. It would appear that at this stage at least the respondents do not warn the claimant that one of the grounds he may be dismissed on is *"some other substantial reason"*. Interestingly when the respondents wrote to the claimant on 4 August (page 648) advising him of his suspension Ms Illingworth had referred to the possibility of dismissal due to some other substantial reason. She had referred to the same four allegations and said

> *"if found to be substantiated constitute dismissal due to Some Other Substantial Reason (SOSR) and or gross misconduct …"*

Clearly this was something that Emma Illingworth had in mind on 4 August but by 1 September she had decided not to include this in the letter inviting the claimant to the hearing.

360. By 1 September when she is inviting the claimant to the disciplinary hearing the letter refers only to the possibility of dismissal for gross misconduct. It states

> *"Please note that if Gross Misconduct is proven, the result of the disciplinary hearing may be the termination of your contract of employment."*

Clearly Ms Illingworth had been aware of the possibility of the claimant being dismissed for some other substantial reason in August and the Tribunal received no satisfactory explanation as to why this was not included in the letter inviting the claimant to the disciplinary hearing.

361. On receipt of the letter the claimant is naturally alarmed and takes advice. The advice he receives is no doubt what any competent employment lawyer looking at the letter of invitation would say which is that the allegations are hopelessly inspecific and that the claimant will require further information from the respondents if he is to have any hope of answering them. The claimant is also advised of the existence of the ACAS Code and the requirements of that Code in relation to letters of invitation.

362. By this time management of the disciplinary process has passed to the respondents' Case Management section. The claimant writes to them, principally to Lorraine Hamdani. He refers to the ACAS Code and asks for further specification. This was an entirely reasonable and indeed inevitable request for him to make. The allegations as drafted are frankly impossible to respond to and any employee faced with these would have no idea what it is he is supposed to have done. The claimant also raises the issue that Emma Illingworth might not be the most appropriate person to be involved in doing the fact find and presenting the employer's case. This was also a completely reasonable thing to say and indeed it must have been crystal clear to anyone with any knowledge of HR that it was entirely inappropriate for Emma Illingworth to have this role. In order to support his contention the claimant makes reference to Emma Illingworth deleting his e-mail accounts and the major difficulty which he faced in defending the charges against him (which he thought must relate to the time when he was actually attending work at the respondents) without access to these e-mails. The thrust of his letter is to see if something can be done about sorting out his e-mails. He is critical of the fact that Lorraine Hamdani has prevented discussion taking place at all with regards to mediation but appears to be happy for Emma Illingworth to refer to this in support of her allegation. He asks the perfectly reasonable question *"why is it ok to talk about mediation now and not earlier in the year?"* In the letter he states that

> *"Emma Illingworth does not seem to have said much on this subject at all and has concentrated on communicating damaging false statements which harm my reputation in the workplace."*

We consider the claimant's statement in this regard to be quite correct.

363. On receipt of this letter Ms Hamdani does not reconsider the decision to have Emma Illingworth prepare the fact find report. She does not consider whether the allegations as drafted should perhaps be made more specific. She does not consider that the issue raised by the claimant regarding mediation is a virtually unanswerable one. Instead Lorraine Hamdani decides that she will add a further allegation to those being faced by the claimant. When she writes to invite the Claimant to the second meeting the letter contains a further allegation that "*You*

*have made allegations against Emma Illingworth including she misled you on the mediation process and that she destroyed your email account."* Whilst the specification of this allegation is an improvement on the absurdly low standard of specification provided in the other four allegations it still in the view of the Tribunal lacked crucial specification. In particular it does not say when or where the claimant has made the allegations. Whilst the claimant may well have surmised that this was a reference to some of his email correspondence with Lorraine Hamdani given that one of these e-mails was attached to the letter the claimant would be unaware for example if other instances of allegations were going to be raised.

364. The Tribunal's view was that by this time most employees would be firmly of the view that there was no way they were going to be getting any fair process from this employer. In this case however the claimant appears to have retained a touching faith in the respondents that eventually things would come right and that he would be heard.

365. The person originally detailed to deal with the disciplinary hearing was an experienced Manager with the respondents who had carried out a number of such hearings before. After the postponement of the first hearing, the respondents chose Mr Allan who at that stage had never carried out any disciplinary hearings. The Tribunal's view was that Mr Allan was entirely dependent on Lorraine Hamdani for advice as to how he should proceed and what he should and should not do.

