EMPLOYMENT TRIBUNALS

Claimant: Mr D W Dambagolia

Respondent: The Automobile Association Limited

HEARD AT: Bedford Hearing Centre **ON**: 21st, 22nd, 23rd, 24th & 25th November 2016
11th, 12th & 13th January 2017
26th, 27th & 30th January 2017 (Deliberations)

BEFORE: **Employment Judge Adamson**

MEMBERS: **Mr R Leslie**
Mrs C A Smith

REPRESENTATION

For the Claimant: Mr N Singer (Counsel)

For the Respondents: Miss R Azib (Counsel)

RESERVED JUDGMENT

1. The complaints brought pursuant to the Equality Act 2010 other than in respect of dismissal are out of time. Time is not extended. The complaints pursuant to the Equality Act 2010 that are within time do not succeed and are dismissed.

2. The complaint of unfair dismissal does not succeed and is dismissed.

3. The complaint of wrongful dismissal does not succeed and is dismissed.

REASONS

1. The Claimant presented his claim to the Tribunal on 1st February 2013. The complaints within the claim are:

    i) Unfair dismissal pursuant to section 98 Employment Rights Act 1996 (ERA);
    ii) Direct discrimination based on the protected characteristic of disability, pursuant to sections 13 and 39 Equality Act 2010 (EqA);
    iii) Discrimination arising from disability pursuant to sections 15 and 39 EqA;
    iv) Indirect discrimination based on the protected characteristic of disability pursuant to sections 19 and 39 EqA;
    v) Failure to comply with an obligation to make reasonable adjustments pursuant to sections 21 and 39 EqA;
    vi) Victimisation pursuant to sections 27 and 39 EqA (the protected act relied on being one referring to the protected characteristic of disability);
    vii) Harassment pursuant to sections 26 and 40 EqA (the protected characteristic relied on being disability);
    viii) Wrongful dismissal being a claim for damages for breach of contract in respect of notice pay brought pursuant to the Employment Tribunals Act 1996 and The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

2. The issues within the complaints are as follows:

    i) Unfair Dismissal

        1. Was there a fair reason for the Claimant's dismissal?
        2. Was the dismissal fair in accordance with section 98 Employment Rights Act 1996?
        3. Did the Respondent have a genuine belief that the Claimant had committed the offence complained of? Was that a reasonable belief?
        4. Did the Respondent follow a fair process, in particular in respect of the investigation and the consideration of treatment of people in comparable situations?

    ii) Disability Discrimination

        The issues to be determined by the Employment Tribunal in respect of such complaints include:

Jurisdiction

1. Do the alleged acts of discrimination complained about by the Claimant constitute a continuing course of conduct?
2. If not, would it be just and equitable to extend time limit in which the Claimant should have brought such claims?

Alleged direct discrimination

3. By putting the Claimant through a disciplinary process and subsequently dismissing the Claimant and dismissing his appeal, did the Respondent treat the Claimant less favourably because of his disability contrary to section 13 Equality Act 2010? The Claimant seeks to rely on Vince Rodriguez, Jamie Hickin, Dave Martin, Andy Smith, Trevor Hunt, Simon Swallow and Paul Bravery as comparators.

Alleged discrimination arising from disability

4. By putting the Claimant through a disciplinary process and subsequently dismissing the claimant, did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability under section 15 Equality Act 2010? The "something arising" relied on, we heard in closing submissions was that the effect of the Claimant's disability resulted in him being a nuisance for the Respondent and an increased cost.

5. If so, was that treatment a proportionate means of achieving a legitimate aim?

Alleged indirect discrimination because of disability

6. Did the Respondent operate a provision, criterion or practice within the meaning of section 19(1) Equality Act 2010? The Claimant seeks to rely on the requirement to use the Vehicle Recovery System and alleges that the Respondent put him through a disciplinary process as a result for low productivity by setting productivity targets with which he was not able to comply (there is no dispute that the Respondent would have applied provision criteria practice to its other employees)

7. If so, did such provision, criterion or practice place the Claimant at a disadvantage in comparison with persons who do not suffer from the Claimant's disability?

8. If so, was that treatment a proportionate means of achieving a legitimate aim?

Alleged failure to make reasonable adjustments

9. Did the Respondent operate a provision, criterion or practice within the meaning of section 20(3) Equality Act 2010? The Claimant seeks to rely on the Respondent's alleged failure to allow him to use a lighter recovery system for the last six years of his employment and alleged failure to grant him longer breaks during his shift pattern for a two and a half year period ending in February 2012.

10. If so, did such provision, criterion or practice place the Claimant at a substantial disadvantage in comparison with persons who do not suffer from the Claimant's disability?

11. If so, did the Respondent take all steps as were reasonable in the circumstances to prevent the provision, criterion or practice from placing the Claimant at that disadvantage?

Alleged victimisation

12. Did the Claimant undertake a protected act by raising a grievance with the Respondent on 17th February 2012?
13. Was the Claimant dismissed on 1 November 2012 or subject to any other detriment as a result of that protected act?

Alleged Harassment

14. Did the alleged acts or omissions by the Respondent amount to unlawful harassment on the grounds of his disability, being unwanted conduct having the effect of violating the Claimant's dignity or creating an intimidating or hostile environment, as defined by section 26(1) Equality Act 2010? The Claimant seeks to rely on the disciplinary process leading up to and including his dismissal, five alleged different sets of disciplinary proceedings and allegedly being shouted at and called a liar by his manager on 23 May 2012 (which was allegedly repeated in an email exchange on 27 May 2012) as incidents of harassment.

(iii) Wrongful dismissal

15. Was the Claimant dismissed in breach of his employment contract?

16. Did the Claimant commit an act of gross misconduct justifying summary dismissal?

17. Is the Claimant entitled to payment in respect of notice?

3. In addition to the legislation referred to above, in respect of the complaints pursuant to the EqA also relevant are: sections 4 (protected characteristic), section 6 and schedule one (the definition of disability); 23 (comparators in relation to the complaints of direct and indirect discrimination; 109 (liability of employers and principals); 123 (time limits); 136 (the burden of proof) liability only, and 212(1) (general interpretation) on the meaning of “substantial”.

4. This hearing dealt with liability only. The Tribunal heard evidence from a number of witnesses, all of whom had produced written statements. All statements were taken as read. The Claimant heard evidence on oath or affirmation from: the Claimant (who produced two witness statements); David Fowler, a work colleague and trade union associate who produced three witness statements; Craig Bond, employed by the Respondent as a Road Area Manager; Anthony John Garbacz, employed by the Respondent as an Area Manager; Douglas Brian Manser, employed by the Respondent as its Regional Manager for London and the South East but at the material time the Regional Manager for the Respondent’s Road Operations, who produced two witness statements; and Stephen Robert Lamberts, at the time employed by the Respondents as a Business Development Manager for Major Fleets and Leasing but at the material time as its National Recruitment Learning and Development Manager.

5. At the start of the hearing, in addition to the issues being agreed, also agreed was a chronology which had been prepared by the Respondent and a bundle (which was in three parts). The hearing went part-heard in November 2016. The Tribunal reconvened on 11th January 2017 and when it did so the Claimant sought to provide a further chronology being one which had been used at an appeal to the Employment Appeal Tribunal. We did not allow that chronology to supersede the one previously agreed. We would use both as an aid, but not being determinative, to our matching findings of fact. The Tribunal was also presented with a better copy of a page in the bundle i.e. 787/2 which we accepted. The Tribunal was presented with further information regarding extracts of texts said to be between the Claimant and Mr Garbacz. That schedule of text had been prepared in December 2016 (but only disclosed to the Respondent just before we reconvened. There is no reason why that proposed evidence could not have been provided during disclosure before, albeit it was not a document in itself

but a compilation) or when the Claimant was giving his evidence. In addition we were provided with further photographs of wrenches, nuts, sockets, and jacks which we did not accept into the bundle there being no need, the Tribunal at that stage being fully aware of the tools and vehicle parts being referred to.

6. We had presented to us a bundle of documents to which we referred and had the benefit of written submissions from both parties' counsel, both of which were supplemented orally. We had regard to all that we heard.

7. In addition to the legislation to which we were referred we were provided with copies of a number of authorities, namely: *Secretary of State For Work and Pensions (Job Centre Plus) v Jamil & Others* EAT/0097/13/BA (26th November 2013); *Pnaiser v NHS England* [2016] IRLR 70; *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305; and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893. We have regard to those authorities and the others referred to in the parties' submissions. In addition we referred ourselves to *Hadjioannou v Coral Casinos Ltd* [1991] IRLR 352.

8. 8.1 In complaints of unfair dismissal it is for the Respondent to establish a potentially fair reason for its dismissal of its employee. In this case the Respondent asserts that its reason was one relating to the Claimant's conduct. That is a potentially fair reason as it falls within section 98(2)(b) ERA. Should the Respondent establish that was its main or principal reason, it is then for the Tribunal to determine on a neutral burden of proof whether the dismissal was fair or unfair within the criteria contained in section 98(4) of that Act. In considering that matter we consider whether the Respondent's investigation, procedure and decision was within the range of reasonable responses. As part of that process when considering the Respondent's treatment of the Claimant against his comparators we take on board the guidance in *Hadjioannou* usefully summarised in the headnote to that case as follows:

The emphasis in s.57(3) of the Employment Protection (Consolidation) Act [now section 94(4) ERA] is on the particular circumstances of the individual employee's case. An argument by a dismissed employee that the treatment he received was not on a par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances. Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will not be dealt with by the sanction of dismissal. Secondly, there may be cases where evidence made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for

dismissal. Thirdly, evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. Industrial Tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for argument. It is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that tariff approach to industrial misconduct is appropriate."

8.2 Direct discrimination takes place when a person treats another less favourably because of a protected characteristic – in this case disability. Such treatment is unlawful in the employment context if it is dismissal or other detriment. Section 23 EqA provides that there must be no material difference between the circumstances relating to each case (circumstances include a person's abilities in complaints of disability discrimination).

8.3 Discrimination arising from disability takes place when an employer treats another (the Claimant in this case) unfavourably because of something arising in consequence of the Claimant's disability. Such unfavourable treatment is not discrimination if it was a proportionate means of achieving a legitimate aim. Section 15(1) EqA does not apply, however if the Respondent does not know and could not reasonably have been expected to know that the Claimant had the disability.

8.4 8.4.1 Indirect discrimination occurs where a person applies to another a provision criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the Claimant (in this case disability). A PCP is discriminatory in relation to a relevant protected characteristic if:

(a) The Respondent applies, or would apply, it to persons with whom the Claimant does not share the characteristic,
(b) It puts, or would put, persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it,
(c) It puts, or would put, the Claimant at that disadvantage, and
(d) The Respondent cannot show it being a proportionate means of achieving a legitimate aim.

8.4.2 Section 23 EqA referred to above also applies to this provision.

8.5 Section 20 EqA imposes on an employer a duty to make reasonable adjustments in an employment context in respect of a number of situations. The particular situation relied on in this case is as identified in section 20(3) EqA which provides “The first requirement is a requirement, where a provision, criterion or practice (PCP) of A’s, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.” Where such a PCP is applied a reasonable adjustment is one which (either on its own or with others) it is reasonable to take to avoid the disadvantage caused by the PCP.

8.6 An employer victimises one of its employees if it subjects its employees to a detriment because the employee has done a protected act or believes that he has done or may do one. One such protected act is as specified at section 27(2)(d) namely making an allegation (whether or not expressed) that the employer or other person has contravened the EqA.

8.7 Harassment occurs when an employer engages in unwanted conduct related to a relevant protected characteristic (in this case disability) and the conduct has the purpose of effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether conduct has that effect to be taken into account is the perception of the Claimant; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

8.8 In all of the above there must also be one of the matters specified in sections 39 (or 40 for the harassment complaint). In this case the Claimant relies on either detriment or dismissal.

8.9 In considering the burden of proof (section 136 EqA) relevant in all the EqA complaints we have regard to the guidance given in the annex to *Igen v Wong* [2005] IRLR 258.

9. In complaints for damages for breach of contract, where it is shown (when considered objectively) that the Respondent has dismissed an employee in the circumstances when he is not, in contract law, entitled to do so (in this case the Claimant alleges he was entitled to notice) that is wrongful dismissal. An employer is able to terminate an employee’s contract without notice where the employee has acted in such a manner that the employer should no longer be required to keep the employee in their employment. There are a number of authorities

on this situation. We refer to *Neary and Neary v The Dean and Chapter of Westminster* [1999] IRLR 288, at paragraphs 18 – 22.

The Facts

10. The Respondent is the well known vehicle breakdown assistance company.

11. The Claimant, whose date of birth is 9th January 1951, began his employment with the Respondent as a Roadside Service Patrolman, referred to in these proceedings as a Patrol, on 18th July 1988. The Claimant has a Diploma in Automobile and Transport Engineering, a Certificate in Transport Economics, is an Associate Member of the Institute of Transport Engineers, an Automobile Service Engineer and has a Training Certificate in Electro-Mechanical Drafting. The Claimant has experience as an Auto Technician and also as an Auto Electrician/Technician in garages. The Respondent does not require its Patrols to have all the qualifications the Claimant has. The Claimant considers himself to be more qualified and experienced than many employed by the Respondent.

12. The Respondent concedes that the Claimant was disabled at all material times. The first material time relevant to these proceedings is 2006. It is likely that the Respondent was aware before that time of his impairments albeit whether it was aware that it was a disability within the meaning of the Equality Act 2010 or Disability Discrimination Act 1995 in 2000 as at that time they provided him with certain equipment to assist him physically and altered his then duties, is unclear. The Claimant has an impairment to his back which causes him pain, affects his sleep and causes flare ups from time to time each year which in turn cause him to take to his bed. The Claimant is able to cope with his work and on numerous times informed the Respondent that he was able to carry out his duties. The Claimant did, however, wear a back support (as advised by an Orthopaedic Surgeon as confirmed in a doctor's letter of 31st May 2011) (of a weight lifting type) which was obvious to those who saw him, and wore insoles in his shoes. The Claimant's work was such that he needed a suitable break between shifts to allow him to physically recover. The Claimant was able to drive a car and work on vehicles.

13. In 2000, the Claimant's duties were adjusted as referred to before, by the removal of the requirement for him to use a heavy "A frame" device for the recovery of vehicles. In 2006 the Respondent introduced an alternative system across the board being a lighter Vehicle Recovery System (VRS) which was controlled electronically. There would also, of course, be some manual work involved in process of using this system.

14. The VRS was required to be used by all Patrols who undertook vehicle recoveries. The system was designed and we accept, made vehicle

recoveries easier and also, reduced the amount of manual handling that the Patrols had previously been required to do. VRS also enabled Patrols to carry out recoveries over greater distance which, while beneficial to the Respondent, was unpopular with a number of Patrols as it meant they were travelling longer distances and thus able to carry out less repairs. The Claimant was the first of the Respondent's Patrols to be provided with the VRS. The Claimant was provided with training on the new system, failing it initially in August 2006 but passing it and being authorised to use the equipment from 8th October that year. The training the Claimant received was, we heard, the same as that as provided to other Patrols. The Claimant did not indicate that his training was unsatisfactory or that he did not know how to use the VRS. The Respondent's position was that there has never been any medical evidence or recommendation provided to it that the Claimant is incapable of using the VRS or that the VRS should be removed permanently from the Claimant. We did not have produced to us any medical evidence that there had been such medical evidence and we accept that to be the case. We refer later in these reasons to other medical reports which refer to the Claimant's medical condition and his duties.

15. On 28th October 2006 the Claimant wrote to various Managers of the Respondent, namely Steve Ives; Budd Davidson; and Jan Labrooy requesting special consideration. The Claimant introduced himself, describing his length of service and that he had a clean service record other than a serious accident which he attributed to reasons beyond his control, which accident he informed left him with a permanent weakness such that he could not do constant heavy lifting or constant pushing of cars without risk of bouts of flare up to his back. The Claimant informed that he had learnt to adapt himself and thus maintain the Respondent's standards of service. The Claimant continued, however, that since being provided with the VRS two months before, almost all his work was now vehicle recovery which he found difficult to cope with as it involved constant lifting and pushing of vehicles himself. On 1st December the Claimant was allocated a new Manager, Mr Andy Rowe. The Claimant was promptly placed on a Traffic Development Plan, the reason being that his performance was considered to be in the bottom 5% of Patrols based on traffic scores for the previous quarter. This was not disciplinary action but depending upon the Claimant's future performance dismissal was stated to be one possible outcome. We did not hear any outcome to either the Claimant's October letter or the Respondent's Traffic Development Plan.

16. On 6th January 2009 while at work, the Claimant slipped on some ice and twisted his back aggravating his back condition. The Claimant was absent from work for two weeks, and provided with four physiotherapy sessions by the Respondent. When the Claimant returned to work he was advised, in response to a request from his doctor that he be provided with light duties, by Mr Garbacz (who had become his line

manager the previous year) that if he returned to work he would have to work like anybody else

17. In May 2009 Mr Garbacz issued the Claimant with two Improvement Notice s, one for failing to complete PS124 (being a post job completion form, a copy of which was required to be handed to the Respondent's client) and a second for repeatedly signing on late. The Claimant sometimes had difficulties signing on to show attendance at work because of the Respondent's computer systems. The Respondent's procedure required its employees to take these difficulties into consideration and to begin the procedure in sufficient time to enable them to begin work when they were contracted to do so.

18. The Patrols shift patterns were set annually by the Respondent' central management. Local management had the ability to vary shift patterns for individual Patrols. On 3rd August 2009 the Claimant wrote to the Respondent's Head of Resourcing, Jim Meaney, referring to his back problem, it being aggravated earlier that year and the physiotherapy sessions he had been provided as referred to before. At the time the Claimant was on a 5:2 shift pattern i.e. 5 days working with 2 days off and he sought a 4:7 i.e. 7 days working followed by 4 days off to enable him to have more frequent rest days. The Claimant informed that he had improved and maintained his performance figures for the previous year, August to August but his back tended to slow him down when he did not have sufficient breaks to recover. This information was passed to Mr Garbacz whose evidence that that was the first he was aware that the Claimant had a longstanding medical condition we accept. In response to this letter the Respondent referred the Claimant to Leading Rehab, an Occupational Health service. The Respondent's referral to the Occupational Health providers, completed by a member of the Respondent's HR department Ms Keri Ace, with information provided by Mr Garbacz; informed that the Claimant constantly referred to his longstanding back problem; stated that the Claimant had constantly used his longstanding back problem to avoid certain things; the Claimant was currently stating that he needed a 4:7 shift pattern because of his back condition which pattern had a shift length of 10 hours and had (all) weekends off. Ms Ace opined in her referral that the Claimant's request did not make sense to the Respondent as there were other shift patterns such as 6:3 (6 working days followed by three days off) which would provide an average shift length of between 5 and 8 hours, that he had been on a 5:4 pattern for the last year, this being 5 working days on followed by 4 days off (which had an average shift length of between 8 and 10 hours) with no major problems. Ms Ace continued that the Respondent was happy to make adjustments to Patrols if it was shown that there was a medical condition that warranted it, however, she sought information as to whether the Claimant's request was a "….want rather than a need..". Ms Ace also reported that the Claimant regularly complained about using the VRS equipment. It was while this referral was in process that on 8th October the Claimant's GP wrote to the Respondent.

19. The Claimant's GP wrote to the Respondent referring to an MRI scan the Claimant had undergone in February that year and reported that it showed degenerated and partly collapsed L3-4 and L5-S1 discs with some protrusion in the discs above, observing that they were fairly significant findings corroborated the Claimant's symptoms of low back pain. The Claimant's GP also stated that he felt the Claimant would benefit in having a work pattern which had more frequent breaks.

20. Stuart Galise, a Chartered Physiotherapist, produced a lengthy report following an assessment of the Claimant on 15th October. Mr Galise reported that the Claimant was not physically suited to the full duties of working as a Patrol driver, that the manual handling abilities that he demonstrated at the assessment were below the requirements of the role; there was no serious pathology indicated; with appropriate advice he would expect that the Claimant's lifting, pushing and pulling abilities would be improved to a level compatible with carrying out all aspects of the Claimant's role; and, he saw no reason why he could not carry on working a 5:4 shift pattern or a 6:3 shift pattern. Within his report Mr Galise described the Claimant's condition, employment history with the Respondent so far as relevant to his report, that the Claimant used a VRS and how it was deployed, and that such activity required the Patrol to reach forwards and to lift and carry light loads, i.e. up to 10 kilograms. It was described that there was some bending, light pushing and lifting and bending/squatting. Mr Galise recited that the Claimant had stated that he had been working 5 days and 4 rest days pattern (not the 5:2 as he stated in his letter to Mr Meaney) since April that year. In response to a standard question, "Do you think that you are able to return to the full duties of your work role at this time?" the Claimant had informed that: he was already undertaking his job, the problem being that he had requested that he returned to a 4 out of 7 shift basis, that would make him more productive; the VRS equipment was problematic when working; that he managed despite regularly experiencing symptoms. The Claimant was carrying out his full duties at that time.

21. Shortly before the Claimant had been referred by Ms Ace to Leading Rehab, on 22nd September Mr Garbacz informed the Claimant that he had concerns that the Claimant's single task completion rate was below average. Mr Garbacz put together a coaching plan for him which involved coaching from a Technical Specialist Patrol, namely Simon Drown. As part of this plan Mr Drown observed the Claimant on 18th October. Mr Drown reported that the Claimant had advised him that he used a "tow pole" for all towing jobs (contrary to the Claimant's statement to Mr Galise as referred to in his report) and did not use the VRS at all, that it had become apparent during the day that the Claimant did not use his VRS in the correct manner (when he was conducting a VRS check) and that he was pushing the VRS out with his knees instead of pulling it out with his arms that being a health and safety issue. Mr Drown also reported that the Claimant had not

removed the VRS ramps correctly as the Claimant could not bend down properly and had to drop it from a height. Mr Drown commented that the Claimant looked very uncomfortable when kneeling down to put the pin into the VRS (part of the process). Mr Drown discussed the Claimant's "boomerang" data (boomerang being the Respondent's jargon for a job reported as completed by one Patrol but which then required a second Patrol to attend to it in respect of the same issue). Mr Drown reported that the Claimant had informed him that he did not fit batteries and it became clear to him that the Claimant could not get into his van and carry out the correct manual handling procedure for removing a battery from his van's battery compartment. Further that when lifting the battery to the car in which the replacement battery was to be fixed, the Claimant had asked Mr Drown to lift the battery as he had found it a strain to lift and put into the battery tray. Mr Drown concluded his report by stating that he believed that the Claimant was a hazard to himself and possibly others. In consequence of this report Mr Garbacz referred the Claimant to an Occupational Health provider, Back2Normal, whom the Respondent regularly used to assess its employees in respect of back related conditions.