366. The Tribunal's view was that by this stage any fair disciplinary hearing was a complete impossibility given that the allegations against the claimant had been drawn up in such an imprecise fashion.

367. It is clear that during the hearing there was practically no investigation or discussion about what the claimant was supposed to have done on the basis of these allegations. The claimant was in the Kafkaesque position of as he put it *"arguing that he was not argumentative"*. Where he was critical of the respondents and in particular of Emma Illingworth this was seen as further evidence of his lack of trust and confidence in the company.

368. Mr Allan was prevented by Lorraine Hamdani from looking at the claimant's original letter of grievance. His position was that he took it on trust that the grievance had been dealt with properly and he was essentially looking at the claimant's confidential letter to John Stewart as evidence that the claimant had not accepted this. He referred extensively to the meeting on 1 August which of course post-dated Emma Illingworth preparing the fact finding report which Mr Allan was supposed to be adjudicating on. With regard to whisteblowing he did not understand the claimant's references to Infinis until the Employment Tribunal Hearing. The discussion on whistleblowing appears to have proceeded on the somewhat ludicrous basis that the claimant was asking Mr Allan what whistleblowing concerns it was he was supposed to have raised (since they were not specified in the allegation) whilst Mr Allan was saying to him that *"how would he know"* and the claimant should have reported them to a Manager at the time. We would simply record that even if Mr Allan had had some notion in his mind that there was some event which the claimant had known about which he was under a duty to report there was no investigation as to whether or not the claimant had indeed reported it. Mr Allan's understanding of the whole concept of whistleblowing seemed to be rather odd.

369. When Mr Allan first started giving evidence regarding the keeping of a whistleblowing register by the respondents the Tribunal's view was that we hoped he was making this up. We wondered if perhaps he had got things wrong. Despite having several opportunities to do so however he maintained his position that the respondents keep a whistleblowing register and in his view if Lorraine Hamdani said that the claimant's name was not on the whistleblowing register then that was conclusive evidence that the claimant had not raised whistleblowing concerns. Mr Allan also appeared to have a peculiar view as to what concerns could be raised as *"valid whistleblowing issues"*. His view was that none of the matters raised by the claimant in the health and safety debate could amount to *"valid whistleblowing issues"*. Whilst it is perhaps understandable that Mr Allan would be unaware of this it is unfortunate to say the least that Lorraine Hamdani who was supposed to be giving him HR advice did not intervene to correct him. In his evidence to the Tribunal Mr Allan was careful to say that he had not really taken into account anything that happened at mediation. He appears to have based his

decision on trust and confidence on the meeting of 1 August and the way the claimant came over at the disciplinary hearing. It did not appear to have occurred to him, no doubt because Lorraine Hamdani did not point it out, that when one is conducting a disciplinary hearing where the individual is facing written allegations the purpose of the hearing is to deal with the allegations based on the factual circumstances at the point they were made. Mr Allan's attitude appeared to be that the claimant was critical of the company, at a point where he was fighting for his job, and critical of the procedures which had been adopted in relation to him then this was evidence of a lack of trust and confidence which was his fault. For the avoidance of doubt the Tribunal's view was that most of the claimant's criticisms of the respondents and the way he had been treated were entirely justified and it was quite inappropriate for Mr Allan to take these legitimate criticisms as evidence of the claimant's lack of trust and confidence in the company. With regard to the failure to demonstrate SSE values Mr Allan appears to have taken as read that what Emma Illingworth said in relation to the claimant's relationship with his managers was correct. There was absolutely no evidence before Mr Allan relating to this. With regard to the e-mail account there was no investigation by Mr Allan as to what had actually happened. Had there been any investigation one would have expected Emma Illingworth to say that she had in fact felt that she should write to IT for their confirmation as to what had occurred and was still awaiting a response. One might have thought that in those circumstances Mr Allan would want to see the response before making up his mind. This did not happen. In considering the matter of allegations against Emma Illingworth Mr Allan appears to have relied solely on the e-mail the claimant sent to Lorraine Hamdani which he thought was dated 15 September. The fact that the first sentence of this e-mail refers to it being in confidence does not appear to have concerned him.