22. Back2Normal was asked to determine whether the Claimant required any adjustments in respect of manual handling and use of the VRS. Following an examination on 19th November Back 2 Normal prepared a report in respect of the Claimant signed by Mr T J Salih, a Chartered Physiotherapist and Mr Colin Natali, a Consultant Spinal Surgeon, who concluded and recommended as follows:

"CONCLUSIONS

- The initial onset of pain was in 1994 following a RTA whilst at work.
- In spite of analgesic treatment and physiotherapy his pain is continuing.
- Spontaneous recovery is unlikely as he has pathological degeneration of discs and fact joints.
- Without further treatment his current level of disability is likely to persist.
- Over the past year Mr Dambagolla has had moderate pain, trouble severity and impairment as a result of his back pain. When he was seen on the day of the examination he had quite low pain and trouble severity.
- His range of movement in all planes was markedly below that which would be expected in a gentleman of his age.
- He exhibits pain avoidance behaviour which is a positive predictor of poor outcome.

RECOMMENDATIONS

Physical

- We recommend a six week course of documentation based care that can be provided at the Back2Normal clinic based on an evidence based algorithm for Documentation Based Care Systems (see appendix). The DBC software recommends an 18 week programme for a 50% reduction in impairment.
- The attendance should be twice weekly for maximum muscle reconditioning as our data indicates that infrequent attendees cannot be progressed and do not do so well.
- During this period he can continue work, although special instructions will be given initially to minimise incorrect lifting and prolonged postures.
- Using this treatment he has an 85% chance of improvement, with reduction of pain and reduced disability.

Work

- Mr Dambagolla presented several work patterns that could be adopted all of which appeared to be acceptable to the AA. The 5 days working followed by a 4 day period of rest is the one that allows the patient sufficient time to recover from the increased pain that he experiences as his days of work increases.
- Therefore, from a practical point of view it is our opinion that this pattern of work could be appropriate and would facilitate his continued work.
- It is also our opinion that the other work patterns are associated with an incomplete recovery pattern and are likely to result in periods of absence due to back pain."

23. In Back2Normal's report summary the Consultant opined that the Claimant had an 85% chance of returning to his former occupation with significant reduction of pain, reduced risk of work absence due to back pain and reduced disability. Further while the treatment they had recommended was taking place it would be safe for the Claimant to continue with his normal occupation albeit he may need reassessment for manual handling as it appeared he had been avoiding certain work related tasks.

24. As a result of the recommendations before him Mr Garbacz arranged for the Claimant to attend a manual handling and VRS refresher session. The session was conducted by Mr Liam Somerset who reported that the Claimant had informed him that each lifting technique shown by Mr Somerset to him was a problem for him (causing pain in his lower back), and his own way of lifting was satisfactory for him albeit Mr Somerset considered and stated that it was an incorrect method and unsafe. Mr Somerset continued that the Claimant had nearly fallen over while practicing each lift technique that he showed him and ultimately the training had to be stopped due to the Claimant complaining of back pain. Mr Somerset recommended that a ROSPA

trained assessor assessed the Claimant's manual handling and also that he undergo a manual handling course. To the Tribunal the Claimant's position was that Mr Somerset had shown him an incorrect way to lift. In consequence of Mr Somerset's report Mr Garbacz concluded that it was unsafe for the Claimant to be working, sent him home and instructed him to visit his GP. The Claimant remained absent from work for a period of 8 weeks during which period he was obliged by the Respondent to continue with 8 weeks physiotherapy treatment which was being provided via the Respondent, as recommended by Back2Normal.

25. 25.1 The Respondent's standard procedures require that when a Patrol is off sick for an excess of 4 weeks, a Sickness Absence meeting is conducted between the employee and both the Respondent's Regional Manager and its HR department. In accordance with this procedure on 19th January 2010 the Claimant met Mr Manser and Ms Ace. Also present were the Claimant's line manager, Mr Garbacz and a trade union representative, Mr Grafton.

25.2 During that meeting the Claimant was asked how the physiotherapy treatment was going to which he responded that he hadn't been for any that year having done sessions before Christmas. After some discussion regarding the treatment the Claimant was firmly informed that he had to book the remainder of the sessions at Back2Normal. The Claimant agreed to do so after stating that he hadn't thought it was necessary to keep attending.

25.3 The Claimant informed that he had had back pain since 1992 but lived with it, wore a weight lifter's belt, felt normal, a lot better, had pain in spurts, still used the traction machine which the Respondent had provided some years before for him, that his back was stable and didn't seem to have got any worse since his original accident. The Claimant informed that the reason he couldn't pick up the box he was tasked with doing at the Manual Handling refresher course conducted by Mr Somerset was because of the technique he was being shown.

25.4 Mr Manser informed the Claimant that a manual handling assessment for him had been arranged for the 25th of that month. The Claimant was further informed that once he had completed the course of rehabilitation and Mr Garbacz had conducted a return to work meeting with him, Ms Ace would refer the matter to Occupational Health to make a judgment on the information in the reports in line with the tasks the Claimant did. Further that the Respondent would be able to provide a lightweight battery box and an electronic power wrench to aid the Claimant once he had returned to work.

25.5 Confirmation of the contents of the meeting was contained in a letter written by Mr Manser to the Claimant on the following day in which letter Mr Manser also informed that once all the documented medical evidence was ready the case would be assessed by Occupational Health with regard to the Claimant's request for a certain shift pattern and that the Respondent would consider any recommendations which may be reasonable.

26. The Claimant returned to work on 26th January on which date he had a return to work meeting with Mr Garbacz. During the return to work meeting the Claimant was informed that he was being placed on a three month action plan, and that the Respondent would continue to monitor his manual handling and that there would be regular sessions with a Vehicle Specialist Patrol to coach the Claimant on how to carry out his working practices correctly.

27. The first session with a Vehicle Specialist Patrol was carried out by Mr Drown with the Claimant on 28th January during which the Claimant was given advice on a number of matters where he appeared not to be carrying out his duties in accordance with the Respondent's instructions. In particular, Mr Drown stepped in to prevent one client driving their vehicle after the Claimant had informed them that it was safe to drive, as he considered that if then had done so, serious damage may have been caused. As a result of his performance, including that he had not logged his time on an arrival at a job on the Respondent's AADIS system, the Claimant was given an Improvement Notice.

28. On 22nd February the Claimant wrote to Mr Manser informing that he had completed the physiotherapy course the previous week and sought consideration of his request in respect of shift preference. The Claimant stated that his preferences were 4:7 or 5:4. Around that time, on 22nd February 2010, Ms Ace referred the Claimant to Connault Compliance Services Ltd, an Occupational Health company, in respect of the Claimant's shift requests. Ms Ace stated in her referral that: the Claimant had informed his request was because of his back complaint; and she sought an assessment of whether the request was a need or a want. Both patterns the Claimant sought gave weekends off, further that the patterns sought are normally ten hour shift lengths, a shift that has been issued to him was 6 days on 3 days off which would have variable shift lengths meaning that the Claimant would not have to work for such lengthy periods. By March the Claimant showed improvement in carrying out his tasks.

29. On 1st March Connault Compliance Service Ltd produced a report which stated that it had conducted a telephone consultation with the Claimant. Connault informed that some work activities may exacerbate the Claimant's symptoms albeit he: should be able to undertake his normal duties; may take longer to perform some aspects of his role; that while no specific restriction was recommended, some flexibility

should be allowed; and that there did not appear to be any specific medical reason why the Claimant should not be able to work the full range of shifts as required. Further that with improved back care management the Claimant's symptoms may be better managed although it was unlikely that it was resolved completely. The outcome of the Claimant's request for a shift variation was that, in accordance with the Respondent's nationally imposed shift pattern, the Claimant was required to work the 6:3 shift pattern allocated to him.

30. On 4th March 2010 Mr Garbacz issued an Improvement Notice on the Claimant in respect of "Misappropriation of AA time/Fraudulent use of AA time..". This was in respect of Mr Garbacz's belief that the Claimant had failed to record his arrival time on a number of occasions only doing so when prompted, the Claimant had failed to complete jobs at the breakdown scene and on one occasion the Claimant had to be prompted to complete the job as he had forgotten to do so. It was recorded that the line manager would review the Claimant's actions on a regular basis Mr Garbacz explaining to the Claimant that Patrols were employed in a position of trust and, being largely unsupervised, were expected to follow the Respondent's procedure and management instruction without the need for constant monitoring. The Claimant had confirmed, Mr Garbacz continued, that he had been provided with more than ample support, direction and tools to carry out his work and henceforth he was to ensure that he was using those resources to fulfil his role. The Claimant was further informed that if he felt there was any need for further coaching or development he was to contact his manager and that it was important for him to demonstrate his ability to fulfil the role. Mr Garbacz informed the Claimant that if there were any further concerns in relation to misappropriation of AA time then the circumstances would be fully investigated with a view to a Stage III disciplinary hearing where summary dismissal was a possible outcome. While Mr Garbacz informed that the Improvement Notice was issued by completion of a template it was, of course, for him to determine its content.

31. In July 2010 the Claimant was scheduled for a routine technical competence assessment. Such an assessment, we were informed, is akin to an MOT for Patrols which they are required to complete every three years. This assessment was nothing to do with any other assessment of the Claimant and would have been required of any of the Respondent's Patrols. The Claimant attempted to cancel the appointment, informing that he was working on a special project for Mr Manser: this was untrue. When the Claimant did attend his technical competence assessment on 22nd of that month he failed, having a score of 44%; and having made numerous mistakes in deploying the VRS which were considered serious and dangerous apart from also going against the Respondent's health and safety guidelines. Mr Rob McDermott who carried out the assessment, considered and reported that: the Claimant did not heed what he had said; only paid lip service to him; frequently interrupting Mr McDermott with matters he

considered to be irrelevant; when corrected the Claimant stating that he knew or would have done things [differently] anyway; and the Claimant had informed that the way he did things was because of the way he had been trained. 44% was a low score and the assessment identified to be one of the worst ever seen.

32. The Claimant's line manager was absent from work at this time, thus another Area Manager, Mr Andy Rowe, met the Claimant and conducted an investigatory interview arising out of the assessment during which the Claimant was suspended. The Claimant was invited to a Stage III disciplinary interview. On 23rd August 2010 the disciplinary meeting was conducted by Mr Manser, Ms Keri Ace attending from the Respondent's HR department and the Claimant attending accompanied by an IDU representative, Tony Dunne. During the disciplinary meeting there was a full discussion during which, amongst other things, the Claimant accepted that he had bad habits; he did not understand why Mr McDermott would consider that the Claimant had not listened to him; that he had been talking too much; and his union representative informed that he thought the Claimant had been using "yellow wedges" incorrectly. The condition of the Claimant's back was discussed: the Claimant informing that it had been stable for the previous fifteen years; that he had benefitted from the treatment the Respondent had provided; that he had ignored the formalities of the assessment and had not followed all the rules afterwards; that he had asked Mr McDermott for training on VRS; that he had improved in the action plans and would like and asked for further training on the VRS. The outcome of this meeting was Mr Manser issued the Claimant with a Stage III final written warning for:

i. Serious breach of health and safety rules;
ii. Serious negligence;
iii. Failure to use the VRS unit correctly; and
iv. Failure to follow Training/Coaching provided.

The warning was to remain on the Claimant's file for two years.

33. Over 25th & 26th August the Claimant was provided with additional VRS training. The trainer reported that ultimately the Claimant had been able to demonstrate he could competently complete all required tasks; and that he understood all the subjects covered.

34. In January 2011 there was a restructuring of the Patrol group areas. It was proposed that the Claimant would be transferred to another manager, Andy Rowe. The Claimant objected with the outcome being that the Claimant remained with Mr Garbacz. The Claimant's objection to the transfer, referring to bullying by Mr Rowe, was treated as a grievance and as a result there was a meeting between the Claimant and Mr Manser with Mr Andy Flitton attending as an IDU representative and Ms Ace on behalf of the Respondent's HR department during

which the Claimant informed that he didn't have a problem with Mr Garbacz.

35. In 2011 the Respondent introduced a new system of performance measurement for its Patrols. This system measured individual performance and ranked that performance in relation to both the team in which they worked and nationally. The Respondent's system provided that where a Patrol's performance was below 56% of the average of their group they would be placed on an improvement plan for six months. If a Patrol failed to reach the 56% of the average score in any given month they would then receive an Improvement Notice followed potentially by a series of disciplinary warnings before potentially facing dismissal. In August 2011 the Respondent conducted a review of all the Patrols' performance. The Claimant was one of 155 (nationally) whose performance fell below the threshold level. Mr Manser met with each of the Patrols who were within his area who had not met the threshold level. Each of those Patrols were to be offered a severance package or informed they would be placed on an improvement plan. The Claimant opted to be placed on the improvement plan. We were referred to documents within the bundle regarding this meeting, in particular, Mr Manser's notes on page 435/1. Those notes are just that, notes, and where Mr Manser records in tabular form a potential "March – dismissal – nothing", we consider that to be nothing more than a shorthand statement of what may happen if the Claimant had failed to achieve the relevant threshold at the end of the performance improvement plan. We do not regard it as evidence that the Claimant was informed that he would be dismissed come what may.

36. The Claimant's performance was measure for August, September, October and November 2011. The Claimant was successful in improving his single task completion rate but did not achieve the stated minimum of 5.8 jobs per shift. Mr Garbacz produced an investigation report which included minutes from an investigation meeting conducted on 22nd December 2011 between himself and the Claimant. In that meeting it was recorded that on 31st August the Claimant had been issued with an Improvement Notice outlining the action plan and the performance measures required for the Claimant to achieve the appropriate standard, the Claimant agreeing that such a meeting had taken place; agreed the Claimant spent time with Technical Support Patrol Spencer Matthews; accompanied visits on 14th & 15th September; as agreed the Claimant had attended a training course entitled Patrol Performance Improvement Programme; there had been a further one to one meeting between the same parties; and, the Claimant had been advised that he was not achieving his agreed performance targets for jobs per shift. The figures were as set out in that report. The minutes record the Claimant's stated reasons for not meeting the targets including that the jobs he had been receiving were not fixable and had thus taken time and that he has carried out a lot of recoveries which took longer (than other jobs). The Claimant further

stated that he took extra precautions and had been doing everything by the book. Mr Garbacz summarised,

"When considering de-assigns it does look as if Dan as a higher % compared to the team however, taking into account the time lost through de-assigns then Dan is very much close to the team average.

The biggest issue which has affected Dan's productivity is his time spent on the job and his decision making. He spends considerably longer under the bonnet (Arrive to RSS complete) only then to convert to recovery."

37. On 8th August 2011 the Claimant wrote to the Respondent asking for a copy of the medical records it held in respect of him. By 21st December that year those records had not been provided albeit there had been correspondence between the parties regarding them. On 21st December the Claimant wrote to the Respondent in respect of the Respondent's efforts, and while thanking it for those efforts made a final request for a copy of those records. We do not go into that matter here as it is not pertinent to these proceedings. We note however, that in that email the Claimant described having a back injury at work on 4th November 1992, repeated again on 13th November 1998, as a result of which suffering from work related back pain and also occasional "flare-ups" which gave crippling acute pain which themselves the result normally of a silly mistake such as "missing my footing"; the Claimant continued that he had been diagnosed by a specialist as having "Lumbar disc destabilised" by the accident in 1992 and that with luck he had learnt to cope with his back problems, and carried out his normal work with a cautious approach without any absenteeism but with the assistance of a traction machine support belt. The Claimant referred to having a "flare-up" in January 2008 through slipping on black ice while getting out of his work van, however he never made a claim against the Respondent seeking only support for another 4 years work, so he could retire at 65. The Claimant continued that since he had formerly been regarded as "highly productive worker maintaining quality" but since the introduction of what he described as a "heavy VRS recovery system in 2006" his efficiency may not have been the same due to back pain caused by carrying out his duties. The Claimant further stated that Mr Rowe had stated, "as far as I am concerned you have no back problem", and his line manager, Anthony Garbacz had said in front of Mr Somerset, "there is nothing wrong with your back…it is your age with your Asian origin!!". Mr Garbacz denied having made any such statement. There had been two dates attributed by the Claimant to this statement. The Claimant has not brought a complaint of race discrimination. That in itself does not mean that the incident did not happen and we well recognise that employees are often reluctant to take proceedings against their employer, albeit the Claimant was experienced in raising grievances. Considering all we heard we are not persuaded that the comments alleged were made.

38. A stage one written warning for poor performance issued 27th January 2012 was confirmed by a letter dated 2nd February 2012. The warning was specified to be in respect of failure to achieve a minimum standard of performance in the Respondent's National Improvement programme. The stage one warning was to remain on the Claimant's file for a year. On 3rd February the Claimant wrote to the Respondent informing that he had been progressively and unfairly penalised against his back problem since the introduction of the "heavy VRS Recovery system" but no help or consideration had been given to his disability. On 9th February the Claimant appealed (treated as a grievance). Due to the matters the Claimant had raised in the previous December, the Claimant's appeal, in respect of the disciplinary action taken at the end of January, was put on hold.

39. 39.1 A grievance meeting took place on 17th February (but did not conclude) continuing on 13th April 2012, the Claimant being accompanied by Paul Grafton, a work representative, the meeting being conducted by Mr Stuart Surridge, a responsible manager supported by Angela Redstone, an HR Delivery Manager. During 17th February meeting the Claimant, through his representative, referred to his VRS being removed in 2000 and having shift adjustments removed. The representative further stated on the Claimant's behalf that no one was asking for the VRS to be removed permanently just for it to be removed on a regular basis. The Claimant being under target expected his targets to be reduced alongside the removal of the VRS (from the evidence that we heard that the reference to a VRS being removed in 2000 must be incorrect as they were not introduced until 2006 and must be a reference to the "A-Bar" then in use). There was a thorough discussion, the Claimant informing that he had been asking for shifts with more breaks for the previous two and a half years due to his medical condition. The Claimant referred to some of the medical reports he had received. A number of other matters were referred to. The Respondent understood the Claimant to have said at that meeting that he had been trained in 2006 but also that he had been never trained until 2010. It was suggested on the Claimant's behalf that further training may be beneficial, the Claimant informing, however, that it would not change the issue.

39.2 During this period the Claimant submitted a second part to his grievance, with documents in support of the grievance as previously presented, and a summary of grievance and history. Ms Ace, who would normally be required to provide support to the area of the Respondent's business which included the Claimant, was absent from work on maternity leave while these events were taking place and a colleague of hers, Elizabeth Reece, wrote to Leading Rehab informing that the Claimant currently worked a 5:4 shift (which gave a longer than average shift pattern) which she thought may not be complimentary to his

back condition as the maximum shift length on that shift pattern was 10.25 hours and the shortest 6.5 hours. The average shift for a patrol on that shift pattern was 9.25 hours and a Patrol on that shift pattern could work 51 hours over each block of shifts. Ms Reece informed that the Respondent could consider an alternative shift pattern which would attract shorter shift lengths such as 4 days on followed by 2 days off which pattern would give a maximum of 9.5 hours per shift and a minimum of 5 hours for each shift length being 7.25 with a maximum working shift of 38 hours. Leading Rehab was asked for recommendations with a question of whether to change the Claimant's shift pattern to 4 days on 2 days off. Earlier that year on 9th January, the Respondent had written to Leading Rehab seeking guidance on use of the VRS system which, it informed, had been temporarily removed pending the outcome of the Leading Rehab's assessment. Leading Rehab was asked to carry out a full functional assessment of the Claimant's work capability and make recommendations as to whether he was able to use the VRS equipment or whether there was a requirement for the VRS equipment to be removed, and if so, whether on a permanent or temporary basis, together with any other recommendations.

40. On 17th February 2012 Serco Occupational Health was also asked for an assessment of the Claimant regarding his shift pattern. On 29th February Serco reported to the Respondent reciting the Claimant's condition and problems at work as reported to it by him. Serco advised that a 5 days on 4 days off shift pattern was likely to be recommended on a long term basis with a view of the Claimant's condition being chronic and that other shift patterns with shorter rest days were not suitable. Serco reported that the Claimant's condition was permanent, potentially progressive, did affect his day to day activities, that the Claimant was fit to carry out his normal duties with certain suggestions as referred to in its report, that exercise, repetitive bending and lifting could exacerbate his back pain and adjustments to the Claimant's current role needed to be explored. Further, if restrictions were not possible consideration may be needed to be given to an alternative role with less physical and manual handling demands.

41. Leading Rehab, through its Clinician Stuart Gallise, did an assessment on 8th March that year. Physical activities described in the report were reported, we do not set them out here (page 511 and 512 of the bundle). In his report Mr Gallise commented that his findings indicated that the Claimant had adequate functional capability to carry out the full duties of his role as a Patrol driver including use of the VRS system provided he followed good working practice.

42. On 23rd April 2012 Mr Surridge wrote to the Claimant with the outcome of the grievance. In particular he considered:-

71. Whether the Claimant had been treated unfairly in the past by not being permanently removed from VRS provided with the shift pattern he had requested;
72. What adjustments the Respondent could make for the Claimant going forward.

43. Mr Surridge considered that the Respondent had made every effort to gain medical advice regarding the Claimant's condition and how it could be managed in the workplace to ensure the Respondent could maintain its duty of care to the Claimant and to its members. Specifically Mr Surridge declined to comment on every piece of evidence that the Claimant had provided considering that doing this would not resolve the issues, reciting that the Claimant had himself stated that they were in the past. We accept that that be a reasonable conclusion bearing in mind the considerable and often historic matters the Claimant had referred to. Mr Surridge concluded that it would not be possible to remove the VRS from the Claimant permanently as it was a key task for him albeit the Claimant would be allowed an additional 5 minutes to load and an additional 5 minutes to unload his VRS beyond the Respondent's standard targets in future. It had been confirmed that the Claimant had been provided with a 5 days on and 4 days off shift.