370. At the end of the day our understanding of Mr Allan's evidence was that he did not consider that the claimant was guilty of gross misconduct. He was however advised by Lorraine Hamdani that he could still dismiss the claimant based on some other substantial reason.

371. The claimant's second letter of invitation to the disciplinary had not contained any reference to *"some other substantial reason"* either. This had been sent by Holly

Wishart of Case Management. It is therefore clear that Mr Allan was dismissing the claimant for a reason which was not foreshadowed in the letter inviting him to the Tribunal. Once again this does not appear to have concerned his HR adviser.

372. At the Tribunal Hearing evidence was led from Mr Allan to the effect that he found the charges against the claimant proven and there was some suggestion that it would have been possible to find the claimant guilty of gross misconduct. The Tribunal did not accept this evidence since our view was that if Mr Allan had truly believed that the claimant was guilty of gross misconduct then this would have given that as the reason for his dismissal.

373. The Claimant appeals. He naturally believes that the appeal will be conducted under the JNC policy which is the one that the Respondents have been telling him they are using up till now (albeit there are different versions of it). The appeal policy clearly states that where the employee is a member of a union the appeal will be heard by a panel. Whilst we accept Emma Illingworth might be right in saying that the Respondents don't do this we consider the policy is quite clear in saying that they should. When the Claimant refers to this he is told at the last minute that in fact, all the way through, they have been using the wrong policy as he is on a personal contract.

374. Given that the Grievance Policy features centrally in one of the allegations against the Claimant one might have thought that the fact they were using the wrong one might be something that concerns the Respondents but any issues around this are simply brushed off.

375. Finally, we have the Appeal Hearing. The Tribunal had some sympathy for Mr Broadbent who conducted the appeal. He appears to have asked Lorraine Hamdani some of the right questions when he initially asked her if it was in order for the respondents to dismiss someone for some other substantial reason based on a loss of trust and confidence when they had invited the Claimant to a meeting to deal with an allegation of gross misconduct. He also asked whether it was in order for an employer to take into account an employee's behaviour at the disciplinary meeting. Having received answers to the effect that it was satisfactory

he then went on to try to get his head round what the case was all about. The difficulty which he faced was similar to that of Mr Allan in that it would be practically impossible to have a fair hearing based on the allegations faced by the claimant in view of their complete lack of specificity. By this stage it was also clear that the claimant was in a complete bind. If he was critical of any of the processes which had been adopted then this would be seen as further evidence of a failure in trust and confidence. On the other hand if he did not make appropriate criticisms then a brief overview of the facts would suggest that he was the one being unreasonable. Once again a factor which struck the Tribunal at this stage was that even at this late stage the claimant was still positive and believed that by explaining matters to Mr Broadbent there was some possibility of him getting his job back. The Tribunal's view is that Mr Broadbent did approach the matter in an honest fashion but given the misinformation he was receiving from the respondents' HR department and the complete lack of clarity there was never really any possibility of him overturning the decision.

376. Having gone through our views of the matter it will be clear that we do not consider that the respondents were successful in establishing that the reason for dismissal was *"some other substantial reason"*. For a reason to fall into this category it must be *"substantial"*. The view of the Tribunal was that the reason for dismissal was that Emma Illingworth and to some extent others in the HR department had come to the view that the claimant should be managed out of the business. The claimant in his submissions described this as an *"Iago situation"*. He referred to the case of ***Co-operative Group Ltd v Baddeley [2014] EWCA Civ 658***. He considered that this was a situation as described in that case as where *"facts known to (the decision maker) or beliefs held by him had been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation – for short, an Iago situation …. in such a case the motivation of the manipulator could in principal be attributed to the employer, at least where he was a manager with some responsibility for the investigation"*. The claimant's position was that Emma Illingworth and Lorraine Hamdani who were in full possession of the facts acted to manipulate the dismissal process and the dismissal chair accepted their advice, evidence and credibility as given. The Tribunal accepted that this was broadly correct. It was not a substantial reason justifying dismissal.