44. On 25th April the Claimant appealed against the grievance decision. As part of his appeal he requested to be exempted from unattended VRS recoveries unless appropriate help was given to compensate for his disability and asserted that comparing his productivity figures with others was unfair and thus discrimination. If the VRS was to stay he sought to be excluded from the Respondent's productivity related dismissal process for the remainder of his employment (stating that was to be three and a half years).

45. On 17th May, Mr Ian Candy wrote to the Claimant with the outcome of the appeal which outcome was accepted by the Claimant. Specifically the following was set out:

> "Specifically we agreed that I would consider the following points as outlined by Paul during the meeting:
>
> 1. that the AA were fully aware of the repetitive strain of using the VRS unit had on Dan's back due to the extensive medical records presented previously. Both Paul and you were not looking for me to permanently remove the VRS but as a reasonable adjustment remove it for a period of six months and then review it to see whether Dan's back is better or not from not having to use the VRS.
> 2. The current adjustment made by Stuart Surridge was not clarified in terms of explaining how the additional ten minutes would help Dan and you both believed it was the

constant bending and move ability whilst using the VRS unit which impacts on Dan's back. Dan pointed out that there were 125 points in the manual for using the VRS system. Also, you believe that Stuart's suggestion for Dan of calling for assistance when needed would potentially rescue his STC score and therefore could unfairly place him on the performance management process.

3. When Stuart temporarily removed the VRS, Dan's productivity went from red to a positive in traffic.
4. The risk assessment completed previously by Leading Rehab who suggested Dan could use the VRS was a staged assessment. Completed on flat ground, it didn't take into account hills, cars parked on either side and you believed it was not a fair assessment of what the job entails especially as Dan had not needed to use the VRS for a while previously and it didn't measure the impact of Dan's back over a period of time using the VRS system.

We discussed point fourteen of your grievance letter in which I explained to you I would not be able to remove you from any performance process and you agreed that if I were to put in some reasonable adjustments (i.e. removal of the VRS) you would not be expecting this. You explained to me that prior to the VRS being introduced you were a top performer and would like to continue to be a good patrol for the remaining three years you would like to work for the AA.

Following an adjournment, where I reflected on what had been said; I agreed that I would remove the VRS with immediate effect for a period of six months where we would then review it."

46. Following the conclusion of the Claimant's grievance on 21st May, Mr Meaney wrote to the Claimant informing him that his disciplinary appeal would be heard on 31st of that month. During the period between those two dates, Mr Garbacz was informed that the Claimant had logged on to the Respondent's deployment system as carrying out "special duties", which is the code used when an Area Manager authorises a Patrol to log off the system for a medical appointment or home emergency. Mr Garbacz telephoned the Claimant to enquire whether he had been allocated a training slot with Technical Specialist Patrol Spencer Matthews between 10.30 am and 1.30pm such time including travel time for the Claimant. The Claimant informed Mr Garbacz that Matthews had told him to log onto the system early, only half an hour provided for the travel time and to log on as Special Duties. On Mr Garbacz's enquiring whether the information provided by the Claimant was correct, Mr Matthews denied that it was but informed that he had contacted the Claimant the previous day about the session. There followed a further discussion between Mr Garbacz and the Claimant in which it appeared to Mr Garbacz that the Claimant had himself taken

the decision to put himself on special duties without authorisation. The Claimant alleged that Mr Garbacz had accused him of lying. This dispute became heated but was resolved by Mr Manser during a meeting he held with both of them on 12th June.

47. The outcome of the appeal was in the Claimant's favour. We quote from Mr Meaney's letter to the Claimant dated 16th June 2012:

> "As communicated to you at the close of the hearing, I concluded that the allegations of poor performance, namely failure to achieve a required minimum standard of performance on the national improvement programme were not substantiated and as a result, my decision is to not uphold the Stage 1 sanction issued on 27th January 2012.
>
> As communicated to you at the hearing I am satisfied that the managers involved acted and interpreted the data available to them at that time. However, it is clear that there may have been confusion over your medical condition in conjunction with further confusion surrounding your medical records.
>
> We are now fully aware of your medical condition and the impact that it may have job performance. Going forward my recommendations are;
>
> 1. Now that your VRS has been removed for a trial period of 6 months, and will be reviewed on a 6 monthly basis, your targets will be adjusted accordingly;
> 2. Your targets will be fully communicated and understood by yourself;
> 3. Monthly performance reviews will be held with your Area Manager, and full support will be given in an effort to assist you;
>
> I will request that your Area Manager fully briefs you on Points Plus and the Contribution model.
>
> Moving forward, your performance will be managed in accordance with the Contribution Model and Points Plus in line with the rest of the Patrol force and your reasonable adjustments will be factored into your targets."

48. There was considerable cross examination on the evidence before us regarding the Claimant's performance. Figures were produced for the months of August to November 2011 and February to June 2012. During that period the Respondent's performance measurement system changed. The Claimant was amongst the lowest performance both within his team and nationally, for example, in August 2011 he ranked 41 out of 42 in his team and 2140 out of 2227 nationally. This general order of ranking remained constant in September and October

albeit in November he had risen to 38 out of 44 and 1789 out of 2214. During that period the Claimant was generally below target in the various tasks that were measured. In February to April, the Claimant's performance within his team and nationally was similar, being 38 out of 45 in February and 1684 out of 2182 nationally but 42 out of 45 and 1962 out of 2187 and 40 out of 45 and 1903 out of 2153 in March and April that year respectively. During those months the Claimant was assessed as Band Neutral i.e. the minimum level of acceptability or below target. In May a new system of recording performance was introduced which was not comparable to the previous one. In the months May to July, being the months we are provided information for, the Claimant achieved the lowest bonus possible in May but did not achieve bonus in either of the following two months. Further his ranking within his team for the respective months was 33 out of 53, 39 out of 53 and 42 out of 52. A bonus was payable on performance bandings based on points. The performance bandings were 4.7 and over for which a bonus of £1,500 was paid, 4.34 to 4.7 for which a bonus of £1,000 was paid, 3.98 to 4.34 for which a bonus of £500 was paid and 3.62 to 3.98 for which a bonus of £100 was paid. When the Claimant achieved his bonus it was of £100 having achieved 3.68 points that month. The following two months his points were below the minimum to achieve a bonus. From these figures and the evidence we heard we are not persuaded that the Claimant's performance improved to any material extent following the removal of the requirement by the Respondent to use the VRS.

49. 49.1 On 25th September 2012 the Claimant was tasked with a call out to one of the Respondent's members during which it was necessary to change a wheel to that member's Range Rover Vogue at their home address. The Claimant attended, changed the wheel and left. Shortly thereafter the member reported to the Respondent that when she was pulling off her drive the wheel which the Claimant had been working on fell off causing her car to drop to the ground, but no injuries were sustained by the member nor by her two children who were in the car, albeit they were upset.

49.2 The Respondent sent another Patrol (a Mr Obsbourne) to assess the situation. That Patrol reported that the Claimant had fitted the spare wheel which had come with the vehicle as a standard spare wheel. The Patrol reported that although the Claimant had fitted the standard spare wheel he had used "after market" bolts to hold it on. The Patrol who attended on the second occasion fitted the spare wheel with the bolts which came with the spare wheel and which were in the boot next to where it had been.

50. 50.1 Mr Garbacz was required to investigate the incident as part of his day to day duties as the Claimant's line manager. Mr Garbacz met with the Claimant the following day informing him

that the meeting was an investigation meeting convened in respect of the job that the Claimant had been required to carry out the previous night. The Claimant was asked to write a statement about the task he completed on the vehicle, which he did. In his statement the Claimant stated that; the vehicle was parked on a soft gravel drive (he had exchanged wheels on gravel surfaces before without difficulty but this one was very difficult); that the task took an hour and a half to complete; nothing went wrong whatsoever, he fitted the spare wheel properly; that the key for the locking nuts was worn and kept slipping; that two of the bolts were over-tightened badly and he told the member about this afterwards, managing to carry out this task using heavy duty tools; he had taken the spare wheel out of the boot which was difficult; he had used a trolley jack and extension, the jack sinking into the gravel; also used the vehicle jack; the spare was an ordinary alloy wheel that was not exactly matching the others on the vehicle; the tyres on the vehicle were low profile ones whereas the spare was an ordinary tyre; and that he had informed the member that it was okay to drive until the spare was sorted out.

50.2 Mr Garbacz read through the Claimant's statement and then discussed the events of the task with him. Mr Garbacz informed the Claimant that after he had left the job the wheel that he had changed had fallen off. The Claimant responded that he did not know why that had happened as he had tightened the wheels to the right torque (torque being a measurement for tightness). By this statement Mr Garbacz understood that the Claimant had fixed the wheel onto the car to the correct specific torque measurement. The Claimant continued that: he did not know how the wheel had come off; had used heavy duty tools albeit not a nut gun or the torque wrench the latter being a requirement of the Respondent to use; and the wheel bolts did not have any grip on the sockets. When asked about the torque setting he had used the Claimant informed that he had not gone into that as he could not use the standard tools, that he had tightened to the best tension he could and then given it a bit extra.

50.3 The conversation then moved to the PS124 being a job completion sheet (our description). The Claimant produced the PS124 for the task and informed that he had not given a copy to the member as he had spent enough time on the job and she was busy with a delivery van (it is a requirement of the Respondent that the Patrols hand a copy of the completed PS124 form to the member and discuss the job with them – see more below. The Claimant informed Mr Garbacz that he had told the member the vehicle was okay and safe to drive and confirmed that while he knew he should have given the PS124 to the customer, reaffirmed that he had not done so as he had

spent too long on the job and told the member that the vehicle was safe to drive. When discussing the wheels, the Claimant was asked if he noticed any difference between the spare wheel and the wheel with the punctured tyre that needed to be changed, to which he had responded that the spare wheel fitted very well, the bolts went all the way, the thing being that the spare was not low profile whereas the others were.

50.4 The Claimant was informed that the second Patrol who had attended after the Claimant noticed that the three wheels on the car and the punctured wheel were all “after market” wheels fitted with “aftermarket nuts” which were of a different size [to the standard] and asked whether he had noticed that. The Claimant focussed on the nuts he had put on and was confident that they were tight, informing that he had put the same bolts as were on the “after market” wheel back on which had tightened nicely. It was put to the Claimant that the second Patrol had advised that the spare wheel looked smaller than the standard wheel but that he could see that the holes for the wheel nuts were bigger. The Claimant responded that he did not notice or notice any difficulty with the size of the nuts. The Claimant admitted that he had missed a jiffy bag in the boot containing the [standard] spare wheels, stating that the spare wheel looked identical but was fitting nicely and tightened nicely. The thing that he had noticed was the low profile tyre.

50.5 After a short adjournment the Claimant and Mr Garbacz went to the Claimant’s vehicle to look at the tools he had used. The Claimant showed the tool that he had used, being a three quarters inch prior bar with a twenty one millimetre socket and while the Claimant had difficulty he did locate the three quarters to one half inch reducer (which would, in the Respondent’s opinion), have enabled the Claimant to properly tighten the wheel nuts.

50.6 The meeting reconvened in the office. The Claimant informed that: he had not used the reducer as when he tried to remove the nuts nothing had worked as they were over-tightened; two nuts had not come off; when the member had asked him to try his best he used the three quarter inch drive prior bar with the twenty one millimetre socket; he had not used the reducer to tighten as he had problems with the wheel jack and he just used the same tool suspecting the wheel may collapse (but having also used the wheel jack and an axel stand); that he had told the member that the rim of the tyre looked identical but the tyre was not matching as it was low profile and that it was okay to drive to the garage to get it “sorted”; there were no speed restrictions; had not said to the member that she must drive straight to the garage; he was not specific in how she should drive it to be

checked, being confident that it was a normal alloy wheel, was identical to the others, and not be a space saver.

51. We referred before to the PS124. This is a form which must be completed by each patrol when they carry out a job. The Patrol must identify the nature of the problem (described as symptoms), state what they had done together with making any comments. The PS124 is required to be signed by the member; the Claimant did not get the member to sign the form. The Patrol is required to provide safety advice relevant to the job that they have carried out and this is to be signified by ticking a box on the form marked "temporary repair important note". The Claimant did not tick this box. In addition the Claimant did not mark the mileage of the vehicle on the form as required.

52. Following their meeting, Mr Garbacz suspended the Claimant.

53. 53.1 After this meeting Mr Garbacz met with Mr Osbourne, the Second Patrol, and then visited the member whose vehicle the Claimant had worked on following which he produced a short report in which he included the information given by Mr Osbourne and in an email received from the client. Mr Osbourne had stated that: the spare wheel looked smaller than the wheel which had the puncture; he could see that the holes [in the spare wheel] for the nuts were bigger; he had used the Respondent's AADIS to ascertain the correct torque settings; and that the spare wheel nuts had been located in an envelope next to where the spare wheel had been. The member informed that: after the Claimant had been present at her home for about 30 minutes she went to see him considering he was taking a long time; the Claimant had informed her that the nuts had been very hard to get off; the gravel drive was creating problems hence he was using three jacks to lift the vehicle; the wheel that he had fitted appeared to be bigger than the other three, but that that was not a problem; that when she had asked if the car would be safe to drive around the next day (needing to take her children to school and then on to the garage to fix the flat tyre in the boot) the Claimant had replied that it was fine to "drive around" and the wheel wasn't dangerous, it just looked different from the others, giving no indication that there was any problem with the newly fitted wheel; after completing the job the Claimant sat in his van for 10 minutes before driving away without having given her any paperwork or being asked to sign any. Five minutes after that the member continued, she had put her two children in the car, driven through her gates and the replacement wheel came off.

53.2 The report contained a number of appendices. There is a dispute as to whether the copy of the report the Claimant received had seven or six allegations. In the event, we do not

consider that any such difference is material as the seventh matter, contained on another version of the documents before us, that Mr Garbacz was investigating is subsumed into the third allegation on the copy that was provided to us. The allegations Mr Garbacz investigated were as contained in the report (at page 593) of the bundle, namely:

> "1. By not noticing that the spare wheel was a different size to the after market wheels on the car, he should have noticed that the wheel nuts were a different size and did not tighten them into the wheel correctly.
> 2. By not noticing the wheel nuts in the spare wheel well next to the spare wheel when he changed it.
> 3. By not using the correct AA issue tools, i.e. the torque wrench. In this case where Dan has stated the torque wrench was unable to grip the nuts, that's why he used the prior bar with a 21 millimetre socket then he should have used his ¾ to ½ inch reducer in order to torque the wheels up correctly.
> 4. By not noticing when tightening the wheel nuts that they were not tightening correctly as all they did was tighten straight onto the wheel hub.
> 5. By not issuing a ps124 to the member
> 6. By not providing safety advice."

54. Mr Garbacz considered that the matter be serious negligence and passed it to Mr Lambert to deal with through the disciplinary process. Mr Lambert had not had any previous contact with the Claimant.

55. By letter dated 15th October 2012, the Claimant was invited to Stage III (a disciplinary meeting) the allegation being:

> "1. Serious Negligence which has manifested itself through your failure to follow the correct AA procedure when carrying out a wheel change for job number 6708 on the 25th September 2012.
>   a. You have brought the AA into disrepute, and;
>   b. As a result of the above you have irreparably broken all trust and confidence in you as a Patrol."

56. We heard some evidence that Ms Ace has assisted other managers' drafting disciplinary charges. Mr Lambert's evidence is that Ms Ace did not assist him in drafting the disciplinary charge. Mr Lambert gave clear and positive evidence on all matters relevant to his involvement and we accept his evidence that he drafted the disciplinary charge himself without input from Ms Ace. The Claimant was informed that the allegations were ones which were considered to be gross misconduct and if proved he would be summarily dismissed by the Respondent.

57. On 22nd October the Claimant wrote to Mr Lambert regarding various matters relating to the member's vehicle that he had worked on in respect of its spare wheel, location, the vehicle's boot, the other wheels and the nuts (page 623 of the bundle). Mr Lambert neither obtained or provided the information sought in advance of the disciplinary meeting, we accept, because he was unsure as to their relevance, deciding to wait until the meeting to discuss the request.

58. The disciplinary meeting took place on 25th October as arranged, Mr Lambert being assisted at the meeting by Ms Ace on behalf of the Respondent's HR department, the Claimant being accompanied by Mr Fowler. Shortly before the meeting the Claimant provided and Mr Lambert received a statement from the Claimant being his updated version of events. Mr Lambert read that statement just after the start of the meeting. There was then a full discussion. The meeting was adjourned to enable Mr Lambert to interview the member at her home and to take photographs of the vehicle.

59. During his visit to the member's home Mr Lambert made notes of his interview with the member and took photographs of the relevant wheels. When he visited the member's home Mr Lambert opened the boot to the vehicle and considered that it was obvious [to him] that the spare wheel was different to the "after market" wheels on the vehicle, as it had a smaller rim, larger holes and different fixings for the wheel nuts, and seven spokes while the after market wheels had twelve. Mr Lambert considered that it was obvious from the size of the holes and the differences of their design that the wheel required different nuts. Further the tyres were also completely different, one being (and marked) as 20 inch with an aspect ratio of 255/50 whereas the tyre on the after market vehicle being (and marked) as 22 inch with an aspect ratio of 285/35. There were no green Landrover badges on either type of wheel. The member reported to Mr Lambert that the Claimant had informed her that: the spare wheel had a bigger tyre but would be okay until she got it fixed; the wheel nuts were tight which had caused problems in getting them off. The member continued that the Claimant had not warned her of any damage to the wheel nuts nor given her any safety advice or paperwork. A copy of the interview notes and photographs were provided to the Claimant together with the note of the first part of the disciplinary meeting. The Claimant was notified that the disciplinary meeting would be reconvened on 1st November.

60. Shortly before that meeting was due to take place, on 31st October, the Claimant requested Mr Manser provide him with; a computer record of a call from one of the service delivery operators, the purpose being to show that the Claimant had informed that operator that he thought the wheels of the relevant vehicle were the same but the tyres were different; and also the details of another job that he had completed two weeks earlier. This information was passed to Mr Lambert to deal with who did not provide the information requested on the basis that there was no dispute about what the Claimant had said to the operator nor

could he understand how the other job was relevant to this. Again Mr Lambert decided to deal with the matter at the reconvened disciplinary meeting.

61. At the reconvened meeting the Claimant was again accompanied by Mr Fowler. Despite having been previously requested to do so the Claimant had not reviewed or annotated the notes of the previous part of the meeting nor signed them. The Claimant was given a short adjournment to do so. After two hours during which time the Claimant made both amendments to the notes and also notes to them, the meeting was reconvened. The Claimant and his representative signed the amended notes. The Claimant's request for further information was discussed as was the photographs and additional information that Mr Lambert had provided, also. At the conclusion of the meeting and after consideration of the evidence before him, Mr Lambert decided to dismiss the Claimant and gave his decision to him, a decision which was subsequently confirmed in writing on 5th of that month. Mr Lambert stated, amongst other things that: he was satisfied that the Claimant had been negligent in his work, he had fitted a spare wheel to the Range Rover Vogue incorrectly; not taken sufficient care and attention; used the wrong wheel nuts, the Claimant maintaining that the wheels looked identical when in fact they were considerably different in appearance and design.

62. Mr Lambert's decision letter provided his reasons which we do not set out in detail. Mr Lambert did, however, summarise as follows:

> "1. You have not used the correct tools and equipment
> 2. You have not given the member clear unambiguous advice
> 3. You have not completed the PS124 correctly
> 4. You have failed to give her a copy
> 5. And finally your negligence in this job has resulted in the wheel falling off."

In conclusion Mr Lambert considered the trust and confidence the Respondent had in the Claimant as a Patrol man had been irreparably broken and that he was dismissed for gross misconduct because of serious negligence. Mr Lambert continued that he found it particularly saddening because of the Claimant's experience. Mr Lambert continued that he had explored the Claimant's history and had ascertained that it wasn't the first mistake the Claimant had made, further that he had examined the Claimant's training records which showed that he had benefitted from a significant amount of time and support during the previous four years, all of which supported his decision to dismiss. The Claimant was informed of his right of appeal.

63. On 13th November the Claimant exercised his right of appeal stating that: the process had not been conducted fairly or relevant evidence considered; the incident was an accident waiting to happen which was

not his fault; the Respondent's client had disguised the wheels with green Landrover badges which had led to the Claimant's mistake, the badges subsequently having been removed before photographs were taken; mitigating circumstances regarding the trolley jack. Ms Ace contacted Mr Manser and asked him to carry out the appeal which he did inviting the Claimant to an appeal to take place on 23rd that month. Prior to the hearing the Claimant requested information from the Respondent, certain computer records involving the operator he spoke to after the incident and the job details of a different job. Again Mr Manser did not understand the relevance of those and informed him that he would consider the matter at the beginning of the hearing. The Claimant asked for other documentation. At the start of the hearing the Claimant produced a further ten grounds of appeal which information together with the previous documentation Mr Manser read.

64. 64.1 The hearing took place as programmed, Mr Manser being accompanied by Ms Angela Redstone and the Claimant by Mr Fowler. Sue Jones, Project for South East Support Manager was also in attendance to take notes. Mr Osbourne attended as a witness during the hearing. There was a full discussion in which the Claimant's points were discussed. The issue regarding the green Landrover badges and all the matters the Claimant wished to raise were discussed. Mr Manser concluded that: the Range Rover had four "after market" wheels which were totally different to the spare wheel; it was light at the time the Claimant attended the member and he should have noticed the difference, owners often buying and using four "after market" wheels without buying one as a spare, which scenario was not unusual; with the Claimant's level of experience he would have been expected to be aware of that scenario; the member handing the nut removal tool to the Claimant did not excuse the Claimant's failure to notice the difference in the wheels; the Claimant should have been able to change the wheel as an expert; the Claimant had had ample opportunity to clarify his version of events; there was a change to the notes of the investigation of the meeting approved; that at the time of the incident, the Claimant himself believed all the wheels were the same and that it was only the tyre that was different, such assessment being badly flawed, the spare wheel being completely different, such that a competent Patrol should have noticed; the Claimant should have moved the vehicle to a safer place to have carried out the wheel change; the wheels did not have the green Landrover badges, which in any event was irrelevant in view of the differences in the wheels; it was not the member's responsibility to locate the spare wheel nuts; the Respondent was a professional breakdown organisation and changing a wheel was one of its most basic tasks which the Claimant should have been able to complete competently; and it was not necessary to contact the member again. The Claimant was provided with copies of the original P124s. Mr Manser

noted that the Claimant had been afforded two hours at the start of the reconvened disciplinary hearing on 1st November to amend the notes and extra space was given to him to add additional annotations before he was asked to accept them (which the Claimant accepted). In the light of these conclusions, Mr Manser considered that the Claimant had not provided any new evidence, that he had been seriously negligent, and there were no mitigating circumstances. Further the Claimant had failed: to use the correct equipment available to him in his van; to issue the correct safety advice orally' to provide the member with the advice on the PS124; or to obtain an acknowledgement and sign advice on such a form. The Claimant did not believe he had done anything wrong despite these matters. During the disciplinary hearing the Claimant had asserted it was the member's fault.