377. The question which the Tribunal required to address however was what motivated Emma Illingworth and Lorraine Hamdani. The claimant's position was that the reason the respondents' attitude to him changed was because he made protected disclosures. Emma Illingworth was clearly aware of his allegation that he had made such disclosures at a fairly early stage. She makes specific reference to this in her notes and in her letter sent to the claimant's managers in September 2013. The Tribunal considered that there were a number of factual circumstances which supported the suggestion that Ms Illingworth had as her primary motivation the fact that the claimant had made disclosures of what he considered to be wrongdoing. These were

1. The fact that Ms Illingworth was involved from a fairly early stage (December 2012) in the management of the HR issues surrounding the claimant but at no time was the claimant advised of this.
2. The fact that Ms Illingworth had, on the basis of her own evidence, made a strong recommendation to Mr. Fernie to remove the claimant from shift but did not mention her involvement to the claimant when she meets him in August and September 2013.
3. That contrary to normal HR practice, no proper notes are kept of Ms Illingworth's meetings with the claimant in August and September 2013.
4. That the Respondent's did not follow their published absence procedure in relation to the Claimant's absence.
5. That as early as September 2013 Ms Illingworth is saying to the claimant's managers that if mediation does not work *"exit discussions"* will take place.
6. That although Ms Illingworth states that as a minimum mediation requires to be with David Fernie and David Small she in fact arranges the mediation so that David Small is not involved. She does not even ask Mr Small if he wants to be involved.
7. In November she is already stating in an unsent letter to the claimant's union representative (pages 609-612) that she would have concerns if the claimant said he wanted to return to work next week.
8. It is clear from the tone of the letter of 21 November that Ms Illingworth is well aware that the claimant's position is that his problems are due to having raised concerns and that he is being "punished for this".

9. As is shown in this letter and throughout, Ms Illingworth expresses absolutely no curiosity at any point about the detail of the claimant's allegations. She appears to clearly be aware that the claimant's view is that he is being punished for raising issues relating to health and safety and despite the terms of the whistleblowing policy she does not explore matters further but takes it as a given that it is the claimant's perception that is at fault.

10. Ms Illingworth distances herself from the grievance investigation but HR arranges for a manager to be appointed who has not been in the business very long and has no experience whatsoever of the work of the EMC department.

11. Despite having been acting as the claimant's Line Manager Ms Illingworth fails to put in a Cirtis request to ensure that his e-mail account is not deleted despite the fact that this is a standard process and utilised on a regular basis when employees go on maternity leave.

12. Having been advised that the e-mails are unavailable to the claimant Ms Illingworth delays 10 days between 4 and 14 January in putting in a new Cirtis request which has the effect that the e-mails can't be retrieved easily.

13. Despite the claimant pointing out the difficulties which are being caused to him by the lack of access to e-mails Ms Illingworth makes no attempt to chase the matter up further with IT or attempt to rebuild the claimant's Inbox from e-mails sent to other managers.

14. The respondents' HR department are heavily involved in managing the grievance process and provide Mr Stainfield with information which is incorrect in relation to the Occupational Health report and is incomplete in other respects. Mr Stainfield only interviews those individuals who the claimant reports as having complained about him and does not interview anyone else.

15. Ms Illingworth sets up the meeting on 1 August and refuses to accept the claimant's assertions that he wishes to return to work. She prods him with leading questions designed to have him express some doubts about his managers.

16. Ms Illingworth produces a statement of facts (prepared in advance of disciplinary proceedings being instigated). Ms Illingworth produces a set of

allegations which are hopelessly unspecific and do not give the claimant reasonable advance notice of the charges he has to face.

17. When the claimant protests and asks for further specification of the charges against him and suggests that Ms Illingworth is not the appropriate person to be dealing with the matter a further allegation is made against the claimant. None of his concerns relating to the specification of the charges are addressed.

18. Despite the fact that Ms Illingworth clearly has in mind a dismissal on grounds of some other substantial reason on 4 August she omits any reference to this from the letter inviting the claimant to a hearing as does Case Management when they write the second letter.

19. Despite this Case Management advise Mr Allan that if he does not wish to dismiss on grounds of gross misconduct he may dismiss for some other substantial reason.

20. Mr Allan is told that he need not look at the claimant's original grievance but just at the outcome.

21. Despite the claimant writing to Mr Stewart on a confidential basis as set out in the respondents' policy Mr Stewart ignores this and passes the letter on to Ms Illingworth to deal with. The letter later forms a substantial plank of the *"case"* against the claimant.

22. HR give Mr Allan somewhat bizarre advice relating to whistleblowing.

23. The company's general attitude to whistleblowing as evidenced by the fact they appeared to keep a secret whistleblowing register which is not mentioned in their published policy but the contents of which are known to senior managers and made available by HR to senior managers dealing with disciplinary cases. The Tribunal could think of absolutely no good reason for a company keeping such a register and one very obvious bad one which is that it enables the company to identify troublemakers with a view to unlawfully subjecting them to detriment.

24. HR appoints Mr Allan as Disciplinary Manager despite the fact he has never carried out a Disciplinary Hearing before. They advise him that it is perfectly in order for him to find against the claimant on the basis of things the claimant says at the Disciplinary Hearing despite the fact that they do not form any part

of the charges against him. Similar advice is given on to Mr Broadbent on appeal.

25. When the Claimant suggests that in terms of the policy he has been told the Respondents are using he is entitled to an appeal panel the Respondents tell him for the first time that all of the policies they have been applying to him for the past year are in fact the wrong policies. They tell him that the policy which applies to him is the personal contract policy which means he does not get a panel.

378. As against that litany the respondents' position appears to be primarily that they did nothing wrong or that if there were breaches of procedure that they were minor and that Emma Illingworth was honestly trying to deal with a difficult situation.

379. The Tribunal found this part of our decision making to be extremely difficult. On the one hand we strongly agreed with the claimant's characterisation of the way he had been treated by HR as being appalling. There were many, many examples of extremely poor practice and there had been genuine unfairness to the claimant on a substantial number of occasions. As against this it was clear to us from Ms Illingworth's evidence that she was not involved in the management of the EMC and on the face of it would have no motive for forming any animus against the Claimant. Ms Illingworth had no detailed knowledge of the operation of the EMC department and no real interest in the health and safety aspects of the shift rota. It was also clear to us that although she knew in general terms that the claimant was of the view that he had raised issues which had caused his managers to want to *"punish him"* Ms Illingworth had not at any stage gone into detail with the claimant as to what these issues were. There were absolutely no minuted discussions between Ms Illingworth and either Mr Small, Mr Fernie or Mr Pibworth. There was no evidence before the Tribunal of any discussion at all between these individuals and Ms Illingworth regarding any disclosures the claimant might have made.

380. We did consider whether this was a case of *"a nod is as good as a wink"* in that in certain situations a management team might advise HR informally that they want rid of someone and HR will then do what they can to oblige. There was absolutely no evidence here to suggest that this was the case. Crucially, we would have

thought that if management were wishing to punish the Claimant for raising his concerns and Emma Illingworth was *"in on it"* that the Respondents would have taken more severe action against him in early 2013 before he went off ill. It appears to us that up to the point the Claimant went off ill there was absolutely no thought of him not continuing in his employment with EMC. It was only after Emma Illingworth met with him in August and September that she decided that he couldn't go back to EMC.

381. It did appear to us from the evidence of Ms Illingworth that from the very outset she found herself somewhat floundering while she was trying to manage the claimant's case. It did appear to us that after the claimant went off sick she seemed unsure as to what to do. She had her two meetings with him at which he *"downloaded"* his issues. At that stage absolutely no formal processes were underway. She decides not to deal with the Claimant using any formal process at that stage. She hit upon mediation but failed to set this up properly. The Claimant was not invited to set out his concerns in writing. David Small was not invited to the mediation. When mediation didn't work she invited the claimant to go down the route of an *"investigation"*. The Tribunal accepted that on the basis of the evidence we heard that this is not a company which places much store on following its own procedures as a general rule. Whilst the complete disregard and ignoring of procedure might in other companies be seen as something extraordinary which demanded explanation it did appear to the Tribunal having heard some 35 days of evidence that within this company HR policies and procedures are ignored as much as they are followed. This was evident right from the start where instead of the claimant being told in no uncertain terms that he should either appeal or accept the findings of the appraisal there are a series of vague meetings designed to *"sort something out"*. The lackadaisical attitude to policies can also be seen from the fact that the claimant was told during the course of events that no fewer than three separate and distinct policies applied to him. Two of them were said to be JNC policies and the third a personal contract. A company HR department which set any store by applying its policies would in the view of the Tribunal have sorted matters out better than this. It was therefore our view that the fact that the respondents ignored their own policies when dealing with the claimant should not be seen as bolstering his view that there was an ulterior motive relating to him

having made a protected disclosure. On the other hand it seemed to us that this was a situation where HR would try to *"sort something out"* and then when that didn't work be at a complete loss as to how to properly progress matters further.

382. A further issue which we considered ourselves bound to take into account is the fact that others have raised similar issues to the claimant without having suffered in the same way. This was evident from the newspaper article lodged and indeed the claimant's evidence was that Jeff Rowlinson was on a safety committee and had himself raised some of these issues. We also considered it relevant that at least until the final stages the claimant was advised by his Union at each point and indeed throughout much of the process Ms Illingworth appeared to be talking to the claimant's Union representatives much more than she was talking to the claimant. Our view was that at the end of the day the claimant had not established that there was a causal link between the protected disclosures he made and Emma Illingworth's decision that she would attempt to manage him out of the business.

383. Our view at the end of the day was that Ms Illingworth took the decision that the claimant should be managed out of the business fairly early on and that the reason was basically that she did not know how to properly deal with the issues raised by the claimant. In our view this was not a substantial reason justifying dismissal. The respondents therefore fail at the first hurdle of seeking to establish a potentially fair reason for dismissal. Equally, however it was not because the Claimant had made the two protected disclosures to Mr Pibworth and to Mr Small.

384. Although the respondents' position in their pleadings was that they wished to keep the alternative of saying that the claimant had been dismissed for reasons of misconduct this did not appear to be pursued with any great enthusiasm at the hearing. In order to cover the matter however we should say that if we had found that the reason was the claimant's conduct then we would still have found that the dismissal was unfair. In our view the respondents would fail to meet all three strands of the test set out in the case of ***Burchell v British Home Stores***. We did not believe that the respondents' Decision Makers had a genuine belief in the claimant's guilt. As mentioned above had Mr Allan had such a genuine belief then we are sure this would have been included in his reason for dismissal. We would

accept that Mr Allan had a genuine belief that the claimant did not accept the grievance outcome despite having said he would not appeal. Our difficulty with this is that we do not think this is misconduct far less gross misconduct. We also accept that Mr Allan did have a genuine belief that the claimant had interpersonal difficulties with a number of colleagues and staff based on the information he was given by Emma Illingworth and the respondents' Case Management section. Once again this is not gross misconduct. Mr Allan did come to a view regarding trust and confidence however he did not base this on the two grounds mentioned in the allegation. In his evidence he claimed to have ignored the mediation and on the basis of his evidence the view was not based solely on the claimant's meetings with Emma Illingworth. It was clear that he did so based on the claimant's interactions with him at the disciplinary hearing.

385. On the question of reasonable grounds for belief our view is that Mr Allan did not have reasonable grounds for the views he came to. So far as investigation is concerned there was no investigation carried out by Emma Illingworth before she wrote her fact finding report and no further investigation was carried out by Mr Allan or Mr Broadbent. The investigation was totally defective. Overall we were also of the view that even if the respondents had been justified in coming to the view that the claimant was guilty of all five allegations against him dismissal was quite clearly outwith the band of reasonable responses.

386. If we are wrong in finding that the respondents' belief that the claimant had lost trust and confidence in them as his employers did not amount to some other substantial reason justifying dismissal the Tribunal's view was that likewise the respondents were not entitled to come to this view. All of the information which Mr Allan relied upon was provided to him by Emma Illingworth who had already made up her mind some months previously. Taking away the slant on events provided by HR the facts available to Mr Allan were that the claimant was perfectly willing to return to work under his previous managers. He would expect his managers to abide by the law of the land and his contract of employment and he was perfectly entitled to insist on this. He made it clear at the meeting of 1 August that he was prepared to return. To demand that he somehow internalised the

grievance outcome and accept that a proper investigation had been carried out when there had not was unreasonable.

387. The suggestion was made many times by the respondents' representative that the claimant was unable to let things go and that the respondents' fear was that as soon as he returned he would raise the same matters over again. If this was a genuine fear of the respondents then it was something which could easily be dealt with. It was quite clear that the claimant went in to the meeting on 1 August with the intention that he would be keeping his head down and returning to work and getting on with things. His view expressed at the meeting and also in his evidence to the Tribunal was that so far as he was concerned he had raised these issues their resolution was now above his pay grade and he would just carry on with his job. It was wholly unreasonable for the respondents to insist on anything more than the claimant providing service in terms of his contract of employment. It was clear that at the meeting on 1 August Emma Illingworth was demanding that the claimant not only accept throughout that he had been wrong but also accept a number of factual circumstances that weren't true - principally that his grievance had been properly investigated. It quite clearly had not. At many instances during the meeting it appears that the respondents not only wished the claimant to acknowledge that he was wrong but express gratitude to the respondents for treating him as they had. This is somewhat reminiscent of a show trial in the former Soviet Union rather than modern employment relations practice.

388. As mentioned above the Tribunal had some sympathy with Mr Allan and Mr Broadbent since they were specifically fed only the information which HR wanted them to have but the Tribunal was in absolutely no doubt that they did not have before them sufficient reasonable grounds to come to the conclusion they did. There had also certainly been a complete failure to carry out any proper investigation whatsoever.

389. It was also the claimant's position that the dismissal was procedurally unfair. He made specific reference to the ACAS Code. Clearly one of the matters to be addressed at the Remedy Hearing will be whether or not there should be an uplift in compensation to take account of the respondents' failures to comply.

390. We have already set out a number of matters where we believe the respondents failed to deal with procedural matters appropriately in connection with the disciplinary hearing which led to the claimant's dismissal. Paragraph 9 of the Code states that the employee should be notified of the disciplinary case to answer in writing and that the notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It is our view that for the reasons stated above the respondents entirely failed to do this. Section 9 also goes on to state that it would normally be appropriate to provide copies of any written evidence which may include any witness statements with the notification. It appeared to the Tribunal that written evidence ought to have been lodged in respect of some aspects of the allegations as they were eventually put to the claimant.

391. With regard to Section 13 we note that no attempt was made to arrange the meeting at a time when the claimant's representative could attend all the way through. Given the importance of the matter to the claimant we consider that a reasonable employer would have ensured that the claimant's representative was available for the whole of the hearing.

392. With regard to Section 12 we note that the employees should be given a reasonable opportunity to ask the questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. In this case the fact finding report was presented as being facts without giving the claimant any opportunity to go beyond this.

393. Finally, it is our view that there was a breach of Section 19 in that even if the respondents had found that the claimant was guilty of some sort of misconduct they ought to have dealt with this by way of a warning.

394. The Tribunal entirely deprecate the fact that when the claimant brought the existence of the ACAS Code to the attention of HR and raised the perfectly reasonable request that he obtain additional details of the allegations against him

the claimant's substantive point was not answered but instead he found himself facing a further additional allegation.

395. The Tribunal's view is that whilst the claimant's claim of automatic unfair dismissal under Section 103A does not succeed then his claim of ordinary unfair dismissal in terms of Section 94 does succeed. The remedy to which he is entitled shall be determined at a future Hearing.

**Breach of Contract**

396. The Tribunal found that there was insufficient evidence from the claimant to uphold his claim of breach of contract. It was indeed unclear to us up to the point of final submission whether the claimant was proceeding with this claim or not. At the end of the day given that the onus is on the claimant to show this the Tribunal decided that it could not uphold the claimant's claim of breach of contract. In any event it appeared to us that the claim being argued by the claimant was not one which would succeed. The claimant's argument appeared to be that he had not received a pay rise as a result of the appraisal and that he had therefore not received the full notice pay to which he was entitled since that ought to have included pay at the new contractual rate. This claim was entirely dependent on the claimant's claim of detriment succeeding and as is this claim has not succeeded then his claim for breach of contract arising from this cannot succeed either.

**Breach of Contract/Unlawful deduction from wages**

397. The claimant also claimed that although he had been paid three months' notice pay, his notice ran from 9 October when it should have run from 13 October when he became aware of his dismissal. We think the claimant is correct in this assertion but would agree with the respondents' representative that what the claimant is saying is that he is due an additional four days' pay for the period 9-13 October when he was still in work. The Tribunal has not seen the claimant's final pay packet, it was not referred to during evidence. It is by no means clear what date the claimant was paid up to. In those circumstances we cannot make a

finding that the respondents were in breach of contract or that he had wages unlawfully deducted.

Employment Judge: Mr Ian McFatridge
Date of Judgment: 23 February 2017
Entered in register: 23 February 2017
and copied to parties