64.2 Mr Manser decided to uphold Mr Lambert's decision which he did confirming the same in writing on 28th of that month. That notification concluded the disciplinary process.

65. 65.1 The Claimant has referred in these proceedings to a number of other Patrols who (he said) had been involved in incidents where they had changed a wheel which was not to the Respondent's standards. We address these now.

65.2 In 2006 Vincent Rodrigez changed a wheel which subsequently fell off. The job involved replacing a wheel with a punctured tyre with a spare wheel. There were no wheel nuts for the spare in the vehicle and the wheel nuts for the alloy wheel which was already on the vehicle were too big to be used. Mr Rodrigez therefore used a wheel nut replacement kit issued by the Respondent which he had available. Mr Rodrigez made it known to the member orally, and on the PS124, that the nuts he used were temporary nuts and that the member should drive straight to the local garage to have the wheel changed. In the event when the member first drove she passed a number of garages, not taking the opportunity to have the wheel changed. The wheel then came off. In that case, Mr Rodrigez had looked for the correct wheel nuts but there were none available, had completed the PS124, provided a copy of the same to the member and given advice which had then been ignored. No disciplinary action was taken.

65.3 In February 2011, Mr Jamie Hickin, a Patrol in Mr Rowe's team conducted a wheel change using the correct wheel nuts and applying the correct torque settings as provided by the Respondent's AADIS. The spare wheel being fixed to the under side of the vehicle on which the job was being carried out had become rusty and dirty. Mr Hickin cleaned the mating and placed the wheel on the vehicle. Mr Hickin had completed a

PS124 correctly. Some debris remained on the mating however and the wheel subsequently became loose. There were no issues regarding lack of safety advice but Mr Hickin accepted that he should have done better. The Respondent issued an Improvement Notice.

65.4 Dave Martin is a motorbike Patrol. In the information to the Tribunal which Mr Manser had obtained he ascertained that Mr Martin had completed a wheel change job in December 2011 but the wheel subsequently came off. Motorbike Patrols do not carry the same level of tools as Roadside Patrols such as the Claimant. Mr Martin had used the tools in the member's vehicle to fix the spare wheel and tighten the nuts. As Mr Martin did not carry a torque wrench he advised the member to drive straight to a garage to have the torque setting checked. The PS124 was completed. The Respondent considered Mr Martin to have acted correctly. The member ignored the advice and drove 80 miles plus past a number of garages after which the wheel came off. The differences here are, of course, there was no torque wrench available for Mr Martin, he provided the correct safety advice, a record had been completed on the PS124, there was no issue in respect of using the wrong wheel nuts and he had followed the correct procedure, in that case the member having ignored the safety advice.

65.5 In April 2004 Andy Smith, a Patrol, conducted repair job not a wheel change. The lower ball joint on a vehicle had popped out of the wheel. As the wheel was loose Mr Smith refitted the ball joint and the member took the car for a test drive during which no fault occurred. Mr Smith completed the PS124 and advised the member to drive straight to a garage to have the lower ball joint replaced. The member did not do so however, and the ball joint popped out again. Mr Smith had applied the proper procedure. No disciplinary action was taken.

65.6 Trevor Hunt is a Patrol; there is no evidence that Mr Hunt had ever completed a job following which a wheel came off. There was no evidence of any disparity of any treatment.

65.7 Mr Manser conducted a disciplinary hearing in respect of Simon Swallow during 2014. Following Mr Swallow carrying out a job, during which he used his torque wrench, the wheel nuts came loose albeit the wheel did not come off the vehicle. The member had driven around 20 miles and safely reached a garage. Mr Swallow had completed the PS124 to a good standard with only the sections of the torque wrench missing, albeit he had used a torque wrench in carrying out his task. Mr Swallow had provided evidence to Mr Manser that he had completed the PS124s on his previous two jobs regarding torque wrench settings. This job, Mr Manser accepted was difficult due to adverse weather

conditions. Mr Swallow had an exemplary record and the client was satisfied with his work. Mr Swallow expressed his genuine remorse and took learning points from the incident. Mr Swallow was issued with a Stage II written warning which remained on his file for eighteen months. There are significant differences between this incident and the Claimant's.

65.8 Mr Craig Bond conducted a Stage II disciplinary hearing in respect of an incident involving a Patrol, Paul Bravery. Prior to the disciplinary allegation being fixed following the receipt of the investigation report, it was determined that the disciplinary hearing should be Stage II. The Respondent determined that Mr Bravery had used the correct wheel nuts and fitted the spare wheel to the correct torque setting using a torque wrench on a job. The mating surface had not been cleaned to remove any rust following which the wheel had become loose. Mr Bravery completed a PS124, including the details of the torque settings and obtained the members' signatures for the copy provided to them. The member was able to drive safely to a garage where the wheel was secured. Mr Bravery had not applied a wheel change sticker. Mr Bravery was issued with a Stage II warning to remain on his file for eighteen months.

Conclusions

66. We determine the complaints dealing with the various matters complained of pursuant to the Equality Act 2010 first. In doing as we reminded ourselves of the burden of proof, the question of whether there has been an act extending over a period of time, and the need to consider all the matters in the round when determining the specific complaints as one matter may have a bearing on the other. We consider also at this stage the facts found in the other two complaints insofar as they may be relevant to these complaints.

67. Harassment

67.1 We have found that on 23rd May 2012 Mr Garbacz shouted at the Claimant and stated that either he or another employee of the Respondent was not telling the truth. The context of that, as found before, were statements made by the Claimant, and by another colleague regarding the Claimant's attendance at a training course. Mr Garbacz we accept believed the one or other of the two employees was not being truthful. We find, however, that that statement and Mr Garbacz shouting was wholly unrelated to the Claimant's disability.

67.2 The Claimant in evidence accepted that Improvement Notices were not disciplinary proceedings. The Claimant relied on the issue of Improvement Notices as acts of harassment. The Respondent's position is that they cannot be disciplinary

proceedings. On each occasion the Respondent had reason on its face to issue the Improvement Notices because of the Claimant's performance. There is nothing to suggest that only the Claimant would ever receive Improvement Notices or do so in like circumstances. We also do not consider that Improvement Notices can or should be regarded as disciplinary action or part of a disciplinary process leading up to and including potential dismissal. Improvement Notices are just that, they are an exortation to improve, albeit should an employee not improve, disciplinary process may well then be instigated. It follows that the Claimant's complaint of harassment in relation to disciplinary processes insofar as Improvement Notice s does not succeed.

67.3 67.3.1 On 7th December 2006 the Claimant's then manager, Mr Rowe, served on the Claimant a Step One development notice requiring improvements in the Claimant's performance. By this time the Claimant had received and passed his VRS training in mid September. The assessment was based on the third quarter, the Claimant only having passed his VRS training mid way through that period. On 14th December that year the Claimant moved to Step two of the Traffic Development Plan it being recorded that the Claimant's performance had deteriorated in all areas to the lowest band level and a technical competence assessment had been booked for 12th January 2006 (which we understand to be a misprint and should be 2007). On that occasion the Claimant commented that he was happy with the TSP visit and that he had been given sufficient time to learn VRS recovery and, had he had at the time certain equipment, which he now had, his performance would have been better.

67.3.2 On 10th January it was recorded the Claimant's performance had improved slightly and he was to be removed from the training development plan process. The Claimant recorded that he was still learning the VRS recovery and gaining confidence at that time. Similar statements were made by both parties on 30th January 2007. On 14th March, the development process was suspended, the Claimant having reached a minimum standard in all performance areas.

67.3.3 We refer to our findings before that there was no medical evidence to support any view that the Claimant could not use the VRS system. The Claimant received training on several occasions as found before. We refer to all the facts found in these proceedings. The Claimant frequently did not carry out his tasks as he had been shown. We are not persuaded that the improvement process was related to the Claimant's disability.

67.4 The Claimant received manual handling training in November 2009 from Liam Somerset and had a subsequent assessment. That was not a disciplinary process. As we found Mr Somerset stopped the training due to the unsafe manual handling practices of the Claimant. The Claimant was sent home and advised to see his GP. The Respondent subsequently provided a course of physiotherapy for the Claimant. We refer to the findings of fact found before, including those of the Claimant relating to his back. We accept that the Claimant believed the statements he made regarding his abilities to carry out his duties as required at the time he made them. The Claimant was not subject to disciplinary action at this time. The Claimant was sent on the refresher training and subsequent manual handling course because of evidence from the Respondent's occupation health advisors. Despite what the Claimant now alleges in these proceedings, having regard to the circumstances of the case, even if the training and the matters surrounding it related to the Claimant's disability (and we repeat our earlier conclusions that the Claimant was frequently found not to have acted as instructed in carrying out his duties) it was not reasonable for the treatment to be considered harassment taking into account section 26(4)(b) and (c) EqA.

67.5 67.5.1 Improvement Notices were issued to the Claimant on 28th January 2010 and on 4th March 2010 culminating in a Stage III disciplinary warning in August 2010. On 28th January the Claimant did not receive an Improvement Notice but did have the benefit of additional training with the Technical Specialist Patrol. The purpose of this was to benefit the Claimant ensuring that he adopted correct manual handling processes.

67.5.2 The 4th March 2010 Improvement Notice for what was described as misappropriation or fraudulent use of the Respondent's time, namely that whilst on a company visit on four occasions the Claimant had failed to push his 'Arrive' button and only did so after being prompted. On all the jobs on that date the Claimant was accompanied, being six jobs in total, the Claimant had failed to complete his tasks properly, as found before. There was nothing to suggest that that was in any way related to the Claimant's disability. There was nothing whatsoever to suggest that the Claimant's difficulties such as he described in logging on to the Respondent's computer system was in any way connected to his disability.

67.5.3 We are not persuaded that the Claimant's performance which led to the issue of Improvement Notices was related to his disability, but rather the way he chose to carry out his

duties (see paragraph 67.3.3 before). If we are wrong in that however, even insofar as it may have been, the additional training the Claimant received was for his benefit. In considering the circumstances of the case, it was not reasonable for the Claimant to consider that it violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

67.6 67.6.1 The Claimant was not issued with an Improvement Notice on 28th January 2010. The Claimant was provided with training. We refer to the facts found between January and August 2010, in particular that Mr McDermot's view that the Claimant's performance in the matter of which he was being assessed was one of the worst he had ever seen and that full re-training was required. We are not persuaded that that was related to the Claimant's disability rather it related to the way which the Claimant chose to carry out his tasks unrelated to any effect of his physical impairment on him. We repeat our conclusions above regarding it not being reasonable for the treatment to be considered to be harassment.

67.6.2 On 10th August 2011, the Respondent informed the Claimant that he would be issued with an Improvement Notice related to his performance. The Improvement Notice was the inevitable result of the Claimant declining the Respondent's exit package. We refer back to our finding that there was no medical evidence to support the Claimant's admittedly repeated statements that his back condition was effecting his performance in respect of the VRS system and also our findings that the Claimant chose to carry out his duties as he did unrelated to his physical impairment. We refer to the Claimant's persistent non-compliance with the Respondent's procedures for carrying out his duties. The Improvement Notice was actually issued on 31st August 2011. We find that this related to, not to the Claimant's disability but to the way he elected to carry out his duties unconnected with his disability.

67.6.3 Following the Claimant's decision to remain in the Respondent's employment and being issued with an Improvement Notice on 31st August, the Claimant was subject to the steps of that Improvement Notice. The Claimant was given a longer review period than was usually prescribed in the notice but nevertheless did not meet the targets. There was an investigation report on 22nd December 2011 (page 437 of the bundle) in which support measures that had been provided to the Claimant since the issue of those notices were referred to, namely the Claimant spending two days with TSP Matthews on 14th

& 15th September 2011 and a five day training course on 19th September 2011. We refer to our findings about the disciplinary process. The Respondent was aware of the information that had been provided by the Claimant previously. We refer back to the events which followed. The Claimant was provided with an extended period for his work with the VRS tool. Ultimately the requirement for the Claimant to use the VRS was removed for a period of six months to be reviewed at the end of that period. The Claimant's targets had been amended. In the event the Improvement Notice was set aside. We refer also to our findings regarding the lack of any material improvement to the Claimant's performance following these matters.

67.6.4 We are not persuaded that the Respondent's actions related to the Claimant's disability albeit the Claimant, for his part, at this stage repeatedly referred to his back and the condition as he saw it. Even if these matters did relate to the Claimant's disability we do not regard it as reasonable for the conduct to be considered harassment taking into account section 26(4)(b) and (c) EqA.

68. <u>Victimisation</u>

68.1 On the 16th February, the Claimant wrote to Mr Stuart Surridge stating, amongst other things:

> "The AA has been fully aware of my back problem for many years, even to the point where the AA have agreed to purchase back support equipment. Further to this I have regularly asked for reasonable adjustments to be made due to my disability which have been ignored and rebuffed by my managers; my age and ethnicity have been blamed in these instances. I shall supply names and dates of these instances at the next meeting.
>
> It is in my belief that you should have made reasonable adjustments in line with the 2010 Equalities Act; firstly by removing the "heavy and cumbersome" VRS equipment, and secondly reducing my key performance indicators. By not reducing these and placing me on a performance related process I am in the belief that it is discriminatory, and should be removed from the formal capability procedure."

68.2 Following a grievance hearing on 17th February the Claimant then wrote to the Respondent on 20th February referring to that grievance hearing summarising his grievance. The Claimant began his summary by stating that he had been "…systematically and unfairly penalized against my disability

with my back problem by the [Respondent] since the introduction of heavy VRS Recovery System in 2006. I have made numerous requests but no help or consideration given to my Back Problem." The Claimant continued providing more detail. The Claimant did, we find, carry out protected as identified above in this paragraph 67.

68.3 In respect of the complaint of discrimination arising from disability it was submitted by the Claimant's representative that the Claimant had become a nuisance and was costly for reasons that arose out of his condition. If that was the case no doubt one of the matters about which the Claimant may consider him to be a nuisance was his protected act. We find that the Respondent undertook a thorough grievance process with it ultimately making adjustments to the way that the Claimant worked. We are not persuaded however, that the Respondent then used the Claimant's actions and omissions following 25th September 2012 incident as a smoke screen to dismiss the Claimant because he had carried out a protected act.

69. Alleged Failure to Make Reasonable Adjustments

69.1 From 2006 until his grievance in 2012, the Respondent required the Claimant to use the VRS system. As is evident from the facts found above, the Claimant did not always use it and when he did, on the occasions which we heard about did not use it properly. We have found that there was no medical reason to support a requirement to use a lighter system (if the Respondent provided training for the Claimant, which it did on numerous occasions). We find that rather than the Respondent failing to allow the Claimant to use a lighter recovery system it required him to use the VRS system (which was, of course, a lighter system to the one that he initially used and which was removed in 2000). We did not hear of any other lighter system in evidence (on one occasion during an assessment/training session the Claimant had said that he had used a pole for recovery of vehicles). We note the Claimant's performance figures, both before and after the removal of the VRS during the latter period of his employment which did not change to any significance. We are not persuaded from the figures that we have been provided that the Claimant's performance had improved since the requirement to use VRS was removed. We do not find it established that the use of the VRS system placed the Claimant at a substantial disadvantage in comparison to other persons either in respect of his health on his performance. As the Claimant's performance did not appear to have been affected by the use of the VRS system it follows that the Claimant's request for different shift patterns was not a reasonable adjustment as there was no disadvantage to be avoided. During the last few years of the Claimant's

employment with the Respondent he worked shift patterns which gave him at least three days off following any period of six and he had also worked five days on and four days off. We note that the removal of the Respondent's requirement for the Claimant not to use the VRS was for a period of a six month's basis from 17th February 2012 to be reconsidered at the end of that period. In the event the Respondent did not review that decision, as the Claimant being placed on suspension and as in September 2012 as described before.

69.2 On 13th April Mr Surridge stated that permanent removal for the Claimant for using the VRS was not an option. The latest was to remove it on a temporary basis and review it after a 6 month period. This we find was the adjustment the Claimant had sought. When the Claimant, through his representative, Paul Grafton, stated that, "no one's asking for it to be removed permanently. Just review on a regular basis..." We find that the Respondent, having made that adjustment, we find there was then no detriment to the Claimant either in respect of the use of the VRS or the shift pattern the Claimant was then on, the immediate requirement for using the VRS being stopped albeit there could have been a decision to reintroduce it later, any claims of the Claimant's complaint regarding making an adjustment in that regard would be out of time in any event.

70. Alleged Indirect Discrimination

The PCP is the requirement to use the Vehicle Recovery System. The Respondent did put the Claimant through disciplinary process as a result of low productivity targets. When the Claimant was no longer required to use the VRS on a temporary basis his targets were reduced. We did not hear that the Claimant met those targets, the only information we received was that the Claimant continued not to meet targets. We are not persuaded that the Claimant's continuing failure to meet targets was because of the VRS system. In any event, on the last occasion the Respondent did not place the Claimant on a disciplinary process it placed him on the improvement plan which was ultimately abandoned in March 2012. It follows that that complaint is out of time.

71. Alleged Discrimination Arising From Disability

We refer to our findings of fact in respect of the complaint of victimisation. The Claimant did not carry out his tasks as he had been shown how to and was frequently required to improve. The Respondent provided considerable training to the Claimant and frequently sought advice from various occupational health advisors. In evidence to the Tribunal, the Claimant expressed his opinion that he was better qualified and experienced than many of his colleagues and managers. It was only if after the Claimant on the evening of 25th

September 2012 was considered to have failed in a number of ways to carry out his duties that the Respondent began the proceedings which led to his dismissal. We do not find that the Respondent placed the Claimant through the disciplinary process or dismissed him for anything arising out of his disability.

72. Alleged Direct Discrimination

We refer to our findings of fact and conclusions before. We find that the Respondent's sole reason for dismissal of the Claimant was the events of 25th September 2016 and the information which the Claimant provided/attitude he displayed to the Respondent during the disciplinary process. We refer to the comparators the Claimant has relied on. We find that although there are superficial similarities we do not find that they were comparators as described in section 23 EqA. We find that the situations involving the Claimant were appreciably different as demonstrated by the findings of fact. We find the Respondent did not dismiss the Claimant because of his disability.

73. Jurisdiction On Equality Act 2010 Complaints

Ms Ace was a Human Resources Advisor and as such dealt with work which fell within her purview. The Claimant caused a considerable amount of work (over a period of years) and thus it would be inevitable that Ms Ace would be involved on a number of occasions with the Claimant. When Ms Ace was absent from work the Respondent's management still took action. The Respondent took action in respect of a number of matters. The Claimant did not carry out his duties for a number of reasons despite the training he received. We do not find the involvement of Ms Ace indicates an act extending over a period of time. We are not persuaded that there was an act extending over a period of time, rather we find that there were a number of separate acts and thus, all matters which occurred more than three months before the presentation of the complaint where beyond the normal time limit the presentation of such complaints. The Claimant was aware at the latest in early 2012 of the Equality Act and his ability to make complaints, apart from any other time. There is no reason why we should consider it just and equitable to extend the period by which his Equality Act complaints should be considered.

74. Alleged Unfair Dismissal

74.1 The Respondent carried out a thorough investigation and a conventional disciplinary procedure including an appeal. We are satisfied that the Respondent believed, on ample evidence, that the Claimant was guilty of gross negligence such as to amount to gross misconduct which resulted in it having no trust or confidence in his future ability or performance. We find that the Respondent's sole reason of dismissal of the Claimant was one

related to his conduct and thus a potentially fair reason that it falls within section 98(2)(b) ERA.

74.2 We do not consider that the Claimant's disability or anything related to it, arising from it, or the Claimant's protected act formed any part of the Respondent's reason to dismiss. We consider the Respondent's process and investigation and procedure was within the range of reasonableness. We considered the comparators that the Claimant has relied on and referred ourselves to the guidance before in *Hadjioannou.* We do not regard the Claimant's "comparators" as true comparators for the purpose of the unfair dismissal in the Employment Rights Act 1996. We do not consider that the Respondent's actions in respect of other employees would lead an employee to believe that certain categories of conduct would be overlooked or be dealt with by sanction less than dismissal.

74.3 The complaint of unfair dismissal does not succeed.

75. <u>Postscript</u>

75.1 While the Tribunal was deliberating in private on 27th January 2017 we were informed by Tribunal security staff and then again by the Clerk that the Claimant was in attendance in the Tribunal building and wished to provide us with a folder. There was no suggestion to us that the Respondent was aware. We declined to receive the folder. The Respondent was notified.

75.2 The Tribunal case file reveals that the Respondent wrote to the Tribunal on 30th January 2017 referring to an email from the Claimant to the Tribunal at 3.15pm that day which email is not within the Tribunal file. In its email the Respondent objects to the Claimant admitting further evidence.

75.3 The Tribunal case file reveals that the Tribunal received from the Claimant further documentation

i. on 3rd February (within which amongst other matters was an email from the Claimant to the Tribunal dated 27th January 2017 at 3.05pm in which he stated that he wished to submit new evidence.
ii. On 9th February 2017 further documentation and a request that the Tribunal consider newly found frauds.

75.4 The Tribunal considered rule 2 Employment Tribunals Rules of Procedure 2013. The Tribunal considered that the Claimant had been provided with an opportunity to present his case, challenge the Respondent's case, and, having done so, the opportunity for his claim to be determined. Further, the Tribunal considered that that being the situation, it was in the interest of justice that

there be a determination of the claim as quickly as compatible with the interests of justice. The Claimant was effectively seeking to reargue and further his case after the close of the hearing. In those circumstances we did not consider the Claimant's additional information.

Employment Judge Adamson, Bedford

Date: 8 March 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS