EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/116513/10

Held in Glasgow on 24, 25 and 26 May 2016; 31 May 2016; 1, 2, 7, and 8 June 2016; 27, 28 and 29 July 2016; 1, 2, 3, 4, 8 and 9 August 2016; 15 August 2016 (Hearing on Submissions); and 16 August 2016 and 1 February 2017 (Members' Meetings)

Employment Judge: **Ian McPherson**
Members: **Hugh Boyd**
Andrew Ross

Mr Andrew Paterson Hamilton	**Claimant** **In Person**
Community Safety Glasgow (formerly Glasgow Community & Safety Services Ltd)	**Respondent** **Represented by:** **Mrs Catherine Greig - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that:-

(1) the claimant was fairly dismissed by the respondents, with effect from 19 August 2010, on grounds of capability, and so his complaint of unfair dismissal, contrary to **Section 94 of the Employment Rights Act 1996**, is not well-founded, and accordingly that part of his claim against the respondents is dismissed by the Tribunal;

(2) the respondents having accepted that the claimant was a disabled person, in terms of **Section 1 of the Disability Discrimination Act 1995**, the Tribunal finds that the respondents did not know that the claimant was a disabled person until 7 December 2009 when they received an Occupational Health

report from Dr Robert Phillips at Capita Health Solutions dated 1 December 2009;

(3) the respondents did not fail in their duty to make reasonable adjustments for the claimant, in terms of **Sections 3A, 4A and 18B of the Disability Discrimination Act 1995,** and accordingly that part of his claim against the respondents is dismissed by the Tribunal;

(4) *esto* there was a breach of **Section 4A**, the Tribunal finds that it was not a continuing breach and it had ended no later than 24 May 2010, and the Tribunal claim having been lodged on 28 October 2010, that part of his claim against the respondents is out of time in terms of **paragraph 3 of Schedule 3 to the Disability Discrimination Act 1995**, and accordingly that part of the claim against the respondents is dismissed by the Tribunal as being time-barred, it not being just and equitable to allow that claim late;

(5) further, the acts relied upon by the claimant to found his complaint of disability related harassment by the respondents, contrary to **Sections 3B and 4 of the Disability Discrimination Act 1995,** as specified at paragraphs 14(a) to 14(e) of the further and better particulars for the claimant dated 11 November 2011, alleged to have taken place more than 3 months prior to the presentation of his Tribunal claim on 28 October 2010, those acts complained of by the claimant are out of time in terms of **paragraph 3 of schedule 3 to the Disability Discrimination Act 1995**, and accordingly that part of the claim against the respondents is dismissed by the Tribunal as being time-barred, it not being just and equitable to allow those claims late;

(6) *esto* those complaints of disability related harassment had not been dismissed by the Tribunal as time-barred, the respondents did not harass the claimant, contrary to **Sections 3B and 4 of the Disability Discrimination Act 1995,** and accordingly that part of his claim against the respondents would have been dismissed by the Tribunal in any event;

(7) insofar as the claim before the Tribunal may have included any complaint of victimisation of the claimant by the respondents, contrary to **Section 55 of the Disability Discrimination Act 1995**, that complaint is not well-founded, as the claimant has not pled any protected act in terms of **Section 55(2),** and accordingly that part of his claim against the respondents is dismissed by the Tribunal; and

(8) the respondents having reserved their position in relation to costs, any application by the respondents for the Tribunal to consider making an award of expenses against the claimant, in terms of **Rule 76 of the Employment Tribunals Rules of Procedure 2013,** should be made by written case management application, within 28 days of the date on which this Judgment is issued to parties, as per **Rule 77**.

REASONS

Introduction

1. On 28 October 2010, the claimant, acting on his own behalf, presented an ET1 claim form to the Tribunal, suing the respondents, then named as Glasgow Community & Safety Services, following the termination of his employment as a Community Enhancement Operative on 30 July 2010, where the claimant brought a claim for unfair dismissal against them, and also a claim of disability discrimination, seeking an award of compensation only, in the event his claim was to be successful.

2. Thereafter, on 30 November 2010, Mr Michael Hennessy, a solicitor with Glasgow City Council Legal Services, presented an ET3 response to the Tribunal, on behalf of the respondents, resisting the claim, and setting out that the claimant was fairly dismissed, in terms of the **Employment Rights**

Act 1996, by reason of lack of capability, due to his continuing level of sickness absence.

3. It was stated that the claimant's last date of employment was 19 August 2010, and that the claimant's internal appeal against dismissal had not been upheld. Further, while accepting that the claimant suffered from a disability, the respondents' ET3 response stated that there had been no breach of the **Disability Discrimination Act 1995** by the respondents.

4. This case first called before us as a full Tribunal on Tuesday, 24 May 2016, for the start of what was then expected to be a 12 day Final Hearing into the claimant`s complaint of unfair dismissal, and unlawful disability discrimination, further to Notice of Final Hearing issued by the Tribunal to parties on 20 April 2016. In the event, the Final Hearing took 18 days to complete before us, and we have had 2 further days in chambers for private deliberation at our Members' Meetings.

5. That Notice of Final Hearing followed upon a Case Management Preliminary Hearing held, on 18 March 2016, before Employment Judge Laura Doherty, whose written Note and Orders dated 28 March 2016 was issued to parties under cover of a letter from the Tribunal dated 1 April 2016. She listed this case for Final Hearing, it having previously been sisted pending the outcome of the claimant`s personal injury claim against the respondents in the Sheriff Court.

6. On direction by Employment Judge Susan Walker, Vice President of the Employment Tribunals (Scotland), this Final Hearing was conducted as a re-hearing of the case. That followed a previous, part heard Merits Hearing, heard before an Employment Tribunal chaired by Employment Judge Alan Strain on 30 April to 3 May 2012.

7. Thereafter, following Judge Strain moving to Australia, there was another Merits Hearing listed, which called before another, differently constituted

Employment Tribunal, chaired by Employment Judge June Cape, on 8 April 2013. That Hearing was, however, discharged, and Tribunal proceedings were sisted pending the outcome of the claimant`s personal injury claim against the respondents in the Sheriff Court.

Claimant' application to amend refused by the Tribunal

8. On Monday, 23 May 2016, when the case was allocated to this Employment Judge to chair that 12 day Final Hearing commencing on 24 May 2016, I reviewed the case file, and I made a number of Case Management Orders, acting on my own initiative. In particular, in terms of my powers, under **Rule 48 of the Employment Tribunals Rules of Procedure 2013**, I converted the first morning of the Final Hearing into a Preliminary Hearing, where I sat alone, for the purpose of hearing both parties and thereafter deciding whether or not to grant leave of the Tribunal to the claimant`s opposed application to amend the claim.

9. While the claimant had previously intimated an application, dated 21 April 2016, for leave to amend the ET1 claim form, and the respondents had intimated objections, dated 3 May 2016, the claimant's opposed application had not been addressed by the Tribunal, and, accordingly, it was necessary that I deal with that matter prior to the Final Hearing starting to hear evidence from both parties. An earlier application by the claimant, to amend the claim, had been opposed by the respondents, and refused by Employment Judge Robert Gall, by his Judgments dated 2 and 3 April 2013.

10. Following a Pre Hearing Review held on 25 and 27 March 2013, by Judgment dated 2 April 2013, Judge Gall refused the claimant's application to amend lodged on 5 February 2013. Thereafter, following a continued Pre Hearing Review held on 2 April 2013, by Judgment dated 3 April 2013, Judge Gall refused the claimant's application for review of that refusal. A subsequent appeal by the claimant to the Employment Appeal Tribunal

against that judgment was rejected at the sift, by Lady Stacey, the EAT Judge, on 1 October 2013, on the basis that the claimant's appeal disclosed no reasonable grounds for bringing the appeal.

11. The claimant's subsequent appeal against Employment Judge Shona MacLean's refusal, on 2 September 2015, to recall the sist, was rejected by the EAT at the sift, by Her Honour Judge Eady QC, on 6 January 2016, on the basis that the claimant's appeal disclosed no reasonable grounds for bringing that appeal. It was clarified before us that the claimant did not seek a **Rule 3(10)** Hearing before the EAT, and so there were no live appeal proceedings before the EAT that prevented us from proceeding with this Final Hearing.

12. Having heard the claimant in person and the respondents' representative in Preliminary Hearing on 24 May 2016, and having considered parties' written representations previously intimated to the Tribunal, I refused to grant leave of the Tribunal to allow the claimant to amend his claim against the respondents. On 25 May 2016, I gave that decision orally, with written Reasons to follow.

13. In my written Judgment, dated 10 June 2016, issued following that Preliminary Hearing, I ordered that the claim and response would proceed to determination by the full Tribunal at the assigned Final Hearing on the basis of parties' pleadings as they then stood.

14. As such, this Tribunal had before it the claimant's ET1 claim form, as presented on 28 October 2010, read together with the further and better particulars for the claimant (lodged by his then solicitor, a Mr Ryan) dated 11 November 2011, and the amendment to the ET1, as per the claimant's letter to the Tribunal dated 5 May 2012, allowed by Order of Employment Judge Alan Strain on 28 June 2012.

15. We also had before us the respondents' ET3 response, as presented on 30 November 2010, read together with the additional information on behalf of the respondents dated 16 August 2011, the respondents' own additional information intimated on 5 April 2012, and the respondents' response to the claimant's amendment dated 5 May 2012, as intimated on 22 January 2013, and allowed by Order of Employment Judge Iain Atack on 31 January 2013.

Final Hearing before this Tribunal

16. At this Final Hearing, the claimant appeared before us, unrepresented. He had been represented, before the Judge Strain Tribunal, in 2012, by a Mr Chris Ryan, solicitor with the Legal Services Agency, Glasgow (Brown & Co.), but Mr Ryan withdrew from acting for the claimant, and before the Cape Tribunal, and before us, the claimant has appeared as an unrepresented, party litigant.

17. Before this Tribunal, the respondents were represented by Mrs Catherine Greig, an Associate with MacRoberts LLP, Solicitors, Glasgow. She had assumed responsibility as the respondents` representative, in connection with this case, as intimated to the Tribunal Office by letter dated 12 May 2016, the respondents having previously been represented by Mr Raymond Farrell, Legal Manager (Litigation & Employment) with Glasgow City Council.

18. Mr Farrell had acted as the respondents' representative at the previous Merits Hearings held before Employment Judges Strain and Cape, as well as at various Case Management Discussions previously held before other Employment Judges, on various dates between 25 January 2011 and 31 January 2013.

19 At this Final Hearing, it was agreed by both the claimant and Mrs Greig for the respondents that the two bundles of documents previously lodged for the

Merits Hearing before Employment Judge Cape's Tribunal in April 2013 remained for use at this Final Hearing before us.

20. We noted that there were two bundles, "***Bundle A***" being an agreed core bundle, extending to 180 pages, duly indexed, paginated consecutively from pages 1 to 180, and with documents tabbed from 1 to 88, and "***Bundle C***" being 79 additional documents lodged by the claimant, that bundle being indexed, and paginated consecutively from pages 181 to 401, but not being tabbed.

21. It was confirmed, for the avoidance of any doubt, that there was, and is, no "***Bundle B".*** Additional documents 80, 81 and 82 were added to the claimant's Bundle ***C*** in the course of the Final Hearing, on 26 May 2016, 7 June 2016, and 4 August 2016 respectively.

Interlocutory Rulings by this Tribunal

22. At the Case Management Preliminary Hearing held in private, on 24 May 2016, with me sitting as Employment Judge sitting alone, the claimant made an application for me to recuse myself from chairing this Tribunal, which application, having heard from both parties, I refused orally, on 24 May 2016, for the reasons set forth in my written Note and Order dated 27 May 2016, as issued to both parties under cover of a letter from the Tribunal dated 31 May 2016.

23. Also, in that case management discussion with the claimant and Mrs Grieg, on 24 May 2016, I discussed with parties' representatives their proposed witness lists, and scheduling of witnesses, and I raised the possibility of the need for a Timetabling Order, under **Rule 45 of the Employment Tribunal Rules of Procedure 2013.**

24. That matter was further discussed at the start of proceedings the following day, Wednesday, 25 May 2016, when I orally announced my decision to

refuse the claimant's application for leave to amend the ET1 claim form, and Mrs Greig tabled a proposed witness running order.

25. While, at that stage, no Timetabling Order was made by the Tribunal, on the basis it was hoped that parties could work within time estimates discussed with the Tribunal, subsequently, on 8 June 2016, the Tribunal decided that it was appropriate to issue a Timetabling Order, for the 12 day Continued Final Hearing assigned to start on Wednesday, 27 July 2016. A written Note and Order by the Employment Judge, dated 1 July 2016, was issued to both parties by the Tribunal, setting forth a witness timetabling schedule.

26. Subsequently, the claimant made case management applications to vary or set aside that Timetabling Order, which the full Tribunal refused on 28 July, and 1, 2, and 3 August 2016, and, on 4 August 2016, we varied the Timetabling Order to reflect certain variations agreed by the Tribunal. We issued five, separate Written Notes and Orders to record these 5 interlocutory rulings.

Claimant' further application to amend refused by the Tribunal

27. During the course of proceedings at this Final Hearing, on 24 June 2016, the claimant made a further application to amend his ET1 claim form, seeking to add a new head of claim to complain of automatically unfair dismissal by the respondents for health and safety reasons.

28. The respondents objected to that application to amend, and parties agreed that as the application arose during a period when the case was adjourned, part-heard, and the subject matter required to be addressed before the Continued Final Hearing resumed, on 27 July 2016, the matter should be dealt with by the Judge sitting alone, in chambers, on 14 July 2016, on the basis of parties' written representations, rather than fix a separate Preliminary Hearing.

29. Having considered, in that Preliminary Hearing, written representations from both parties, and having considered the claimant's opposed application dated 24 June 2016 for leave to further amend the ET1 claim form to include a health and safety dismissal, the respondents' objections dated 4 July 2016, and the claimant's further comments dated 8 July 2016, all as per parties' written representations previously intimated to the Tribunal, by my written Judgment, and Reasons, dated 19 July 2016, I refused to grant leave of the Tribunal to allow the claimant to so amend his claim against the respondents.

30. Accordingly, when the Continued Final Hearing resumed, on 27 July 2016, the claim and response proceeded to final determination by the full Tribunal on the basis of parties' existing pleadings, all as detailed in the Tribunal's earlier Judgment dated 10, and entered the register and copied to parties on, 13 June 2016.

Evidence heard by the Tribunal.

31. Over the course of the Final Hearing, the Tribunal heard evidence from the following witnesses:

1. **Martin Carlyle, HR Officer**
2. **Robert Smith, Senior HR Officer**
3. **Jamie Callaghan, Service Manager**
4. **John McMillan, Supervisor (retired)**
5. **Louise Belton (now Hunter), formerly Assistant Operations Manager**
6. **Derek Brown, Service Manager**

7. John Hynes, Operations Manager (Dismissing Officer)

8. Patricia Lowe, Deputy Supervisor (retired)

9. Carol Connolly, Director (Appeals Officer)

10 Andrew Hamilton, Claimant

11. Paul McGaulley, HR Manager

32. While the claimant had previously sought to lead evidence from other witnesses, being Patricia Dawkins and Ross McMillan, whom he identified as witnesses on the first day of this Final Hearing, 24 May 2016, in the end, the Tribunal heard from neither of these persons. The claimant advised the Tribunal, on 25 May 2016, that while he had hoped to lead evidence from Ross McMillan from SSAFA (The Soldiers, Sailors, Airmen and Families Association), who, the claimant being ex- Army, had accompanied him to the meeting with John Hynes, on 30 July 2010, and to the appeal hearing on 27 August 2010, he had been unable to track him down, but he intended to lodge a witness statement.

33. On the morning of Thursday, 26 May 2016, when the Tribunal resumed to continue with evidence from Martin Carlyle, the respondents' first witness, the claimant raised a preliminary matter with the Tribunal, concerning a document from Ross McMillan, SSAFA, that he wished to add to his Bundle C, being an e-mail dated 27 April 2012 at 15:27 from Mr McMillan to the claimant. Mrs Greig, solicitor for the respondents, objected to the document being lodged, but, having heard both parties, and after an adjournment at 10.25am , for our private deliberation, we allowed the document to be lodged and added to the claimant's additional bundle **C** as **document 80**, at **page 402**.

34. On returning to the public Hearing at around 10.45am, after that adjournment, the Employment Judge read verbatim from the following note, written in chambers and agreed with both members of the Tribunal, as follows:-

> "***Having carefully considered the claimant's application to allow the copy e-mail from Ross McMillan, SSAFA, to the claimant, dated 27 April 2012, to be received, and added to the claimant`s bundle `C`, the Tribunal notes the respondents` objection on the basis of (a) the weight to be attached to that document, and the lack of opportunity to cross-examine the author, Mr McMillan, and (b) the lateness of the application, on day 3 of an assigned 12 day Final Hearing.***
>
> ***However, the Tribunal agrees to allow the claimant to add that document to his bundle (as document 80, page 402, in Bundle `C`) but does so under reservation for parties` closing submissions to address the Tribunal on what weight (if any) should be given to this document, in the absence of its author for cross-examination by the respondents, and questions by the Tribunal.***
>
> ***While the claimant seeks to use this document as corroboration of evidence he is to give to the Tribunal about his treatment at meetings with the respondents, the Tribunal will assess the case on the whole evidence led, and we refer the claimant to Rule 41 of the Employment Tribunal Rules of Procedure 2013 and the provision there that the Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the Courts".***

35. On the afternoon of Thursday, 26 May 2016, at around 12.15pm, just as the Tribunal was progressing to the start of the claimant's cross-examination of

Martin Carlyle, Mrs Greig took exception to the claimant seeking to ask the witness about his evidence to the Strain Tribunal, when this was a re-hearing, and neither she nor this Tribunal had the benefit of any access to any transcript of evidence previously given to that Tribunal. That objection was upheld by the Tribunal, as this is a re-hearing before us, a differently constituted Tribunal, and it was clarified that we would decide the case on the basis of the evidence led before us at this Final Hearing.

36. Later that afternoon, at around 2,50pm, we upheld a further objection by Mrs Greig, when the claimant sought to ask questions about whether it would be fair to say that the respondents failure in health and safety was impacting on their service, because it had not been established that there was any such failure, and the claimant had not brought a claim for automatically unfair dismissal, on grounds of whistleblowing, or a health and safety related dismissal, only an ordinary unfair dismissal complaint, and a claim of disability discrimination.

37. On the morning of Wednesday, 1 June 2016, when the Tribunal was still in process with the claimant's continuing cross-examination of Martin Carlyle, the Tribunal had to address an issue that had emerged the previous afternoon about the claimant's reference to data protection, and documents he had obtained, post-dismissal, from the respondents, by way of Subject Access Request under the **Data Protection Act 1998**.

38. Having heard from both parties, and after an adjournment at around 12.30pm, for our private deliberation, we upheld Mrs Greig's objection, and on returning to the public Hearing at around 12.50pm, after that adjournment, the Employment Judge read *verbatim* from the following note, written in chambers and agreed with both members of the Tribunal, as follows:-

> "***Having carefully considered the respondents' objections intimated yesterday afternoon by Mrs Greig, the Tribunal has agreed to uphold her objection. It is not appropriate for the***

claimant to ask questions of Mr Carlyle about the respondents` processes in dealing with the claimant`s Subject Access Request to the respondents under the Data Protection Act 1998, but the claimant is entitled to cross-examine the witness on the content of any letter he sent to the claimant.

The claimant has, however, advised us that he wishes to ask questions not about the content of such letters from Mr Carlyle, but about the respondents` data protection processes. That is not the purpose of this Final Hearing. Given Mr Carlyle has already answered the claimant that he was not aware of his Data Protection Act request, there is no further avenue open to the claimant to pursue his line of questions, even if we agreed it was relevant.

It is not relevant to the issues before us, and the claimant is not allowed to ask questions of other witnesses about how he came to be in possession of their correspondence now in the Hearing Bundles. What is relevant for us is questions about the content of any such correspondence, not about how it came to be in the Bundle, whether by voluntary production by the respondents, or by Data Protection Act Subject Access Request, or Order of this Tribunal at an earlier stage in these proceedings.

We will accordingly uphold Mrs Greig's objection, recall the witness and proceed to questions by the Tribunal, and thereafter any re-examination by Mrs Greig. In doing so, we are conscious of the time taken to address this matter, and the time taken generally to hear from this witness, compared to parties` original time estimates. We will wish to hear from parties later today, or certainly tomorrow, about timetabling of this case, and identifying further dates for Hearing, and also whether or not we need to make a Timetabling Order".

39. On 3 August 2016, the claimant advised the Tribunal that he did not now seek to lead Patricia Dawkins as a witness on his behalf. She was a friend of his mother (whom he thought used to be a trade union representative, when she and his mother worked together as social workers), who had accompanied him, as an observer, to absence management meetings with the respondents on 25 June 2010 and 9 July 2010. Previously, on 1 August 2016, he advised us that she had personal issues of her own, which he described as her not being medically fit, and he enquired whether she could provide a written statement.

40. While the claimant was advised by the Employment Judge that Mrs Dawkins could do so, it was explained to the claimant that if she did not attend, and so she was not open to cross-examination, it would be a matter for the Tribunal to decide what weight to give to a written statement. The claimant advised the Tribunal that she would prefer to give a written statement, and he was happy with that being allowed, even if it reduced the impact of what she would actually say, and he also advised us that he was absolutely not seeking a Witness Order for her to appear before the Tribunal. She did not appear before us, and no written statement from her was lodged by the claimant for our consideration at this Final Hearing.

41. Further, on 4 August 2016, the claimant withdrew his request for us to hear evidence from John McGaughrin, the respondents' Assistant Operations Manager, given the evidence already heard by the Tribunal from the respondents' other witnesses, about the suitability of the store person role, offered to the claimant as an alternative job, and discussions with the claimant about that role.

42. As per our interlocutory ruling, on 4 August 2016, we refused, as not relevant or necessary for us to hear, the claimant leading any evidence from Pamela Carruthers, an HR Officer with the respondents, and Marion Summers, an

Operations Manager, but we acceded to the claimant's request that he be allowed to lead evidence from Paul McGaulley, the respondents' HR Manager.

43. In particular, we decided that, as regards Pamela Carruthers, the HR adviser in the early stages of the absence management process, we had heard evidence on that from Jamie Callaghan, and to hear her further evidence about her limited involvement in HR support for absence management meetings would have been unduly repetitive, and it was is unnecessary.

44. Similarly, as she was HR adviser in the first and second stages of the claimant's grievance, and we had heard from Mr Callaghan as the Investigating Officer on that Stage 1 grievance, we decided it would have been repetitious to hear further from Ms Carruthers, especially when the Agreed Statement of Facts agreed the chronology of who did what, where and when, and the relevant documents are agreed for their respective terms.

45. Further, for Marion Summers, who dealt with the claimant's grievance only, and who had no involvement in the respondents' decision to dismiss the claimant, reasonable adjustments, or the specified acts of alleged victimisation or harassment, we decided that as she was the Investigating Officer for the grievance, second stage, and her involvement started on 7 September 2010, her role post dates both dismissal, and appeal against dismissal, and so her evidence is not relevant or necessary for a fair hearing of the case. Accordingly, we decided that she was not required as a witness.

46. Finally, as regards Paul McGaulley, having heard from both parties, and formed our own view, based on the evidence heard from Carol Connolly, the Appeals Officer, we decided that it was appropriate that we hear from Mr McGaulley.

47. Having heard Ms Connolly's evidence to the Tribunal, we felt that there were a number of matters where it would be in the interests of justice, so as to

ensure a fair hearing of the case for both parties, that the Tribunal hear from Mr McGaulley, but restricted to his involvement in the Appeal process and, in particular what briefing he gave the Appeal panel, and what advice he gave them as regards options for disposal of the Appeal.

Findings in Fact

48. On the basis of the evidence heard from witnesses over the course of the Final Hearing, and the various documents included in the Bundles of Documents lodged with the Tribunal, the Tribunal has found the following essential facts established:-

Claimant

(1) The claimant, aged 44 at the date of the Final Hearing before the Tribunal, was formerly employed by the respondents.

(2) He was previously employed by the respondents, then known as Glasgow Community and Safety Services ("***GCSS"***), as a Community Enhancement Operative, with a start date of 22 January 2007.

(3) A copy of his written statement of main terms and conditions of employment, issued by the respondents on 11 December 2009, and still in force at the effective date of termination of employment, was produced to the Tribunal in the core bundle **A** at **Tab 15, pages 55 and 56.**

(4) His employment with the respondents was terminated, due to lack of capability, with effect from 19 August 2010, following a meeting with the respondents' Operations Manager, John Hynes, on 30 July 2010. A notice period of 3 weeks was applied by the respondents.

(5) As at that effective date of termination of employment, the claimant, then aged 38, had three complete years' of continuous employment with the respondents.

(6) A copy of his letter of dismissal, issued by Mr Hynes, on behalf of the respondents on 30 July 2010, was produced to the Tribunal in the core bundle **A** at **Tab 77, pages 159 and 160.**

(7) The claimant was employed by the respondents on the basis of a normal working week of 37 hours, Monday to Friday, for which, as at the date of termination of his employment, his gross weekly wages were £310.53, and his net weekly wages were £240.54, based on a gross annual salary of £16,192.

(8) As at the date of the Final Hearing before the Tribunal, the claimant was currently carer for his mother, and he was not in any employment. He was in receipt of Industrial Injury Disablement Benefit in respect of himself, as also income-based Jobseekers' Allowance, and Carer's Allowance in respect of his mother, Moira Hamilton.

Respondents

(9) The respondents are a Scottish charity. They are constituted as a private company, limited by guarantee, but exempt from using the word "***Limited***" under Company Number **SC130604.** They are also a recognised Scottish charity under Reference Number **SCO17889** with OSCR (Office of the Scottish Charity Regulator).

(10) Further, at the time of the claimant's employment, the respondents operated as ***"GCSS",*** being a partnership between Glasgow City Council, Strathclyde Police, Greater Glasgow & Clyde NHS Board,

and Glasgow Housing Association, and as an ALEO (being an at arm's length external organisation) supported by Glasgow City Council.

(11) The respondents changed their name, from Glasgow Community and Safety Services Ltd, by certificate of incorporation on change of name on 23 August 2013, during the currency of these Tribunal proceedings, and, by application to amend the ET3 response, made on the respondents' behalf on 12 May 2016, the Tribunal allowed the identity of the respondents to be amended to that name, there being no objection by the claimant.

(12) The respondents provide services within the local government area of Glasgow City Council, and they have a Board of Directors, and a professional staff led and managed then and now by their Managing Director, Phil Walker. Line management of staff employed by the respondents is generally by their manager/supervisor, all under the general direction and control of the Managing Director.

(13) The respondents employ a number of staff. As at the time when the claimant was employed, the respondents employed around 500 staff, operating across a variety of different functions, and work locations. The claimant operated originally from a work location at Shieldhall depot, and latterly from Blochairn depot.

(14) During the period of the claimant's employment by the respondents, where, at certain times, his duties included being responsible for the removal of graffiti using various chemicals, the claimant was line managed by the respondents' Supervisor, John McMillan, or, in his absence, by Patricia Lowe, a deputy Supervisor, and they were all part of the respondents' Community Enhancement function, led by a Derek Brown, Service Manager.

(15) To support local management, the respondents had an HR section operating from premises at Westergate, 11 Hope Street, Glasgow, G2 6AB. The HR section, led by Paul McGaulley, HR Manager, provided HR support, advice and assistance to managers across the respondents' organisation. Their role was advisory, in support of managers, acting within appropriate delegated powers, being decision makers.

Respondents' Absence Management Policy

(16) As part of the respondents' commitment to controlling and managing absence levels within the organisation, so as to allow them to respond effectively to actual and potential problems with service delivery, and also to provide assistance to employees with health problems at an early stage, the respondents had in place, during the period when they employed the claimant, an Absence Management Policy.

(17) A copy of the respondents' Absence Management Policy was produced to the Tribunal in the core bundle **A** at **Tab 13, pages 48 to 52**. It set forth (1) policy aims and objectives; (2) management responsibilities for management of absence; (3) management considerations; (4) guidance on managing absence categories, including long term absence (being any single period of absence amounting to 20 or more working days); (5) disciplinary considerations; and (6) lack of capability considerations.

Claimant's Absences from Work

(18) The claimant had four periods of absence during the period of his employment by the respondents, as follows:-

Absence 1 - Monday 23/02/2009 to Wednesday 25/02/2009; **3** working days lost; absence reason due to "***cold/flu.***"

Absence 2 - Tuesday 14/04/2009 to Sunday 10/05/2009; **19** working days lost; absence reason due to "***dermatitis."***

Absence 3 – Wednesday 11/11/2009 to Sunday 22/11/2009; **8** working days lost; absence reason due to "***chest infection."***

Absence 4 - Tuesday 15/12/2009 to Thursday 19/08/2010; **178** working days lost; absence reason due to "***dermatitis."***

(19) For the purposes of this Final Hearing, the parties provided an Agreed Statement of Facts in relation to the amounts of sick pay received by the claimant and time period, in the following terms:-

1. The Claimant`s last period of sickness absence commenced on 15 December 2009 and ended on 19 August 2010.

2. As at 15 December 2009 the Claimant had 2 years and 11 months service and was contractually entitled to 18 weeks full sickness allowance followed by 18 weeks half sickness allowance, inclusive of statutory sick pay. *See Statement of Main Terms of Employment Tab 15 page 55 Core Bundle A*

3. The Claimant`s entitlement to full sickness allowance expired on 8 March 2010. The Claimant commenced half sickness allowance on 9 March 2010. The 18 weeks period of half sickness expired on 12 July 2010. *See letter dated 26 February 2010 from Paul McCaulley to the Claimant Tab 43 page 98 Core Bundle A*.

4. On expiry of the Claimant`s entitlement to contractual sickness allowance and statutory sick pay the Claimant applied for Employment and Support Allowance from the Department of Work and Pensions. *See (1) letter from the Claimant to Robert*

Smith dated 11 July 2010 Tab 70 page 146 (2) Robert Smith to the Claimant dated 14 July 2010 Tab 71 page 148 and (3) part of letter from Jobcentre Plus to the Claimant dated 13 July 2010 enclosed with Tab 74 page 155, al of Core Bundle A.

5. The Respondent terminated the employment of the Claimant on 30 July 2010 with three weeks` notice. The Claimant`s employment terminated on 19 August 2010. The Respondent paid the Claimant full contractual pay during the three week notice period, from 30 July 2010 to 19 August 2010. *See letter from John Hynes to the Claimant dated 30 July 2010 Tab 77 page 159 Core Bundle A*.

6. The Claimant received the following payments:-

23/2/09 – 25/2/09	cold	3 working days full sickness allowance
14/4/09 – 10/5/09	dermatitis	19 working days full sickness allowance
11/11/09 – 22/11/09	chest infection	8 working days full sickness allowance
15/12/09 – 8/3/10	dermatitis (ongoing	60 working days full sickness allowance
		Total = 90 workings days full sickness allowance = 18 weeks full sickness allowance
9/3/10 – 12/7/10		18 weeks half sickness allowance
13/7/10 – 30/7/10		No payment from Respondent
30/7/10 -19/8/10	notice period	3 weeks full contractual pay

7. The Document entitled "ABSENCE MANAGEMENT – POLICY/ARRANGEMENT FOR ABSENCE MANAGEMENT` applied to the Claimant`s absences as set out above. *See Tab 13 pages 48-52 Core bundle A.*

Absence Management Meetings attended by the Claimant

(20) For the purposes of this Final Hearing, the parties provided an Agreed Statement of Facts in relation to the absence management meetings attended by the claimant during the period from 7 May 2009 until 30 July 2010, in the following terms:-

Date	
1. 7 May 2009	The Claimant was absent from 14 April 2009 to 10 May 2009. This meeting was attended by the Claimant, John McMillan and Pamela Carruthers (HR). The record of the meeting was prepared by Pamela Carruthers (**Tab 17/Pages 58-59**). The reason recorded for the absence was "dermatitis". Pamela Carruthers prepared a letter dated 13 May 2009 recording the issues discussed at this meeting (**Tab 19/Page 61**). At this meeting the Claimant explained he was suffering from dermatitis; he had suffered from dermatitis before; he was waiting for a dermatologist appointment; neither the Claimant nor his GP knew the cause; his GP had advised him it was unlikely that the condition was

	caused or made worse by the chemicals used for removing graffiti.
2. 21 May 2009	The Claimant has returned to work. This meeting was attended by the Claimant, John McMillan and Martin Carlisle (HR). The report of the Formal Interview was prepared by Martin Carlisle (**Tab 21/Pages 63-64**). Martin Carlyle sent a copy of the report to the Claimant on 28 May 2009 (**Tab22/page 65**). At this meeting the Claimant explained he was still suffering from dermatitis; it had not deteriorated; he was still waiting for a dermatologist appointment.
3. 12 August 2009	The Claimant is not absent. This meeting was attended by the Claimant, Pat Lowe and Martin Carlisle (HR). The report of the meeting was prepared by Martin Carlisle (**Tab 27/Pages 71-72**). This was a follow up interview under the Absence Management Policy (as above) arranged as a review three months on from the meeting of 21 May 2009 (above). The outcome of the meeting was to refer to Occupational Health and to review within three months and possibly meet earlier to discuss OH Report. At this meeting the Claimant explained he had had the dermatologist appointment; dry skin was caused by change in weather; cold, dry conditions set off the

	condition; paint prevents it from healing, chemicals as well; symptoms had still not cleared up completely. The Claimant provided the Respondent with a letter from his GP dated 4 August 2009 [**Tab 26/page 70**] explaining that the Dermatologist felt that the sensitivity rash over the Claimant's eyes, face and trunk was related to the chemicals used to remove graffiti. The GP would be grateful if the Claimant could be transferred to another job not involving chemicals.
4. 27 November 2009	The Claimant was absent from 11 November 2009 to 22 November 2009 and had returned to work. The meeting was attended by the Claimant, John McMillan and Martin Carlisle (HR). The report of the meeting was prepared by Martin Carlisle (**Tab 30/Pages 79-80**). The Sickness Absence Certificate, dated 23 November 2009, recorded the reason for the absence as "chest infection (**Tab 29/Page 78**). At this meeting the Claimant explained that he was not fully recovered from the chest infection and that dermatitis not cleared from mouth, under eyes and in and around ears, still using cream to control it. The Respondent confirmed the Claimant was removed from graffiti duties due to the GP letter (as above) recommending he stay away from chemicals used to remove graffiti.
5. 8 December 2009	The Claimant is back at work. The meeting was attended by the Claimant, John

	McMillan and Martin Carlisle (HR). The report of the meeting was prepared by Martin Carlisle (**Tab 35/Page 87**). The meeting was arranged under the Respondent's Absence Management Policy (as above) and to discuss the first Occupational Health Report (dated 1 December 2009, **Tab 31/Pages 81-83**). Martin Carlisle prepared a letter, dated 15 December 2009 (**Tab 36/Pages 88-89**) recording the issues discussed at this meeting. The OH Report confirmed it was likely that the Claimant's condition was covered under the Disability Discrimination Act.
6. 28 January 2010	The Claimant is absent from 15 December 2009 and does not return. The meeting was attended by the Claimant, John McMillan and Martin Carlisle (HR). The record of the meeting (**Tab 39/Pages 92-93**) was prepared by Martin Carlisle. This meeting was a formal interview triggered by level of absence under the Absence Management Policy (as above). The Claimant, at this point, fell under the definition of "Long Term Absence" in terms of the Policy (as above). The reason recorded for the absence was "dermatitis". Martin Carlisle prepared a letter dated 4 February 2010 (**Tab 41/Pages 95-96**) recording the issues discussed at this meeting.
7. 19 March 2010	The Claimant is absent from 15 December 2009 and

	does not return. The meeting was attended by the Claimant, Pat Lowe and Martin Carlisle (HR). The record of the meeting was prepared by Martin Carlisle (**Tab 45/Pages 100-102**). The reason recorded for the absence was "dermatitis". The meeting was held under the Absence Management Policy (as above) because the Claimant was on Long Term Sickness Absence. A further referral to Occupational Health for an update assessment was agreed and a follow-up meeting in 4 – 6 weeks. Martin Carlisle prepared a letter dated 1 April 2010 (**Tab 46/Pages 103-104**) recording the issues discussed at this meeting and also issues discussed in telephone calls before the meeting. The meeting among the Claimant, Martin Carlyle and Jamie Callaghan on 17 February 2010 in relation to the Community Reparation driver post was discussed.
8. 24 May 2010	The Claimant is absent from 15 December 2009 and does not return. The meeting was attended by the Claimant, Derek Brown and Robert Smith (HR). John McGauchrin, Assistant Operations Manager, attended for part to discuss the role of Storesperson in Uniformed Services division. The record of the meeting was prepared by Robert Smith (**Tab 52/Pages 115-116**).

	The reason recorded for the absence was “dermatitis”. The meeting was held under the Absence Management Policy (as above) because the Claimant was on Long Term Sickness Absence and also to discuss the recent (second) Occupational Health Report dated 28 April 2010 (**Tab 50/Pages 112-113**). Robert Smith prepared a letter dated 11 June 2010 recording the issues discussed at this meeting (**Tab 56/Pages 122-128**).
9. 25 June 2010	The Claimant is absent from 15 December 2009 and does not return. This meeting was attended by the Claimant, Patricia Dawkins (friend), Derek Brown and Robert Smith (HR). The record of the meeting was prepared by Robert Smith (**Tab 62/Pages 134-135**). The meeting was held under the Absence Management Policy (as above) because the Claimant was on Long Term Sickness Absence. The reason recorded for the absence was “dermatitis”. Robert Smith prepared a letter dated 28 June 2010 recording the issues discussed at this meeting, signed by Derek Brown (**Tab 64/Pages 137-139).** The storesperson role was offered as a permanent role and offered to the Claimant.
10. 9 July 2010	The Claimant is absent from 15 December 2009 and does not return. This meeting was attended by the Claimant, Patricia

	Dawkins (friend), Derek Brown and Robert Smith (HR). The record of the meeting was prepared by Robert Smith (**Tab 69/Pages 144 – 145)**. The reason recorded for the absence was "dermatitis". The meeting was held under the Absence Management Policy (as above) because the Claimant was on Long Term Sickness Absence. Robert Smith prepared a letter dated 20 July 2010 (**Tab 72/Pages 149-150**) recording the issues discussed at this meeting and this was signed by Derek Brown.
11. 30 July 2010	The Claimant is absent from 15 December 2009 and does not return. The meeting was attended by the Claimant, Ross McMillan (representative), John Hynes and Robert Smith (HR). The record of the meeting was prepared by Robert Smith (**Tab76/pages 157 – 158)**. The reason recorded for the absence was "dermatitis". The meeting was held under the Absence Management Policy (as above). Robert Smith prepared a letter dated 30 July 2010, signed by John Hynes, recording the issues discussed at this meeting (**Tab 77/Pages 159 - 160**). The decision to terminate the Claimant's employment was taken by John Hynes at this meeting.

Alternative Employment offered to the Claimant

(21) Following the absence management meeting held on 24 May 2010, the respondents' Robert Smith wrote to the claimant, by letter dated 11 June 2010, as per the copy letter produced to the Tribunal in the respondents' bundle ***A*** at **Tab 56, pages 122 to 128**. John McGaughrin, Assistant Operations Manager, had attended that meeting to discuss the role of Storesperson in the Uniformed Services division. Mr Smith's letter to the claimant enclosed a copy of the roles and responsibilities associated with the alternative duties offered, copy produced at **Tab 56, page 126**.

(22) The job title was Store person, and the main purpose of the job, on site at the respondents' HQ at Westergate, was to ensure that the uniform/equipment sore operated efficiently, implementation of proper stock control, and assisting in development of proper procedures/systems/ processes, etc.

(23) It was stated that there would be no requirement to work with chemicals in the role, and the claimant confirmed, at the meeting held on 24 May 2010, that he would discuss this option with his GP at his next appointment, as he indicated that he would be fit to return to a position which did not involve the use of chemicals, however, at that stage, he had not returned to work in any capacity, including the temporary storesperson role offered at the meeting held on 24 May 2010.

(24) Mr Smith also enclosed with that letter to the claimant a copy of a Risk Assessment carried out by the respondents, having regard to concerns previously raised by the claimant about the previously discussed role of temporary Community Reparation driver, copy produced at **Tab 56, page 124**.

(25) Further, Mr Smith's letter also referred to recent recruitment advertisements within the company that had been passed to the claimant and he was advised to submit an application for any appropriate vacancy for consideration, but, with regard to external vacancies, it was noted that the claimant had stated that he had not been seeking alternative employment outwith the respondents.

(26) Specifically, as shown in Mr Smith's file note, copy produced at **Tab 53, page 117,** further to the meeting on 24 May 2010, at which the claimant was passed a copy of Choice Works positions advertised, the claimant attended at Westergate on 26 May 2010 and obtained application forms for Admin Assistant with a Finance role, and Literacy Tutor, and he applied for both positions. He did not meet the minimum criteria for the Literacy Tutor post, and although interviewed for the Admin Assistant post, he was not appointed to that post.

(27) The claimant was subsequently provided with copy advertisements for Communications Operator, and Administration Officer, as per letters from Mr Smith dated 10 June 2010, copy letters and job advertisements produced at **Tab 54, pages 118/119**, and **Tab 55, pages 120/121**.

(28) After the absence management meeting held on 25 June 2010, Mr Smith again wrote to the claimant, as per the copy letter produced to the Tribunal in the core bundle **A** at **Tab 64, pages 137 and 138.** He confirmed that management had investigated the Stores/Admin Assistant role further, and they were satisfied that there was a requirement for the role to be established on a permanent basis, and in that regard, Mr Smith confirmed the terms of the offer to the claimant as being a permanent post, 35 hours per week, on an annual salary of £16,192.

(29) He enclosed a copy of the job description pertaining to the role of Stores / Admin Assistant, as per the copy produced at **Tab 64, page 139**, being full-time, and located at Westergate. He confirmed that, as with any prospective redeployment, the initial period in the role would be on a trial basis for a period of 4 to 6 weeks, to be reviewed thereafter, and as the salary payable for this post would remain consistent with remuneration for a Community Enhancement Operative, as the claimant's hours of work would reduce to 35 hours per week, this offer constituted a rise in his hourly rate of pay.

(30) Mr Smith's letter of 28 June 2010 also noted that vacancies within the company had been forwarded to the claimant separately on a number of occasions, and he confirmed that applications for posts advertised would be welcomed from the claimant, with due consideration given by the appropriate selection panel. Copy documentation relating to vacancies within the respondents, between 2 July 2009 and 6 August 2010, were noted in a document produced by the respondents, but included in the claimant's additional bundle produced to the Tribunal in the claimant's bundle ***C,* at document 79, pages 336 and 337,** with relevant copy job descriptions **at pages 338 to 401.**

Claimant's Dismissal from Employment

(31) A copy of the claimant's letter of dismissal, issued by Mr Hynes, on behalf of the respondents on 30 July 2010, was produced to the Tribunal in the core bundle **A** at **Tab 77, pages 159 and 160.** It records that at that meeting the claimant confirmed his continued absence was due to dermatitis, and with regard to his discussions with his GP, the claimant stated that he had been advised that he was unfit to return to work in any capacity at present.

(32) Further, at that meeting with Mr Hynes, the claimant confirmed that he had not discussed the alternative duties offered by Mr Brown, on 9 July 2010, with his GP, and that his current medical certificate (**Tab 74 – page 154**) covered his absence up to and including 21 September 2010. When specifically asked, the claimant stated that he could not confirm a timescale for returning to work. He stated that he felt he had been a loyal member of staff and that this should be taken into consideration when deciding as to whether his employment with the company should continue.

(33) After an adjournment of that meeting, the claimant was advised orally that he was being dismissed, and Mr Hynes' letter confirmed that:

> "***Due to your level of attendance with no indication of returning to work, I confirm that a decision has been taken to terminate your contract and dismiss you from employment with Glasgow Community Safety Services, on the grounds of lack of capability***."

(34) That letter of dismissal further stated that if the claimant considered that action of dismissal, with 3 week's notice paid, was unfair, then he had a right of appeal, in writing, within 14 days, to the HR Manager. It also stated that the claimant did not meet the criteria for retirement on grounds of ill-health in accordance with the Local Government Pension Scheme (Scotland) Regulations. Thereafter, by further letter dated 11 August 2010, from Robert Smith, Senior HR officer, the claimant was advised that he would receive full contractual pay from 30 July 2010 to 19 August 2010 inclusive, as per copy letter produced to the Tribunal in the core bundle **A** at **Tab 81, page 164**.

Claimant's Appeal against Dismissal

(35) In accordance with the right of internal appeal offered to him, the claimant, by letter of 2 August 2010, addressed to Mr Smith, HR, wrote a short letter stating that he would be appealing the decision to dismiss him, and that he would send in a more detailed appeal at a later date, once he had received information on the relevant procedures. A copy of the claimant's letter of 2 August 2010 was produced to the Tribunal in the core bundle **A** at **Tab 78, page 161**.

(36) Following further correspondence from Mr Smith to the claimant, on 3 and 11 August 2010, copy produced to the Tribunal in the core bundle **A** at **Tabs 79, 80 and 81, pages 162 to 164,** by letter dated 15 August 2010, addressed to Mr McGaulley, HR Manager, the claimant set out his detailed reasons for his appeal against dismissal. A copy of the claimant's letter of 15 August 2010 was produced to the Tribunal in the core bundle **A** at **Tab 83, page 166**.

(37) In his detailed grounds of appeal, the claimant raised the following points:

(***1)*** ***I would refer to the disability discrimination act as I have a recognised disability.***

(2) ***There was neither occupational health report on the suitability of the position offered nor any independent advice taken on its suitability so I can only assume that you suspected that it would be unsuitable.***

(3) ***You have at no time contacted my Dr to discuss suitability or my condition.***

(4) Unreasonable pressure to make a decision about when I could return to work despite having produced a GP sick note.

(5) I was unaware of the capability processes or policy thresholds.

(6) To take the position even if it was safe in the long term would endanger my health and would invalidate both company and private insurance for the workplace.

(7) Lastly, there was not a recess to discuss my statement that I would off course *(sic)* ***return to my Dr to get signed off if my condition improved.***

Appeal Hearing

(38) By letter dated 17 August 2010, from Mr McGaulley, HR Manager, the claimant was invited to attend an appeal hearing before the respondents' Personnel Committee, represented by Phil Walker, MD, and Carol Connolly, Director, with Mr McGaulley in attendance as HR adviser, to be held on Friday, 27 August 2010.

(39) The claimant was provided with a copy of the Appeal Procedure, and advised that he would be sent a copy of the appeal papers before the hearing. He was also advised that management intended to call John McGaughrin, Assistant Operations Manager, in the capacity of a witness.

(40) A copy of this letter to the claimant was produced to the Tribunal in the core bundle **A** at **Tab 84, page 167.** There was also produced to

the Tribunal, a copy of the Appeals Procedure for the Personnel Committee, at **Tab 14, pages 53 and 54,** and the appeal papers at **Tab 85, page 168,** comprising 2 documents for the claimant, and 20 documents by the respondents' Head of Service, as inventoried **A1/A2,** and **R1/R20**.

(41) Management's case at the appeal hearing was set forth in a written ***"Case Summary",*** prepared by Robert Smith, Senior HR Officer, as adviser to Derek Brown, Service Manager. A copy of this case summary was produced to the Tribunal in the core bundle **A** at **Tab 87, pages 174 to 179**.

(42) John Hynes, Operations Manager, as dismissing officer, accompanied Mr Brown and Mr Smith as part of the management group at the appeal hearing. Mr McGaughrin gave evidence as a management witness. The claimant attended the appeal hearing as appellant, and he was accompanied by Ross McMillan, a representative from SSAFA, who was present as a support to the claimant as an ex-Army veteran. The claimant did not lead any witness at his appeal.

(43) Phil Walker, as the respondents' Managing Director, chaired the appeal hearing, and Carol Connolly, Director, was the other member of the appeals panel. Mr McGaulley, HR Manager, attended as HR adviser, and notes of the appeal hearing were taken by Janet Kindness, PA to Mr Walker. No objection was taken by the claimant to the presence of any member of the appeal panel, nor to Mr McGaulley, as the HR adviser.

(44) A copy of these notes of the appeal hearing was produced to the Tribunal in the core bundle **A** at **Tab 87, pages 174 to 179.** In terms of an Agreed Statement of Facts, regarding Documents in the Bundles, entered into by parties, for the purposes of this Final

Hearing, these notes were agreed to accurately reflect the issues discussed at the appeal hearing.

Claimant's Appeal Rejected by the Respondents

(45) Having heard from the claimant and management, the appeals panel called a recess for deliberation. When the appeal hearing resumed, after that recess, Mr Walker, as chair of the Appeals Committee, stated that having listened to both parties' submissions, he was satisfied that management had endeavoured to retain the claimant in employment by way of offering a suitable alterative post and they had not acted unreasonably during the absence management process.

(46) Further, Mr Walker stated that he was satisfied that the responsibility to discuss the alternative duties was with the claimant and his GP, and he was of the view that the claimant had not met this responsibility. When asked during the appeal hearing, the claimant confirmed that he was not in a position to confirm a return to work date and, as such, Mr Walker could not see what additional support management could have provided.

(47) Finally, Mr Walker further stated that he was satisfied that the grounds which led to the claimant's dismissal were fair in the circumstances and accordingly the claimant's appeal was rejected, and he advised the claimant that the appeal process was concluded, and the outcome would be confirmed in writing to the claimant .

(48) By letter dated 27 August 2010 from Mr McGaulley, HR Manager, the claimant was advised in writing that having heard management's submission, and his/ his representative's submission, Mr Walker and Ms Connolly concluded that the decision to dismiss the claimant was reasonable in the circumstances and therefore his appeal was not upheld, and that concluded the company's procedures.

(49) A copy of this written confirmation of his appeal against dismissal not being upheld by the Appeals Committee was produced to the Tribunal in the core bundle **A** at **Tab 88, page 180.**

Grievance Procedure relating to the Claimant

(50) As part of the respondents' employment policies, in place during the period when they employed the claimant, they adopted a Grievance Procedure, with the aim being to ensure that their employees are given the opportunity to raise and have resolved grievances relating to their employment, when a formal procedure is necessary to meet circumstances where routine issues and complaints cannot be settled quickly through constructive informal discussions with management.

(51) A copy of the respondents' Grievance Procedure (March 2009) was produced to the Tribunal in the claimant's additional bundle **C** at **document 1** at **pages 181 to 189**. It set forth the aim and scope of the procedure, its guiding principles, and narrated the formal procedure for grievances being dealt with through 3 stages. It included a "***status quo***" provision that management should not take any precipitative action whilst the issue is still under consideration and the grievance procedure has not been exhausted.

(52) For the purposes of this Final Hearing, the parties provided an Agreed Statement of Facts in relation to a summary of key dates relating to the claimant's use of the respondents' grievance procedure, during the during the period from 7 April 2010 and 28 October 2010, and the relevant documents produced to the Tribunal by the claimant in the additional documents Bundle **C**, in the following terms:

			Bundle "C"
1	Stage One Grievance lodged by Claimant	7 April 2010	190 - 197
2	Meeting with Claimant, Jamie Callaghan and Pamela Carruthers	15 April 2010	198-201

3	Further meeting with Claimant, Jamie Callaghan and Pamela Carruthers	20 May 2010	207
4	Outcome of Stage One Grievance (last page missing)	16 June 2010	212-217A
	Notice of termination of employment	***30 July 2010***	
5	Further Stage One Grievance lodged by Claimant	30 July 2010	228-233
	Date of termination of employment	***19 August 2010***	
6	Outcome of Further Stage One Grievance	26 August 2010	244-249
7	Claimant lodges grounds of appeal as Stage Two Grievance	Date unknown?	250-255
8	Marion Summers, Operations Manager, replies to Claimant	7 Sept 2010	256
9	Stage Two Grievance/Appeal Hearing attended by Claimant, Claimant's representative Ross McMillan, Marion Summers and Pamela Carruthers	20 Oct 2010	262
10	Outcome of Stage Two Grievance/Appeal Hearing	28 Oct 2010	263-268

(53) The claimant's stage 1 grievance, submitted on 7 April 2010, seeking "***full-time employment in safe working environment, without intimidation, harassment, victimization, bullying or intimidation"*** was dealt with by Jamie Callaghan, a Service Manager with the respondents, and he having investigated the grievance, he did not uphold it. By letter dated 18 June 2010, the claimant was sent a letter from Pamela Carruthers, HR, enclosing the grievance outcome made by Mr Callaghan on 16 June 2010.

(54) By letter dated 22 June 2010, the claimant indicated that he wished to proceed to stage 2 of the respondents' grievance procedures, and he indicated that he wished to raise a second grievance, including Paul McGaulley, HR Manager. Eileen Marshall, the respondents' Head of Finance, who had line management responsibility for Mr McGaulley, responded to the claimant by letter dated 21 June 2010 (sic), advising the claimant that his original grievance would be re-opened and that he should submit any further grievance statement to Mr Callaghan. He was advised that other matters he raised should be discussed at the

meetings held under the respondents' absence management procedures.

(55) After further correspondence between the claimant and the respondents, the claimant submitted a second grievance to Mr Callaghan under cover of a letter dated 30 July 2010, which Mr Callaghan received on 2 August 2010, by which date the claimant had been dismissed by the respondents, following a decision taken by John Hynes to dismiss the claimant with effect from 19 August 2010.

(56) Mr Callaghan thereafter proceeded to investigate the claimant's second grievance, but the claimant did not attend any meetings arranged to progress his grievance. Mr Callaghan considered the written grievance submitted by the claimant, and he interviewed relevant officers employed by the respondents. He rejected the claimant's grievance and this outcome was communicated to the claimant under cover of a letter dated 26 August 2010 sent by Pamela Carruthers, HR.

(57) The claimant's appeal against dismissal was considered and rejected by the respondents' Appeals Committee on 27 August 2010. In the period from 27 August 2010 onwards, there was further correspondence between the claimant and the respondents in relation to his grievance, culminating in the rejection of the claimant's grievance appeal after a stage 2 grievance appeal hearing heard by Marion Summers, Operations Manager, on 1 and 20 October 2010, where the claimant attended along with Ross McMillan from SSAFA.

(58) The outcome report from that grievance appeal hearing was sent to the claimant under cover of as letter dated 29 October 2010 from Marion Summer, concluding the company's grievance procedures. She concluded that the claimant's grievance had not been upheld.

Claimant's disability

(59) In his ET1 claim form, at section 9.1, the claimant described his disability as "***contact dermatitis***". In the further and better particulars for the claimant, lodged on 11 November 2011, at paragraph 2, it was averred that, from around December 2008, the claimant was a disabled person in terms of the Disability Discrimination Act 1995, suffering from dermatitis, which has a substantial long term adverse effect on his ability to carry out normal day to day activities, and that the respondents were aware of his disability.

(60) The respondents, in their ET3 response, accepted that the claimant suffers from a disability. At the first Case Management Discussion, held on 25 January 2011, before Employment Judge Shona MacLean, the respondents accepted that the claimant was disabled: paragraph 1 of that Judge's CMD Note refers.

(61) At a subsequent Case Management Discussion, held on 25 October 2011, before Employment Judge Stewart Watt, both parties' solicitors agreed that there were no preliminary issues in this case, and that it could proceed to a Hearing on the Merits (now known as a Final Hearing) and not to a Pre-Hearing Review (now known as a Preliminary Hearing): paragraph 2 of that Judge's CMD Note refers.

(62) Further, at a subsequent Case Management Discussion, held on 31 January 2013, before Employment Judge Iain Atack, the respondents' then solicitor, Mr Farrell, raised a possible issue of time-bar in respect of some of the claims, but he did not feel that a Pre-Hearing would be of any benefit, and the issues would be best dealt with at a full Hearing: paragraph 7 of that Judge's CMD Note refers.

(63) When, following a Case Management Preliminary Hearing, held on 18 March 2016, before Employment Judge Laura Doherty, this case was listed for this Final Hearing, Mr Wallace, the respondents' then

solicitor, accepted that the claimant was a disabled person, but no preliminary issues of disability status, or time-bar, were reserved: paragraph 8 of that Judge's CMPH Note refers.

(64) At this Final Hearing, the respondents accepted that the claimant was a disabled person in terms of **Section 1 of the Disability Discrimination Act 1995**, subject to the qualification that they did not know the claimant was a disabled person until receipt of the Capita Health Solutions occupational health report (**Tab 31, pages 81 to 83**) sometime after 1 December 2009 and before 7 December 2009.

(65) On 7 December 2009, Martin Carlyle, HR Officer, emailed Paul McGaulley, HR Manager, and Robert Smith, Senior HR Officer (**Tab 32, page 84**) attaching the Capita Health Solutions OH report, stating that: ***"Andrew Hamilton cannot return to his contracted post due to his underlying health problems as he cannot work with chemicals or anything associated with it",*** and noting that: "***They also feel he is covered under the DDA***."

(66) Mr Carlyle and John McMillan, the claimant's supervisor, met with the claimant on 8 December 2009 to discuss the contents of the Capita Health Solutions OH report. The claimant had declined the opportunity for the Capita Health Solutions OH report to be sent to him first, and its contents were read out to him at the absence management meeting on 8 December 2009.

(67) In that Occupational Health Report to the respondents' management, dated 1 December 2009, and written by Dr Robert Phillips, an accredited specialist in occupational medicine, for Capita Health Solutions, the respondents' then OH provider, he stated, following a consultation with the claimant on 30 November 2009, that: "***Andrew's condition is likely to have automatic cover under the Disability Discrimination Act while exposure occurs."***

(68) At that absence management meeting held on 8 December 2009, the claimant did not sign the notes of the meeting (**Tab 35**) as he was far too shocked to sign, as the Capita Health Solutions OH report content was a lot more serious than the claimant was expecting. In cross-examination, he spoke of being "***emotionally overcome***" when he read the OH report, and realised how serious was, as it was the first time that the DDA was mentioned.

(69) In the subsequent Occupational Health Report to the respondents' management, dated 28 April 2010, and written by Anne Traquair, Occupational Health Practice Nurse, for BUPA Health & Wellbeing UK, the respondents' then OH provider, she stated, following a consultation with the claimant on 23 April 2010, that: ***"His condition is likely to be covered by the Disability Discrimination Act while exposure occurs."***

(70) A copy of her report was produced to the Tribunal in the respondents' bundle ***A*** at **Tab 50, pages 112 and 113.** She was aware of the Capita Health Solutions OH report by Dr Phillips, and she found that the claimant was then unfit due to concerns regarding exposure to chemicals, but noted that the claimant was keen to resume his duties at the earliest opportunity.

(71) She recommended a meeting be arranged between management and Mr Hamilton to discuss the possibility of his redeployment to another post, and she anticipated he should be able to resume duties within the next 2 to 3 weeks. At that stage, he was unfit to perform his contracted duties, and he had been off work on sick leave from December 2009, and he remained absent.

(72) On 27 July 2010, the respondents received the claimant's final Med 3 statement of fitness for work, dated 22 July 2010, from his GP, Dr Orr, stating that, having assessed the claimant's case, on 20 July 2010, he advised that, because of dermatitis, the claimant was not fit for work, from 21 June 2010 to 21 September 2010. Copy Med 3 certificate was produced to the Tribunal at **Tab 74, page 154**.

(73) This followed on a letter from the claimant, dated 22 July 2010, to the respondents' Robert Smith, copy produced at **Tab 74, page 152**. When John Hynes convened the meeting with the claimant, on 30 July 2010, it was known to the respondents, as vouched by the notes of that meeting (**Tab 76, page 157**) that the claimant's current medical certificate was due to expire on 21 September 2010. When specifically asked by Mr Hynes if he could confirm a timescale for returning to work, the claimant stated that he could not do so, as recorded by Mr Hynes in his letter of dismissal to the claimant dated 30 July 2010 (**Tab 77, at page 159**).

Knowledge of the claimant's disability

(74) The physical symptoms of the claimant's condition evolved over time. Similarly the parties' state of knowledge (both the claimant's and the respondents') evolved as time passed.

(75) The claimant's Staff grade dermatologist, Dympha Lambe, reported to his GP on 26 June 2009, as per copy report produced in the respondents' bundle ***A*** at **Tab 24, page 67,** diagnosing irritant dermatitis of eyelids, angular cheilitis, and secondary sensitisation rash, for which he was prescribed Canesten hand cream to face, and Elocon to body, and discharged back to the GP's care, stating:-

> "***He is known to have had an itchy scaly rash over his eyes for 10 years but I believe in December when he was working as a graffiti remover his eyes became significantly worse and after several weeks this spread to his arms and trunk. He was off work during the month of April because his eyes were so severely affected. His job has recently changed to now delivering in the community. On examination today he has some erythema still in his eyelids with scaling and evidence of healing nodular prurigo on the arms and legs and angular cheilitis on both sides of the mouth. I have suggested the above management plan and he has been discharged back to your care."***

(76) The letter from the claimant's GP, Dr Ryan, dated 4 August 2009, as per copy produced in the respondents' bundle ***A*** at **Tab 26, page 70**, simply stated:

> "**I *write to confirm that the above was recently seen at hospital with a sensitivity rash over his eyes face and trunk. The Dermatologist felt that this was related to the chemicals used to remove graffiti. I would be grateful if he could be transferred to another job not involving chemicals. "***

(77) The respondents had both the dermatologist's letter and GP letter by the time of Martin Carlyle preparing the management referral to Capita Health Solutions, for the first OH report, on or around 6 November 2009, as produced in the respondents' bundle ***A*** at **Tab 28, pages 73 to 77**, specifically at **page 74.**

(78) The OH report from Capita Health Solutions (dated 1 December 2009, **Tab 31, pages 81 to 83**) came as a shock to the claimant. It was the

first time the DDA and disability had been mentioned, and it was the first time he had considered the DDA and disability.

(79) When the claimant wrote to John McMillan, by letter dated 7 December 2009, as produced in the respondents' bundle ***A*** at **Tab 34, page 86, h**e reported to his supervisor that the outcome of his OH consultation on 30 November 2009 was that he was advised that he should not work with any chemicals and that the OH physician would be recommending that the claimant be transferred to alternative employment. He made no mention of the DDA or disability.

(80) The respondents were in the same position as the claimant, as regards knowledge of his disability, for they did not know that the claimant was a disabled person until receipt of the Capita Health Solutions OH report, on 7 December 2009.

(81) Further to the absence management meeting held with the claimant on 8 December 2009, the respondents wrote to him by letter dated 15 December 2009, as per the copy letter produced in the respondents' bundle ***A*** at **Tab 36, pages 88 and 89,** stating that while Dr Phillips concluded that his condition is likely to be covered under the DDA, he was optimistic that, with complete restriction from exposure to chemicals, the claimant would give regular and effective service.

Alleged Failure to make Reasonable Adjustments

(82) The claimant founded his complaint of the respondents' alleged failure to make reasonable adjustments, and the substantial disadvantages that he relied upon in making that complaint**,** as per the narrative provided at paragraphs 4 to 7 of the further and better particulars for the claimant dated 11 November 2011.

(83) A full copy of those further particulars for the claimant was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 2, pages 6 to 13**.

(84) The specific allegations relating to reasonable adjustments, and substantial disadvantage, which the claimant relied upon before the Tribunal, were as detailed at paragraphs 4 to 7 of those further particulars, at **Tab 2, pages 7 to 10.**

(85) In his letter of 11 July 2010 to Robert Smith, copy produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 70, page 146,** the claimant stated, amongst other things, that he still wanted his dermatitis condition to be logged in the respondents' accident / incident book.

(86) When, by letter to the claimant dated 14 July 2010, Mr Smith replied, as per the copy letter produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 71, page 147,** the claimant was advised that:

> ***"In regard to your request, through discussions with yourself previously, the Company is aware that you had a "pre-existing" dermatitis condition, however, in order to ascertain whether there is a requirement to meet your request, with advice taken from relevant professional bodies, I would ask that you confirm exact details of the actual incident which occurred, which you are requesting to be detailed in relevant correspondence."***

(87) Thereafter, by letter from the claimant, dated 22 July 2010, to Robert Smith, the claimant forwarded to the respondents his report for inclusion in the accident / incident book, as per the copy letter produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 74, page 152.**

(88) A copy of the claimant's report, as enclosed with his letter to Mr Smith of 22 July 2010, was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 74, page 153.**

(89) Thereafter, by letter to the claimant dated 11 August 2010, Mr Smith replied, as per the copy letter produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 80, page 163,** advising the claimant that :

> ***"Taking into account the information you submitted on request regarding the above) and further to discussions with relevant Health & Safety practitioners, I confirm that these details will not be recorded within Accident/ Incident Log correspondence, however, will be noted within the paperwork relating to your continued absence."***

(90) The Tribunal finds that the respondents did not fail in their duty to make reasonable adjustments for the claimant, in terms of **Section 3A, 4A and 18B of the Disability Discrimination Act 1995.**

Alleged Harassment of the Claimant

(91) The claimant founded his complaint of disability related harassment by the respondents, contrary to **Sections 3B and 4 of the Disability Discrimination Act 1995, as** specified at paragraphs 12 to 14 of the further and better particulars for the claimant dated 11 November 2011, where he listed specific instances of alleged harassment of him by either, or both, of John McMillan and Patricia Lowe.

(92) The specific allegations of unlawful acts, between 7 December 2009 and 4 February 2010, where the claimant considered that John McMillan and Patricia Lowe in particular subjected him to harassment

on account of his disability, by unwanted conduct that he considered had the purpose of creating an intimidating, degrading and hostile environment within which he had to work, were detailed at paragraph 14(a) to 14(e) of those further particulars, at **Tab 2, pages 12 and 13**.

(93) The Tribunal finds that the claimant was not the subject of any harassment or victimisation by either, or both, of John McMillan and Patricia Lowe, as alleged or at all.

Claimant's Industrial Injuries Disablement Benefit

(94) In March 2010, the claimant claimed Industrial Injuries Disablement Benefit ("***IIDB"***), which was provisionally assessed in July 2010 at 14% due to the prescribed disease D5 – "***non-infective dermatitis of external origin***". In May 2012, he was re-examined and the disablement assessed at **5% for life** as from 2 July 2012.

(95) The claimant appealed that assessment, the decision was reconsidered but not changed and his appeal came before the First Tier Tribunal, Social Entitlement Chamber, on 19 December 2012, when his appeal, considered by a Tribunal of a Judge and two medical members, was disallowed, and the decision of the Secretary of State issued on 7 June 2012 was confirmed by that Social Security Tribunal.

(96) A copy of the Statement of Reasons for that decision by the First Tier Tribunal, Social Entitlement Chamber, on 19 December 2012, by Tribunal Judge Hutton, dated 13 February 2013, and issued to the claimant on 23 February 2013, was produced to the Tribunal in the claimant's additional bundle **C** as document **82.**

(97) In the findings in fact made by that Social Security Tribunal, it is stated that the claimant was previously employed as a graffiti remover,

where he developed a sensitivity to chemicals used at work, which led to him developing "***extremely irritated skin, the worst effects of which cleared up after he avoided exposing himself to chemical irritants. The appellant has continuing non-infective dermatitis which affects his mouth, eyes, groin and wrists. He is prescribed a steroid cream which he uses as required."*** It further stated that his "***condition has been stable for some time and he has been discharged from further review by his dermatologist."***

Claimant's circumstances post Dismissal by the Respondents

(98) Following his dismissal by the respondents, effective on 19 August 2010, the claimant referred various matters relating to his former employment with the respondents to the Health & Safety Executive ("***HSE***"), and he made various subject access requests of the respondents under the **Data Protection Act 1998**, and freedom of information requests to the HSE under the **Freedom of Information (Scotland) Act 2000**. Copy correspondence relative to these requests was produced to the Tribunal in the claimant's additional bundle ***C,*** **at documents 45 to 52, at pages 271 to 301.**

(99) He also entered into correspondence with JobCentreplus, and the HSE, relating to his claim for IIDB, and RIDDOR health & safety reporting, and related copy correspondence was produced to the Tribunal in the claimant's additional bundle ***C,*** **at documents 60 to 68, at pages 310 to 318, and document 74 at pages 329/330.**

(100) On 16 September 2011, Robert Smith, the respondents' Assistant HR Manager, sent a private and confidential reference about the claimant to Enable Scotland, in response to their request for a referee's report on the claimant, who was then being considered by Enable Scotland for a post as a Sessional Worker.

(101) A copy of that reference by Mr Smith, on behalf of the respondents, was produced to the Tribunal in the claimant's additional bundle **C** at **document 69**, **page 319.** As per the respondents' standard procedures, it detailed, over 4 lines, the claimant's job title, his start and end dates of employment, and a provided a brief description of his duties, before giving a 4 line legal disclaimer.

(102) The claimant advised the Tribunal that he was dissatisfied with the terms of this reference, and he further stated that his employment with Enable Scotland, which he described as being on a "***zero hours***" contract basis, ended after only a few sessions, in September 2011, because he assumed that they were not happy with his reference provided to them by GCSS. He stated that this was the only reference that he received from the respondents, but he did not contact Enable Scotland to try and get further work.

(103) The claimant produced, in his additional bundle ***C***, as **document 71, at pages 324 and 325,** a copy of an extract from his Army personnel document, date stamped 2 March 1999, certifying that Fusilier Hamilton had given "***exemplary"*** conduct over 3 years dedicated and professional service as a qualified infantryman and assault pioneer, including 8 months as a catering steward, learning basic stock checking, accounting and administration skills. His testimonial referred to his "***many personal qualities and professional skills that will serve him well in civilian employment."***

(104) From his evidence given at this Final Hearing, the claimant spoke to having had 3 &1/2 years in the Army as a Fusilier in the Royal Highland Fusiliers and, after his Army discharge, he worked with Asda as an admin assistant, with point of sale specialisation, then as a GS3 clerical assistant with Glasgow City Council Housing, before being involved in a road traffic accident, and out of work for 3 years.

(105) He spoke of being involved in a motor bike accident, and suffering compound fracture to both legs. At that time, he stated that he joined the Territorial Army Intelligence Corps, and he got a job in warehousing at MFI, until that business went into liquidation, after which he then secured his employment with the respondents at GCSS.

(106) At the time of this Final Hearing before the Tribunal, the claimant was unemployed, and a carer for his mother, since January 2016. Prior to January 2016, he spoke of a lot of personal issues to deal with, which he stated prevented him looking for new employment.

(107) Following termination of his employment by the respondents, effective 19 August 2010, the claimant has been in receipt of IIDB in respect of himself, and also income based Jobseekers' Allowance, and a Carer's Allowance for this mother.

(108) Around June 2016, the claimant advised the Tribunal that the DWP stopped paying him unemployment benefit, although previously he had given evidence that they were satisfied with his attempts to look for work, and he spoke of his Employment Support Allowance being stopped, and following an appeal, he being found entitled to it, although he stated it was not being paid by the DWP.

(109) Prior to his dismissal by the respondents, the claimant had been in receipt of Employment and Support Allowance at the rate of £65.45 per week, as from 21 June 2010, as per letter to him from JobCentreplus, dated 13 July 2010, a copy of which he provided to the respondents with his letter of 22 July 2010 to Robert Smith, copy produced to the Tribunal in the core bundle **A** at **Tab 74, pages 152 and 155**.

(110) On 7 June 2016, the Tribunal allowed the claimant to add to his additional bundle ***C,*** as **document 81**, various vouching documents

produced by the claimant, extending to 77 pages, including his JobCentre Plus work plan dated 10 July 2015, his registration with Pertemps Scotland Ltd on 2 September 2015, his current account bank statements from 27 May 2010 to 25 April 2016 , and DWP letter dated 2 May 2016, confirming his entitlement to £62.10 per week, from 15 February 2016, as Carer's Allowance for Moira Hamilton.

(111) On account of income based Jobseekers' Allowance paid to him during the period of Carer's Allowance arrears, the value of that JSA was deducted from the arrears of Carer's Allowance paid to the claimant. From the copy bank statements produced, over the period from dismissal to date of Final Hearing, the claimant has received various payments from the State in respect of DWP repayments of mortgage interest payments, Employment Support Allowance, and Jobseekers' Allowance.

(112) Further, in his evidence to the Tribunal, the claimant spoke of how, after his employment with the respondents ended, in August 2010, he did an HNC course in Social Care, from September or October 2010 until May or June 2011, at Glasgow Nautical College, obtaining his HNC.

(113) The claimant further stated that he needed re-training to go back into work, as he felt blue collar work was not suitable for him. While he had an HND in Business Administration, he stared that he had had no recent experience of admin work, and so he did not look for any administrative jobs. Further, he stated, post GCSS, he did not apply for any jobs, as he considered that he was too ill to work, so he looked for a College to attend.

(114) When his HNC Course finished, in May or June 2011, the claimant stated that he looked for employment, as he was fit to do so, between

July and September 2011, although he knew he had a conditional offer to go and do a Degree course from that autumn 2011.

(115) In or around September 2011, the claimant stated that he applied to Enable Scotland to work on a "***zero hours***" contract basis, as a Sessional Worker, and while he did two training sessions, he only worked two long weekends, from Friday to Sunday, including sleepover, caring for a person with particular needs. He spoke of that employment "***petering out***", and how he never did any more sessions for Enable Scotland.

(116) The claimant advised the Tribunal that his earnings from Enable Scotland were the only paid job that he had done since 19 August 2010 to date of his evidence at the Final Hearing before this Tribunal.

(117) Further, in his evidence to the Tribunal, the claimant spoke of his plan to become a qualified Social Worker, in the private or voluntary sector, but not statutory social work, but he added that that plan did not come to fruition.

(118) The claimant also spoke in evidence to the Tribunal of being a student at Glasgow Caledonian University, where he stated that he did a Degree ion Social Work, from autumn 2011 to summer 2014, but while this was a 4 year course, he only completed 3 years, after an issue arose with his placement at Kirkintilloch CAB, resulting in a complaint against him, sometime around 2013, to the Scottish Social Services Council ("***SSSC***").

(119) The specifics of this SSSC complaint were not canvassed in evidence at the Final Hearing, and the claimant produced no relevant documentation in this regard for the Tribunal's perusal. Further, the claimant spoke of being "***outraged***" by this SSSC complaint, and he stated that, to the best of his knowledge and belief, he was still able to

work in the social care sector in Scotland, and that he was not prohibited from working in that sector, but that he would require reasonable adjustments to do work.

(120) During his time at University, the claimant advised the Tribunal that he looked for casual / temporary work, but he further stated that he was looking for a voluntary experience, and due to his disability, he found it difficult to get a job.

(121) In terms of his qualifications, the claimant advised the Tribunal that , at the time when he was first employed by the respondents, in January 2007, he held an HND in Business Administration, from Aberdeen College, although that qualification was not a qualification required by the respondents for his job with them as a Community Enhancement Operative.

Claimant's Schedule of Loss

(122) In his evidence in chief to the Tribunal, the claimant stated that the Schedule of Loss at Tab 3 in the core bundle A had been superceded by and updated in the Schedule of Loss presented to the Tribunal on 25 July 2016.

(123) At the Final Hearing before the Tribunal, the claimant produced that revised Schedule of Loss, seeking **£194, 207.30**, and the respondents produced, by way of a Counter Schedule, their response to the claimant's Schedule.

(124) In his Schedule of Loss, the claimant sought a basic award of **£931.59**, a compensatory award of **£160,275.71**, and injury to feelings, in the ***Vento*** highest band, assessed at **£33,000**, including interest.

(125) He confirmed that he sought the sums shown by way of compensation from the respondents, if his claim was to be successful before the Tribunal, and that whatever amount he earned from Enable Scotland should be deducted from his loss of earnings from 19 August 2010 to date of this Final Hearing.

(126) As regards future loss of earnings, the claimant stated that his claim for compensation was calculated to 5 June 2039, as that is his retirement date, based on his date of birth on 5 June 1972.

(127) In cross-examination, he stated that, as regards his claim for future loss of earnings, he should be able to start looking for part-time, but not full-time, work, once his mother recovers, and that he would need to take a voluntary, unpaid job, and thereafter go for a job in paid employment.

(128) The claimant further explained that the sum of £22,670.47, in respect of a Student Loan, was the debt incurred by him to get himself re-trained, and that this sum was the repayment figure provided to him by the Student Loans Company in May 2016.

(129) In their Counter Schedule, the respondents submitted that, in the event of success for the claimant, the appropriate total compensation should be **£3,888.83**, comprising a basic award of **£931.59**, a compensatory award of **£1,997.24**, and injury to feelings, in the ***Vento*** lowest band, assessed at **£960,** including interest.

Tribunal's Assessment of the Evidence led at the Final Hearing

49. In considering the evidence led before the Tribunal, the Tribunal has had to carefully assess the whole evidence heard from the various witnesses led before the Tribunal, and to consider the many documents produced to the

Tribunal in the Bundles of Documents lodged, which evidence and the Tribunal's assessment, we now set out in the following sub-paragraphs:-

1. <u>Martin Carlyle, HR Officer</u>

(a) We heard evidence from the respondents' first witness, Mr Carlyle, on 25 and 26 May 2016, as also 31 May 2016 and 1 June 2016. In our findings in fact, where quoting from the Agreed Statement of Facts entered into between the parties, his surname is mis-spelled as "***Carlisle".*** We have left it as spelt, rather than make global changes to the agreed text.

(b) Aged 42, Mr Carlyle, in his evidence to the Tribunal, spoke to his HR support for absence management meetings related to the claimant, and looking for alternative duties for him, in the period up to April 2010.

(c) While Mr Carlyle had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, Mr Carlyle did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(d) We have no issues about the credibility or reliability of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection .

2. <u>Robert Smith, Senior HR Officer</u>

(a) We heard evidence from the respondents' second witness on 1, 2, 7 and 8 June 2016. Aged 43, Mr Smith, now Assistant HR Manager, spoke, in his evidence, to his HR support for absence management meetings related to the claimant, and looking for alternative duties for him, in the period from May 2010 to August 2010, including the claimant's dismissal, and subsequent internal appeal against dismissal. He was HR advisor to Mr Hynes, the dismissing officer, and he drafted the appeal case summary papers.

(b) While Mr Smith had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, Mr Smith did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(c) We have no issues about the credibility or reliability of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection .

3. <u>Jamie Callaghan, Service Manager</u>

(a) We heard evidence from the respondents' third witness on 9 June 2016, and then continued on 27 and 28 July 2016. Aged 40, Mr Callaghan spoke, in his evidence, to his involvement in the claimant's case, in particular the meeting with the claimant on 17 February 2010 to discuss alternative duties for the claimant in a Community Reparations driver's post.

(b) Mr Callaghan had not previously given evidence to the Strain Tribunal in April 2012. In giving his evidence to this Tribunal, Mr Callaghan did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(c) We have no issues about the credibility or reliability of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection .

4. <u>John McMillan, Supervisor (retired)</u>

(a) We heard evidence from the respondents' fourth witness on 28 July 2016. He appeared under citation by a Witness Order previously granted by the Tribunal on the respondents' application. Aged 64, Mr McMillan had retired from the respondents' employment in 2011.

(b) In his evidence, Mr McMillan spoke to his role as the claimant's supervisor, the claimant's duties while under his line management and supervision, and the various absence management meetings held by him with the claimant up to April 2010, as well as steps taken to find alternative duties for the claimant, in the period up to April 2010.

(c) He also spoke to the claimant's allegations of disability discrimination, including the victimisation and harassment allegations against him, as set forth in the claimant's further and better particular lodged with the Tribunal in November 2011.

(d) While Mr McMillan had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, Mr McMillan did so in a plain-speaking, sometimes robust way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(e) We have no issues about the credibility of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection. His evidence about attempts to find alternative duties for the claimant, up to April 2010, was memorable for his turn of phrase that the respondents had done so "***until we hit a brick wall, and we couldn't find him anything more to do safely."***

(f) We did, however, have some cause for concern about Mr McMillan's reliability as a witness. He had a tendency in giving evidence to this Tribunal to not remember (more so than other witnesses, who equally had to contend with the passage of time, and its effect upon their recall of events) the detail of things from a long time ago. We put this down to forgetfulness on his part, given the passage of time, rather than any deliberate attempt by him to mislead the Tribunal, or avoid answering relevant questions.

(g) We note, in this regard, that Mr McMillan became particularly agitated, when cross-examined by the claimant, when the Employment Judge had to ask the witness to calm down, and

advised him that the claimant was entitled to test his evidence by asking questions through cross-examination.

(h) That said, when asked about the victimisation and harassment allegations against him, as set forth in the claimant's further and better particular lodged with the Tribunal in November 2011, the witness described them as ***"rubbish***", and he specifically denied the claimant's allegation that he had told him that he was going to sack him.

5. <u>Louise Belton (now Hunter), formerly Assistant Operations Manager</u>

(a) We heard evidence from the respondents' fifth witness on 28 and 29 July 2016. Aged 35, Mrs Hunter left the respondents' employment, in November 2013, and she is now Director of Operations with Y-People, having previously been Assistant Operations Manager with the respondents. In her evidence to this Tribunal, she spoke to the claimant's application for a role with Community Reparations, and steps taken by the respondents to find him alternative duties, around February 2010.

(b) While she had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, Mrs Belton did so in a straight-forward, matter of fact way, assisted by her reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(c) We have no issues about the credibility or reliability of this witness, and we were satisfied that she was doing her best,

after the passage of significant time since the material dates, to recount her limited involvement in the claimant's case to the best of her recollection .

6. Derek Brown, Service Manager

(a) We heard evidence from the respondents' sixth witness on 29 July 2016. Aged 57, in his evidence, Mr Brown spoke to his involvement in chairing absence management meetings related to the claimant, between May and July 2010, and looking for alternative duties for him, in that period, in particular the store person's role.

(b) While Mr Brown had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, Mr Brown did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(c) We have no issues about the credibility or reliability of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection .

7. John Hynes, Operations Manager (Dismissing Officer)

(a) We heard evidence from the respondents' seventh witness on 1 and 2 August 2016. Aged 61, Mr Hynes was the dismissing officer, and, in his evidence, he spoke to his involvement in the claimant's case, in particular the meeting held on 30 July 2010, which resulted in the claimant's dismissal, and his subsequent

attendance at the appeal hearing on 27 August 2010, when the claimant's internal appeal against dismissal was rejected by the respondents' appeals panel.

(b) While Mr Hynes had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, Mr Hynes did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(c) We have no issues about the credibility or reliability of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection .

8. <u>Patricia Lowe, Deputy Supervisor (retired)</u>

(a) We heard evidence from the respondents' eighth witness on 2 August 2016. She had previously attended the Tribunal, on 9 June 2016, to give her evidence, but the Tribunal had then refused to allow her to be interposed, given other witnesses then being heard.

(b) Aged 60, Mrs Lowe retired from the respondents' employment in May 2016. In evidence, she spoke to her role as the claimant's deputy supervisor, the claimant's duties while under Mr McMillan's line management and supervision, and the various absence management meetings held by him (or

herself, on 12 August 2009 and 19 March 2010) with the claimant up to April 2010, as well as steps taken to find alternative duties for the claimant, in the period up to April 2010.

(c) She also spoke to the claimant's allegations of disability discrimination, including the victimisation and harassment allegations against her, as set forth in the claimant's further and better particular lodged with the Tribunal in November 2011.

(d) While Mrs Lowe had previously given evidence to the Strain Tribunal in April 2012, we took that fact into account, but in giving evidence to us at this re-hearing of the case, she did so in a straight-forward, matter of fact way, assisted by her reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(e) We have no issues about the credibility of this witness, and we were satisfied that she was doing her best, after the passage of significant time since the material dates, to recount her involvement in the claimant's case to the best of her recollection.

(f) We did, however, have some cause for concern about Mrs Lowe's reliability as a witness, as regards the claimant's victimisation and harassment allegations against her, from December 2009. She was, however, completely frank in stating to us that she had a real difficulty in recalling matters from so long ago, and she apologised if her evidence about the alleged harassment of the claimant by her appeared to be a "***mish mash***".

(g) Given the passage of time, and its effect upon her detailed recall of events complained of by the claimant, in his further and better particulars lodged with the Tribunal in November 2011, we put this down to the passage of time, rather than any deliberate attempt by her to mislead the Tribunal, or avoid answering relevant questions.

(h) While she did not recall the detail of the events cited by the claimant, in his further and better particulars, Mrs Lowe was adamant that neither she nor Mr McMillan had victimised or harassed the claimant, and that they both were simply doing their job as his supervisor.

9. <u>Carol Connolly, Director (Appeals Officer)</u>

(a) We heard evidence from the respondents' ninth witness on 2 and 3 August 2016. Aged 45, Ms Connolly advised us that she is currently seconded out of the respondents, and working as Head of City Deal with Glasgow City Council.

(b) In giving her evidence to this Tribunal, she spoke to her involvement in the claimant's case and, specifically, her role as a member of the respondents' Personnel sub-committee which, having held an appeal hearing with the claimant, on 27 August 2010, had rejected the claimant's internal appeal against dismissal, and upheld Mr Hynes' previous decision to terminate the claimant's employment.

(c) Ms Connolly had not previously given evidence to the Strain Tribunal in April 2012. In giving her evidence to this Tribunal, she did so in a straight-forward, matter of fact way, assisted by her reference to contemporary documents from the relevant

time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(d) Of all the witnesses led for the respondents, she was the most impressive and compelling, and it was clear to us that she still vividly remembers dealing with Mr Hamilton's appeal. We have no issues about the credibility or reliability of this witness, and we were satisfied that she was doing her best, after the passage of significant time since the material dates, to recount her direct involvement in the claimant's case to the best of her recollection.

(e) While we did not hear evidence from Phil Walker, the respondent's Managing Director, who had sat with Ms Connolly on the respondents' appeals panel, Mrs Greig explained to us, and we understand why, she did not feel it necessary to call both members of the appeals panel, when there was no dispute about the fact it had rejected the claimant's appeal, and the minutes of that appeal hearing were an agreed production before us. To have heard from her and Mr Walker would have been unnecessary duplication.

10. <u>Andrew Hamilton, Claimant</u>

(a) We heard evidence from the claimant on 4, 8 and 9 August 2016. By agreement with both parties, as he was appearing before us as an unrepresented, party litigant, his evidence in chief was elicited by a series of structured and focussed questions asked of him by the Employment Judge, followed by cross-examination by Mrs Greig, solicitor for the respondents, and questions from the Tribunal, in the usual way.

(b) In giving his evidence in chief, the claimant did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(c) He was polite and courteous in his dealings with the Tribunal, and he respected our interlocutory rulings, even when they went against his position. He generally complied with our case management orders and directions, although sometimes we had to extend him an extension of time to do so.

(d) However, when it came to the claimant asking questions of the respondents' witnesses, through cross-examination, despite guidance given to him, by the Employment Judge, on 26 May 2016, just prior to him cross-examining Martin Carlyle, about how to conduct cross-examination, throughout the Final Hearing before us the Judge had to repeatedly raise with the claimant the need to address his cross-examination, having regard to the need to ask relevant questions, avoid making statements, and try to take the time allowed, and not over-run.

(e) In that general guidance offered to the claimant, by the Employment Judge, the claimant was advised that he should focus on matters in dispute between the parties, and put to the respondents' witnesses his points, so as to avoid the need to recall any witness at a later stage. As a method, it was suggested to the claimant that in asking questions he might care to use Kipling's "***six honest men***" (of who, what, why, where, when and how) to help him clarify a witness's evidence for the assistance of himself and the Tribunal.

(f) It was further suggested to the claimant , by the Judge, that he ask bite sized questions of witnesses, avoid making statements, or giving his own evidence, and allow the witness being cross-examined by him time to get to any document being referred to in the bundle, appropriately identifying it by bundle and tab/page number, then confirm with the witness whether they had seen that document before, and only then ask his question, and thereafter let the witness have time to answer, before proceeding to follow up, or move on to his next question.

(g) While the claimant advised us that he was working from pre-prepared questions for each witness being cross-examined, and that he had gone through all the documents in the bundles to identify what witnesses to ask about what documents, we observed throughout the Final Hearing that while reading out questions from his pre-prepared list of questions, the claimant tended to take few contemporary notes during his cross-examination, despite judicial guidance that it would help him in the process.

(h) Further, although the claimant acknowledged the Judge's guidance as helpful, he frequently failed to follow it, and it had to be oft times repeated to him in the course of the Final Hearing, particularly as regards speed of delivery of his questions, the length and complexity of some of his long questions, failing to pause, and give a witness time to answer, before proceeding on to his next question, and his tendency to try and make statements / give his own evidence, or comment on the witness's answer, rather than simply asking relevant questions of the witness being cross-examined.

(i) The claimant also had to be reminded, on several occasions, to keep his questions relevant to the specific witness, and their

direct involvement in his case, and address relevant questions to the appropriate witness at the appropriate time, as they were being led by the respondents in terms of the timetable for witnesses.

(j) Generally, over the first diet of the Final Hearing, between 24 May 2016 and 8 June 2016, there was a concern by the Tribunal, and shared by Mrs Greig, as the respondents' representative, in her comments to the Tribunal at that time, about the time being taken by the claimant, and the manner and extent of his irrelevant questioning, so much so that, on the afternoon of 7 June 2016, the Employment Judge raised the Tribunal's concerns about the claimant's cross-examination to that date.

(k) In doing so, the Employment Judge referred again to his previous guidance to the claimant, and how, under the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, conduct of the proceedings should have regard to the saving of expense and avoiding delay, and that it was not for the Judge to frame the claimant's questions for the respondents' witnesses being cross-examined. The Tribunal thereafter made its Timetabling Order on 8 June 2016.

(l) In making these observations about the claimant's conduct of his cross-examination of the respondents' witnesses, we do so, fully recognising that the claimant is an unrepresented, party litigant, and, as such, we appreciate that it is difficult for him to remain objective.

(m) Put simply, during that first diet in May and June 2016, we feel that the claimant failed to have proper regard to the commonsense and pragmatic guidance offered to him by the

Tribunal with a view to trying to ensure that there was a level playing field between the parties, and that the Final Hearing was conducted effectively and efficiently to as to allow a fair hearing of the case for both parties. With the Timetabling Order put in place, the second diet of Final Hearing progressed more smoothly in July and August 2016.

(n) Given the majority of facts in the chronology of events relating to the claimant's employment, and its termination, were the subject of Agreed Statements of Facts, there was little dispute between the parties as to the relevant events, as detailed in our findings in fact. Despite the passage of significant time since the material dates, those events were usually recorded in contemporary records, taken at or about the time of the relevant events, and that fact reduced significantly the room for disputed factual matters.

(o) We have no real issues about the credibility or reliability of the claimant's evidence to us, and we were satisfied that he was doing his best, after the passage of time, to recount his case to the best of his recollection.

(p) He had a far better grasp of the numerous productions before the Tribunal, in both parties' bundles, than any other witness led before us, and he was able to navigate successfully between the two bundles, showing his mastery of the chronology of events, a factor no doubt influenced by the undoubted fact that he was pursuing his own case, and it was obvious to us that, despite the passage of time, he still feels aggrieved by the respondents' treatment of him.

11. <u>Paul McGaulley, HR Manager</u>

(a) We heard evidence from this final witness on 9 August 2016. Aged 34, he has been the respondents' HR Manager since November 2007. He was on the claimant's list to lead, as the respondents advised that they did not intend to call him to give evidence.

(b) In light of our interlocutory ruling, on 4 August 2016, we acceded to the claimant's request that he be allowed to lead evidence from Mr McGaulley, albeit on a restricted basis, as detailed earlier in these Reasons at paragraph 47 above.

(c) Mr McGaulley was examined in chief by the claimant, but Mrs Greig did not cross-examine him, although the witness was asked questions of clarification by the Tribunal. He spoke to his HR support for the appeal hearing, on 27 August 2010, and to his previous, limited involvement in the absence management procedure relating to the claimant, he being the HR line manager for Martin Carlyle, Robert Smith and Pamela Carruthers.

(d) Mr McGaulley had not previously given evidence to the Strain Tribunal in April 2012. In giving evidence to us, he did so in a straight-forward, matter of fact way, assisted by his reference to contemporary documents from the relevant time included in the bundles of documents lodged with the Tribunal for use at the Final Hearing.

(e) We have no issues about the credibility or reliability of this witness, and we were satisfied that he was doing his best, after the passage of significant time since the material dates, to recount his involvement in the claimant's case to the best of his recollection.

12. <u>Agreed Statement of Facts regarding Documents in the Bundles</u>

(a) It was generally of assistance to the case that parties had entered into an Agreed Statement of Facts in relation to the contents of the core documents bundle **"A**" and the claimant's additional documents bundle "**C**", whereby they agreed that, in relation to documents contained in those bundles, (a) the correspondence including emails and letters, between or among the claimant and/or employees (or former employees) of the respondents, were sent by and/or received by the parties as reflected in those documents; (b) records of meetings accurately reflect the date, attendees and issues discussed at such meetings; and (c) other documents, such as notes for file, were prepared by the party and at the time as reflected in those documents.

(b) Given the passage of time from the date of relevant events, from April 2009 onwards, until the date of the Final Hearing before us, many witnesses could recall matters in general terms, but not necessarily with full detailed recall. The existence of these agreed, contemporary records, included in the Bundles of Documents before us at the Final Hearing, was of considerable assistance to us in getting as full a picture as possible of relevant events, and the roles and involvement of specific individuals at the relevant time.

Parties' Closing Submissions to the Tribunal

50. Following the close of evidence at the Continued Final Hearing, on 9 August 2016, and as per case management orders previously made by the Employment Judge, and set forth in the Tribunal's letter of 9 June 2016, as supplemented by further directions by the Judge as set forth the Tribunal's further letter dated 10 August 2016, a timetable was put in place for the exchange of parties' closing submissions.

51. It was ordered that the respondents' written outline skeleton submission was to be produced by 12 noon on Friday, 12 August 2016, and for the claimant to lodge his written outline skeleton submission in time for the start of the Hearing on Submissions at 10am on Monday, 15 August 2016.

52. On 12 August 2016, Mrs Greig, the respondents' representative, duly intimated to the Tribunal, and copied to the claimant, her written outline skeleton for the respondents, extending to 6, numbered pages, and a fuller submission, extending to 16, numbered pages, which she intended to refer to at the Hearing on Submissions.

53. Thereafter, on the morning of 15 August 2016, the claimant duly intimated to the Tribunal, and copied to Mrs Greig, the respondents' representative, his own skeleton final submissions, comprising 25 unnumbered pages, including his commentary on some of the case law authorities cited by the respondents, and his own submissions in reply.

54. For the sake of brevity, we do not record here ***verbatim*** the full terms of either party's written closing submissions for the Tribunal, but we note and record that a full copy of each has been retained in place in the Tribunal's case file, and we have referred to those copy written closing submissions in the course of coming to our Judgment and writing up these Reasons.

55. We also wish to place on record here that we are obliged to both Mrs Greig, and the claimant, for their respective written closing submissions, which we have found most helpful in addressing the competing arguments presented to us for determination by the Tribunal.

Written Closing Submissions for the Respondents

56. Mrs Greig's outline written skeleton submission for the respondents, running to 6 typewritten pages, addressed matters by way of a general denial that

the respondents had unfairly dismissed the claimant or discriminated against him, followed by discreet sections addressing each of unfair dismissal, remedies, discrimination-general, disability and knowledge of disability, duty to make reasonable adjustments, timebar, harassment, victimisation, and costs.

57. We have summarised what we have taken to be her main points on behalf of the respondents, as set forth in that outline written submission, as follows: -

Unfair Dismissal

- The reason for the dismissal was lack of capability on grounds of ill-health, and this is a potentially fair reason in terms of **Section 98(2)(a) of the Employment Rights Act 1996**.
- The respondents acted reasonably in treating this reason as a sufficient reason for dismissing the claimant, and the dismissal was fair in accordance with **Section 98(4) of the ERA**.
- The claimant's argument that a live grievance prevented the respondents making a decision to dismiss is not well founded.

Remedies

- As the respondents deny that the claimant was unfairly dismissed, no award of compensation should be made.

Alternatively:-

- any compensatory award should be nil - the claimant no longer wanted to return to work by the time of the dismissal.
- reduced either substantially or completely by 100% to reflect the claimant's contributory fault in withholding information from and

actively misleading the respondents in the absence management process.

- the claimant failed to mitigate his loss, and his decision to immediately enter full-time studies is not reasonable mitigation.

- in addition, once the claimant became his mother's carer, any causal link ends.

- In all the circumstances, it is not just and equitable, in terms of **Section 123(1) of ERA,** to make an award of compensation.

Discrimination – General

- The effective date of termination of the claimant's employment was 19 August 2010. The claimant's discrimination claims are made under the **Disability Discrimination Act 1995.** (**The Equality Act 2010** came into force on 1 October 2010.)
- The Disability Rights Commission issued a Code of Practice, and Tribunals must take the Code into account under **Section 53-54 of the DDA** and the Code is admissible as evidence.

Disability

- The respondents accept that the claimant was a disabled person in terms of **Section 1 of the DDA**, subject to the qualification re knowledge below.

Knowledge of disability

- The respondents did not know that the claimant was a disabled person until receipt of the Capita Health Solutions Occupational Health report in December 2009.

- No duties under the **DDA** arose until the Respondent had possession of that report sometime after 1 December 2009 and before 7 December 2009.

- No duties under the **DDA** arose at that time. In any event the claimant made no complaint to John McMillan. The absence of any record of any complaint by the claimant at the time is significant.

Duty to Make Reasonable Adjustments

- It is important to assess all elements of the statutory test. It is for the claimant to identify the PCP. The respondents' first submission is that this head of claim should be dismissed for failure to identify a PCP.

- Alternatively, the PCP may be that the claimant should at all times be physically fit to do his job as a community enhancement operative. The substantial disadvantage may be that if he was physically unable to do the job he was employed to do he was liable to be dismissed, in comparison with others in the same employment who were not so at risk.

- It is necessary to identify the "step", and the step must have the effect of removing the substantial disadvantage of that PCP. A reasonable step would be to find alternative duties for the claimant, which would remove the substantial disadvantage, namely dismissal if physically unable to do his existing job.

- The statutory duty is not to make all adjustments to remove disadvantage, but only to make reasonable adjustments. The respondents complied with the statutory duty. At the time the community reparation driver job was offered, it was a reasonable adjustment, given the information available to the respondents.

- The offer of the stores/admin assistant role was a reasonable adjustment. The offers of the two roles were reasonable adjustments in all the circumstances of the case. The respondents complied with their duty.

- Transferring the claimant to an existing vacancy without completive interview would not have been a reasonable adjustment. By offering the stores/admin assistant role, the respondents fulfilled their duty under **Section 4A of the DDA**.

- The respondents, having fulfilled their duty, were not under any further duty. In any event at the appeal the claimant advised that even if he had been offered the admin assistant finance post he would not have been fit to take up the post.

- Recording the claimant's condition in the accident book, to the respondents' H&S officer, to the HSE, via COSHH or RIDDOR, would not have been a reasonable adjustment, as if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment within the meaning of disability discrimination legislation.

- The claimant confirmed that none of these steps would have any effect on his ability to return to work. Even if the respondents' caused the disability, an employer may be required to do more by way of reasonable adjustment than would be necessary in other circumstances. but it cannot give rise to an unlimited obligation to accommodate the employee's needs.

Timebar

- Even if there was a breach of **Section 4A of the DDA** (which is denied), it was not a continuing breach and had ended no later than 24 May 2010, if not earlier. The claim having been lodged on 28 October 2010, it is out of time in terms of **paragraph 3 of Schedule 3 to the DDA.**

Harassment

- There is no evidence before the Tribunal that supports a finding of harassment. The conduct as pled was unrelated to the claimant's disability, and it does not meet the test set out in **Section 3B of the DDA** for "harassment".

- In any event, as the acts relied upon by the claimant in his harassment claim took place more than 3 months prior to the presentation of his Tribunal claim on 28 October 2010, they are out of time, and it would not be just and equitable to allow the claims late.

Victimisation

- The Note following the Case Management Discussion on 31 January 2013 records claims of both harassment and victimisation. However, in the claimant's case as pled, he makes no distinction between the two. The word "victimisation" appears only once in the case as pled

- The respondents adopt the same factual response as above. In addition, there is no evidence that at this time (December 2009) John McMillan or Pat Lowe believed or suspected that the claimant intended to "do anything" under or by reference to the **DDA**.

- Indeed the claimant admitted that at this time (December 2009) he himself had not yet formed an intention to do anything under or by reference to the **DDA**.

Costs

- The respondents reserve their position in relation to Costs.

Written Closing Submissions for the Claimant

58. As stated earlier in these Reasons, at paragraph 53 above, the claimant's own skeleton final submissions, intimated on 15 August 2016, comprised 25 unnumbered pages, including his commentary on some of the case law authorities cited by the respondents, as intimated to him, by e-mail from Mrs Greig on 10 August 2016, and his own submissions in reply.

59. We have abstracted what we have taken to be his main points, as the claimant, as set forth in that outline written submission, as follows:

Unfair Dismissal

- Having cited some passages from page 7 of 8 in Mr Justice Browne-Wilkinson's judgment in **Iceland Frozen Foods Limited v Jones**, reproducing the former statutory test under **Section 57(3) of the Employment Protection (Consolidation) Act 1978**, the claimant stated:

> *"It was not a reasonable response of GCSS to dismiss considering the resources of the organisation and the alternatives available to them. It was reasonable to transfer me to alternative employment in an already existing vacancy and provide the training as required, some of the vacancies would have required no training other than that necessary for any new employee."*

- Having reproduced paragraphs 12, 14, 15 and 17 from Lord Drummond Young's judgment in **BS v Dundee City Council** , the claimant stated:

> *"The BUPA occupational health report (Tab 50) anticipated a return to work within 2 to 3 weeks if the recommendations were followed, there was no change is my diagnosis from the GP, as such it was reasonable for GCSS to conclude that they were not following the recommendations of the BUPA report, The BUPA report also explained the necessity of a further referral to a doctor if there was further concerns, a failure to return to work should have flagged up this necessity, which never happened. What I considered necessary was made aware to GCSS via the grievance procedure (Bundle C: 191-197, 228-233, 250-255, letter Bundle A tab 63, the BUPA OH report tab 50, note for file tab 53 and by the jobs I was applying for). Also the fact that I was following GCSS's policies and procedures despite that fact that I did not consider that they were following the correct policies and making them aware of this via the grievance, absence monitoring tab 71, letter tab 70.)"*

Procedure

- Having reproduced paragraph 5, and part of paragraph 37, from Lord Justice Walls' judgment in **McAdie v RBS**, the claimant stated:

> *"As such I do not consider the actions of GCSS to dismiss me reasonable considering all the circumstances of the individual case and the size and resources of GCSS. The expectation is to go the extra mile and put up with a longer period of absence than would normally be the case. Not the minimum that GCSS thinks they can get away with, i.e the offer of two unsuitable jobs neither of which took account of my disability (risk*

assessment tab 56, store person tab 56 for which there was no risk assessment).

34 (84) the handling of the grievance was not reasonable (86) respondent only went through the motions of investigating the grievance, 37."

[We pause here to note that the claimant's references to 34(84) and (86), and 37 are to paragraphs 34 and 37 in the EAT's judgment in **McAdie**, and his reference to "***go the extra mile***" has been taken from paragraph 37 in **McAdie**, where the EAT reviewed earlier case law authorities in cases where an employer had dismissed an employee on account of ill-health or incapacity for which the employer had been wholly or partly responsible. The claimant's references to 34(84) and (86) were paragraphs reproduced from the original Tribunal's judgment in **McAdie**, and that Tribunal's conclusions on the unfair dismissal complaint in the **McAdie** case.]

- Having cited some passages from pages 5, 6 and 7 in Mr Justice Phillips' in **East Lindsey District Council v Daubney,** the claimant stated:

" As such I feel that this case is such a case that "the industrial tribunal because it cannot have been easy to know, except as the case unfolded, precisely what was the complaint which was being put forward. To some extent difficulties of this kind are inescapable from the informal nature of proceedings before Industrial Tribunals; but it is important to bear the point in mind when considering the form of the decision." As such I feel that when considering the judgement the tribunal to place consideration on the testimony of the witnesses, the application to amend allowed by judge strain (tab 4)and those considered

part of the submissions by Judge Cape (tab 9) as well as the further particulars submitted by Mr Ryan.

It would have been sensible for GCSS to refer me back to BUPA as BUPA recommended if there was further concerns (tab 50). GCSS showed a lack of understanding of my disability throughout their testimony and also a lack of curiosity and as such the significance of what both OH reports said regarding my disability and made no attempt to clarify either with myself, their health and safety officer (although this is not clear from their testimony), the Health and Safety Executive or OH to have these issues clarified. GCSS's cancelling of a further OH report prevented me from the opportunity to state my case and as such I consider an injustice had been done. I consider that this is a case were a referral could have resulted in a solution being found that would have allowed by continued employment at GCSS. As such it is right that a further referral to OH rather than cancelling such a referral would not have been superfluous".

- Having reproduced paragraph 7 from Mrs Justice Simler's judgment in **Holmes v QinetiQ Limited**, reproducing **paragraph 1 from the ACAS Code of Practice on Disciplinary and Grievance Procedures**, the claimant stated:

"This case only appears to deal with specific issues in this case and does not explicitly exclude the grievance and as such I consider the uplift to still apply."

Remedies

- Having reproduced, in whole, or in part, paragraphs 41, 43, 44, 45, 47, 48, 49, 51 and 55 from His Honour Judge McMullen QC's judgment in **Orthet Ltd v Vince-Cain**, the claimant stated:

"It wasn't possible due to my disability to seek similar employment to that which I has done at GCSS. Due to a long absence it was not possible to seek employment in my previous work experience and qualifications which is amply demonstrated by GCSS's failure to provide similar work (indeed virtually identical) to my previous work experience and qualifications.

Bringing an employment tribunal reduces my marketability in the jobs market, an employment tribunal lasting six years would proportionately reduce my marketability in the jobs market than would a normal employment tribunal lasting much less.

Retraining was the only feasible alternative, continuing that to degree level was the only feasible alternative due to the continuing impact that my disability would have had at the lower HNC level qualification. Going to university was the only feasible course of action to mitigate unlimited loss of income into the future.

There has been no early receipt of pension loss by the respondents and I consider that in the unique situation of this case the simplified model (employer and employee contributions) is a suitable recompense in this case. It is not reasonable of the tribunal to consider that future events may prove to make such recompense incorrect."

Reasonable Adjustments

- The claimant cited from, and made comment about, the **DRC Code of Practice on Employment and Occupation (2004)**, in particular regarding the following paragraphs : 2.21; 2.22, 3.2, 4.33,4.38, 4.39,

5.3, 5.4, 5.5, 5.7, 5.8, 5.11,5.18, 5.20, 5.21, 5.26, 5.36, 5.37, 5.40,6.11, 6.14, 6.15, 6.16, 8.15, 8.16, 8.24, 8.27, 8.28, 8.30, 13.2, 13.6, and 13.11.

- In doing so, we noted that the claimant often paraphrased from the official DRC Code of Practice text, and / or added his own commentary, so we have had to refer to the full text of the DRC Code as helpfully reproduced in ***Butterworths' Employment Law Handbook*** (2009), at [4661] to [4677A], as the extracts from the DRC Code produced by the respondents, as part of their Bundle of Authorities, only included some selected pages i-ix;1-6,47-82, and 113-132.

- Further, we also noted, in particular, that, at page 16 of his written submission, when commenting on the DRC Code of Practice, the claimant stated that (5.4) a person was identified namely John Doyle who was promoted without the required qualifications with the understanding that he would be provided with them once in post ; (5.21) GCSS actively delayed him getting IIDB and did not consider it work related ; (8.27) he would have the right to bring a constructive dismissal; and (13.11) he followed GCSS's internal procedures before taking an employment tribunal as such there should be no time bar because he provided GCSS every opportunity to remedy the situation before taking a case to an employment tribunal.

- Having reproduced from paragraphs 5 and 11 from Mr Justice Langstaff's judgment **in <u>Royal Bank of Scotland v Ashton</u>**, reproducing from **<u>Sections 3A and 18B of the Disability Discrimination Act 1995</u>**, the claimant stated:

> *" I feel that the implications of this judgement is that I should have been transferred to a pre-existing position with no requirement to apply for those jobs it should have been clear*

from the OH reports that it was no longer possible for me to continue in most if not all blue collar positions. This is especially the case when it is considered my previous employment and qualifications which should have made it clear to GCSS that there was few if any of the vacancies available to GCSS which I would be unable to fill with reasonable adjustments and or training even if that required an increase in grade or pay. Merit is also touched and the requirement of the funding does not excuse GCSS of its legal obligations many of these jobs could have been filled with a large number of people and it was unreasonable for GSCC to consider that I should not have been transferred into these positions or that I should have gone through a recruitment process".

- Having reproduced from paragraphs 16 to 20 from His Honour Judge McMullen QC's judgment **in <u>Wade v Sheffield Hallam University</u>**, the claimant stated:

" This case involves what was not reasonable adjustments I do not consider that it is relevant in this case for the job that I applied for there is no information of what essential criteria i did not meet could I have met them with training, or a reasonable adjustment to the job. It was just a blank statement that I did not meet the essential criteria. Also there is no claim that this was the case with the other job I applied for or any of the other vacancies available to GSCC."

<u>ACAS Code of Practice</u>

- At page 24 of his written submission, the claimant stated as follows:

"ACAS code discipline and grievance guide
6- allow employee to appeal

Deal with appeal impartially and where possible by a manager not previously involved
Tried to deal with issues informally
Raised with manger (sic) *not subject to grievance*
Disabled probably would be entitled to be accompanied.
Appendix 4
Redeployment to a different type of work if necessary."

Conclusions

- Also, at pages 24 and 25 , the claimant further stated as follows:

  "I feel that the witnesses of the respondent have not all been honest and forthright in their testimony".

- Thereafter, he made specific comments about certain witnesses led by the respondents, being Martin Carlyle, John McMillan, Patricia Lowe, Robert Smith, Jamie Callaghan, John Hynes, and Carole Connelly.

Authorities referred to/relied upon by Parties

60. On 10 August 2016, Mrs Greig, the respondents' representative, duly intimated to the Tribunal, and copied to the claimant, her list of authorities on which the respondents intended to rely at the Hearing on Submissions on Monday, 15 August 2016, as follows:-

Unfair Dismissal

Iceland Frozen Foods Limited v Jones [1982] IRLR 439; [1983] ICR 17 (EAT)

BS v Dundee City Council [2013] CSIH 91; [2014] IRLR 131(CSIH)

McAdie v RBS [2007] IRLR 895; [2008] ICR 1087 (CA)

Procedure

East Lindsey District Council v Daubney [1977] ICR 566 (EAT)

Holmes v QinetiQ Limited [2016] UKEAT/0206/15 (EAT)

Remedies

Orthet Ltd v Vince-Cain [2004] IRLR 857; [2005] ICR 374 (EAT)

Tchoula v ICTS (UK) Ltd [2000] IRLR 643, [2001] ICR 1191 (EAT)

Reasonable Adjustments

DRC Code of Practice (2004)

Royal Bank of Scotland v Ashton [2011] ICR 632 (EAT)

Environment Agency v Rowan [2008] IRLR 20; [2008] ICR 218 (EAT)

Archibald v Fife Council [2004] UKHL 32; [2004] IRLR 651; [2004] ICR 954 (HL)

Wade v Sheffield Hallam University [2013] UKEAT/0194/12; [2013] EqLR 951 (EAT)

Wilcox v Birmingham CAB Services Ltd [2011] UKEAT/0293/10 (EAT)

Salford NHS Primary Care Trust v Smith [2011] UKEAT/0507/10; [2013] EqLR 1119 (EAT)

61. As per the Employment Judge's oral directions on 9 August 2016, so as to assist the claimant as an unrepresented, party litigant, accessing the case law authorities being relied upon by the respondents, Mrs Greig's e-mail of 10 August 2016 to the Tribunal, copied to the claimant, provided the necessary hyperlinks to the Bailli or EAT websites.

62. As stated earlier in these Reasons, at paragraphs 53 and 59 above, the claimant's own skeleton final submissions, intimated on 15 August 2016, included his commentary on many, but not all, of the case law authorities cited by the respondents. The claimant cited no further case law authorities for us to rely upon or refer to in considering his claim before the Tribunal.

63. However, within the respondents' written submission for the Tribunals there was a further case law authority cited, but not included in their list of authorities, nor their bundle of authorities produced, in hard copy, for the Hearing on Submissions. That further case law authority cited by Mrs Greig for the respondents is: **H M Prison Service v Johnson [2007] IRLR 951** (EAT). In considering our decision in this case, we have added a copy of that reported case to our bundle of authorities.

64. While referring to the bundle of authorities produced to us, Mrs Greig in her list of authorities had cited **Tchoula v ICTS (UK) Ltd [2000] IRLR 643**. What was included in the bundle provided by her for us, however, was the unreported judgment of 27 September 1999 by Mr Justice Charles, at a preliminary hearing at the EAT, **[1999] UKEAT/465/99**, and not the subsequent judgment of the EAT, chaired by Judge Peter Clark on 4 May 2000, as reported at the citation provided as **[2000] IRLR 643** *sub nom* **ICTS (UK) Ltd v Tchoula.** In considering our decision in this case, we have substituted a copy of that reported case to our bundle of authorities.

Oral Submissions from the Parties

65. At the Hearing on Submissions, on 15 August 2016, each of Mrs Greig, the respondents' solicitor, and the claimant, spoke to their respective written closing submissions provided to the Tribunal. We do not record here *verbatim* the oral submissions made to us on that date for they were, in the main, an oral delivery of the written closing submissions already produced to the Tribunal, and previously exchanged between parties' representatives, together with an oral reply to the other party's written submission.

66. Unlike her written closing submissions, on the unfair dismissal part of the claim, where Mrs Greig specifically included her submissions on remedies, at pages 6 and 7, in the event that the Tribunal were to find in favour of the claimant on that part of his claim, her written submissions on the disability discrimination parts of the claim did not address the respondents' submissions on remedy, in the event that the Tribunal were to find in favour of the claimant on that part of his claim. She dealt with that subject matter, in her oral submissions to the Tribunal, when the Employment Judge sought clarification from her on that matter, given the lack of any written submissions on remedy for that part of the claim.

67. Where parties' written submissions were added to, or augmented, orally in the course of the Hearing on Submissions, we have noted that later in these Reasons, when discussing the competing arguments presented to us in respect of the issues before the Tribunal.

Reserved Judgment

68. In concluding proceedings, on the afternoon of Monday, 15 August 2016, we reserved our judgment, and the Employment Judge advised both parties` representatives that we would issue our full, written judgment, with reasons, in due course, after private deliberation at our Members' Meeting arranged for the following day. By various letters from the Tribunal, dated from 18

August 2016 to 28 February 2017, both parties were updated as to our progress. The Employment Judge apologises to both parties for the delay in issue of the Judgment and Reasons.

69. As has already been explained to both parties, in those various update letters from the Tribunal, the delay in issue of the Judgment and Reasons has been occasioned by other judicial business, as also annual leave, affecting the presiding Employment Judge, as well as the need to consult with, and agree with, the lay members of the Tribunal, at a second Members' Meeting, on 1 February 2017, our unanimous Judgment, and thereafter draft and agree these our Reasons.

70. While the claimant wrote to the Tribunal, on 5 December 2016, enquiring about the Tribunal's deliberations, and also taking the opportunity to inform the Tribunal that he had comments to make about the DWP, and the First Tier Tribunal (Social Entitlement Chamber), and the welfare rights officer at Glasgow City Council, the Tribunal's letter of reply, dated 9 December 2016, issued on the Employment Judge's instructions, advised both parties that the claimant's various comments are not relevant to the Tribunal's deliberations, where the Tribunal would apply the applicable relevant law to the facts found by us, having regard to the evidence led by parties before us at this Final Hearing.

Issues for the Tribunal

71. The principal issues before the Tribunal were to consider the respondents` liability (if any) for the claimant`s complaint of alleged unfair dismissal, and alleged unlawful disability discrimination, and, if the Tribunal found for the claimant on either of those heads of complaint, then the follow-up issue before the Tribunal was to proceed to determine what amount (if any) to award to the claimant by way of compensation, taking into account the respondents' various applications for any award of compensation to be reduced, on various stated grounds as advanced by Mrs Greig for the

respondents. In our discussion and disposal, later in these Reasons, we address, in turn, each of (1) unfair dismissal, (2) failure to make reasonable adjustments, (3) harassment, and (4) victimisation.

72. Arising out of the respondents' written closing submissions for the Tribunal, further preliminary issues emerged which had not previously been flagged up, or addressed by the Tribunal, or parties, at any earlier stage in these Tribunal proceedings. Again, in our discussion and disposal, later in these Reasons, we address, in turn, each of these further issues, which we note and record here are as follows: -

(a) the date of the respondents' knowledge of the claimant's disability;

(b) Identification of the provision, criterion or practice ("***PCP***") applied by the respondents;

(c) whether the claim was time-barred in any respect; and

(d) whether there was any properly pled victimisation complaint before the Tribunal as part of the claim brought by the claimant against the respondents.

Relevant Law: Unfair Dismissal

73. We reminded ourselves of the relevant law on unfair dismissal, as contained in **Section 98 of the Employment Rights Act 1996** ("***ERA***"). In her written submission for the respondents, Mrs Greig had set forth the relevant statutory provisions from **Section 98(1) to (4)** respectively, as follows:-

> ***"98. - General.***
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, …

(3) In subsection (2)(a)-

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

74. It is for the respondents to establish the reason for dismissal as being one which is potentially fair in terms of **Section 98 (1) and (2) of ERA**. A reason for dismissal is potentially fair if it relates to the capability of the employee, in terms of **Section 98(2)(a),** as read with **Section 98(3),** and capability means capability assessed by reference to health, amongst other things.

75. Further, as highlighted in Mrs Greig's written submission for the respondents, in applying **Section 98(4),** this Tribunal is bound to have regard to the guidance provided by the Court of Session in the case of **B S v Dundee City Council [2013] CSIH 91**.

76. In coming to our decision in the present case, we had regard to the full terms of the judgment in **BS**, including paragraphs 28 to 34, where Lord Drummond Young, in delivering the Opinion of the Court, gives further detail about the 3 tests / themes identified at paragraph 27 of the Court of Session's judgment.

77. In making its decision in the **BS** case, the Court of Session made reference to two earlier decisions, namely that of **Daubney v East Lindsey District Council [1977] ICR 556** and **Spencer v Paragon Wallpaper Ltd [1977] ICR 301**. Following those two earlier cited cases, the Court of Session in **BS**, at paragraph 27 of its judgment, stated as follows:-

> ***"Three important themes emerge… First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that it operates in***

his favour; if, on the other hand he states that he is no better and does not know he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered"

78. As was made clear in **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**, the function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, but if the dismissal falls outside the band, then the dismissal is unfair.

79. If the Tribunal finds that the claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to the old job, or re-engagement to another job with the same employer, or alternatively award compensation. The claimant has indicated in this case that he seeks an award of compensation only in the event of success before the Tribunal. Compensation is made up of a basic award and a compensatory award.

80. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances. **Section 122(2) of ERA** states that where the Tribunal considers that any conduct of the claimant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

81. **Section 123 (1) of ERA** provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the

loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to a claimant's duty to mitigate their losses, in terms of **Section 123(4),** this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the claimant from the respondents.

82. Where, in terms of **Section 123(6) of ERA,** the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

83. An employer may be found to have acted unreasonably under **Section 98(4) of ERA** on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred.

84. This approach (known as a **Polkey** reduction) approach derives from the well-known case law authority from the House of Lords' judgment in **Polkey v AE Dayton Services Ltd** [**1987] IRLR 503 / [1988] ICR 142 (HL).** In this event, the Tribunal requires to assess the percentage chance or risk of the claimant being dismissed in any event.

85. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** ("***TULRCA"***) provides that if, in the case of proceedings to which the section applies, which includes an unfair dismissal complaint, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or employee has unreasonably failed to

comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift.

86. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a relevant Code of Practice, but in the present case, the claimant intimated no claim for a statutory uplift to any compensatory award payable to him. It is generally accepted that the ACAS Code applies to disciplinary situations involving misconduct, and not capability dismissals due to ill-health: **Holmes v Qinetiq Limited [2016] UKEAT/0206/15.**

87. However, where an employee is absent because of illness or injury, the guidance set forth in Appendix 4 to the ACAS Guide to Discipline and Grievances at Work should be followed. In addressing how longer-term absence through ill-health should be handled, the ACAS guidance states that: "***Employers need to take a more sympathetic and considerate approach, particularly if the employee is disabled and where reasonable adjustments to the workplace might enable them to return to work."***

Discussion and Disposal: Unfair Dismissal

88. Having considered the relevant law, we turn now to consider parties' competing submissions to the Tribunal. A reason for dismissal is a set of facts known to the employer, or it may be of beliefs held by the employer, which causes the employer to dismiss the employee: **Abernethy v Mott, Hay & Anderson [1974] ICR 323 (CA).** There was no dispute between the parties that this was a capability related dismissal, and accordingly, subject to the Tribunal's consideration of the reasonableness of the decision to dismiss, that there was a potentially fair reason for the respondents to dismiss the claimant.

89. The reason for dismissal was a lack of capability on grounds of ill-health, and this potentially fair reason was agreed by the claimant in his further particulars of 11 November 2011, at paragraph 1, as reproduced in **Tab 2, page 6.** The respondents submit that they acted reasonably in treating this reason as a sufficient reason for dismissing the claimant, and that his dismissal was fair. The claimant, on the other hand, submits that his dismissal was unfair.

90. We have reminded ourselves firstly of the main points of the claimant's unfair dismissal complaint, as per the narrative provided at paragraphs 8 to 11 of the further and better particulars for the claimant dated 11 November 2011. A full copy of those further particulars for the claimant was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 2, pages 6 to 13**. For present purposes, we focus on those paragraphs 8 to 11, as reproduced at **Tab 2, at page 11**, as follows:

> **<u>Unfair dismissal</u>**
>
> 8. *The Claimant`s dismissal was unfair. The Claimant was dismissed for lack of capability on grounds of ill health. Reference is made to the circumstances of his dismissal outlined within paragraphs 1-6.*
>
> *9. The Respondents ought to have considered the possibility of alternative employment. They did not do so satisfactorily or reasonably. Furthermore, they acted unreasonably by requiring the Claimant to compete with other applicants. There were numerous vacancies in which the Claimant could have been redeployed. Even although the Respondents confirmed on 28 June 2010 that a redeployed role as a stores/admin assistant was available, the Respondents unreasonably delayed in offering alternative employment and reference is made to Paragraph 6(k).*

[For ease of reference, we reproduce here the terms of that paragraph 6(k), as follows:-

k. By letter dated 28 June 2010, the Respondents advised that a redeployed role would be available at a stores/admin assistant. At a meeting regarding sickness and absence on 9 July 2010, the Claimant confirmed that he did not consider that there would be any issues with the redeployment offer. The Claimant had been absent from work due to ill health related to his disability from 15 December 2009. At that time he continued to suffer from the symptoms of ill health due to dermatitis. At a meeting on 30 July 2010, the Claimant was dismissed from his employment on the basis of his level of attendance and that there was no indication of when he would be returning to work. This was notwithstanding that the Claimant had advised tat he did not foresee any issues with the redeployed role. In any event, the Respondents unreasonably delayed in making the adjustment given the length of time which has passed. Furthermore, the post that was offered was on a like for like basis. It included duties to assist with setting up stock systems and other additional responsibilities for which the Claimant would require training. No such training was offered. A reasonable adjustment would have been to ensure that appropriate training was offered in relation to any redeployed role and that this was communicated to the Respondent accordingly.]

10. *The Respondents did not provide sufficient warning to the Claimant that his employment would be terminated. Whilst by letter dated 20 July 2010 the Respondents advised the Claimant that a decision on his continued employment may be taken at a meeting arrange for 26 July **2011**, they did not advise that the Claimant would require to return to his employment by any particular date. The Claimant was dismissed at the meeting which in the event took place on 30 July **2011**. The dismissal was accordingly unfair.* [We pause here to note that the references to 26 and 30 July **2011** are in error and clearly should have stated **2010.**]

11. *The Respondents are a company limited by guarantee with charitable status. They are owned by Glasgow City Council and Strathclyde Police. They have around 500 employees. In the contact* (sic) *of the size and resources of the Respondents, it was unreasonable for the Respondents to dismiss the Claimant when they did so. The Claimant had not* (sic) *been absent for less than one year. He was in receipt of half pay. It was an unreasonable response for the Respondents to wait until the Claimant`s pay to stop prior to making a decision.*

91. Next, we have referred to the respondents' grounds of resistance to the unfair dismissal complaint, best summarised, we feel, at paragraph 21 of the respondents' additional information, provided to the Tribunal on 5 April 2012, a copy of which was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 7, pages 29 to 31.** For present purposes, we focus on paragraph 21, as reproduced at **Tab 7, at page 31**, as follows:

> *"It is denied that the dismissal was unfair. The dismissal was for a fair reason being capability within the meaning of section 98(2)(a) and 98(3)(c) of the Employment Rights Act 1996. The decision to dismiss was within the band of reasonable responses open to the employer.*

The dismissal was procedurally and substantively fair within the meaning of section 98(4)."

92. At paragraph 59 of these Reasons above, we summarised the main points from the claimant's written closing submission, in particular, at page 16 of his written submission, when commenting on the DRC Code of Practice, the claimant stated that (5.4) a person was identified namely John Doyle who was promoted without the required qualifications with the understanding that he would be provided with them once in post.

93. We have not made any finding in fact about that matter because, while the claimant made that allegation, there was insufficient evidence before us for us to be satisfied as to what the factual position had been with Mr Doyle and, in any event, it was no part of the claimant's pled case before us that he had, in any way, been treated inconsistently by the respondents, when compared to other employees in comparable circumstances, where they had not been dismissed from the respondents' employment, whereas he had been so dismissed.

94. Further, it will be recalled, from paragraph 59 of these Reasons above, where we summarised the main points from the claimant's written closing submission, in particular, at page 16 of his written submission, when commenting on the DRC Code of Practice, the claimant stated that (5.21) GCSS actively delayed him getting IIDB and did not consider it work related. These matters being irrelevant to the matters properly before this Tribunal, we have not made any findings in fact related to them.

95. Further, where, at (8.27), the claimant stated that he would have the right to bring a constructive dismissal, we have reminded ourselves that the claim before the Tribunal relates not to an alleged unfair constructive, dismissal, but to an alleged unfair dismissal arising from Mr Hynes' decision on 30 July 2010 to terminate the claimant's employment with the respondents, effective

19 August 2010. As such, we are concerned with an actual dismissal, rather than a constructive dismissal.

96. Having carefully considered the claimant's evidence led before us at this Final Hearing, we have to say that that the fact we are dealing with an actual, as opposed to a constructive, dismissal is an important fact. In his cross-examination by Mrs Greig, solicitor for the respondents, the claimant spoke of losing trust in the respondents as his employer from around June 2010, when he lodged his second grievance. He spoke of there being an ***"irretrievable breakdown"*** with his employers, as he stated that "***you would struggle to find a job more unsuitable to me"*** than the permanent Stores post offered to him by the respondents.

97. Further, the claimant stated that he had not made a decision at that time, after receipt of Mr Brown's letter of 28 June 2010, not to come back to work, but he had decided that he would not stay long at GCSS. He added that, while he was not contemplating leaving GCSS, by resigning, he felt that he had to go through the process, with his grievance, and absence management, and if GCSS had offered him a job, which he felt was safe, he stated that he would have returned to work, and been working, and not absent, but he would have left GCSS's employment within a maximum of one year, but probably a lot sooner.

98. The claimant spoke of waiting for a third Occupational Health report, albeit that had not been instructed by the respondents, and then raising his concerns about the Stores job with Occupational Healthy, rather than management, but he accepted that he had never said anything explicit to the respondents' management about the Stores job being unsuitable for him, until the appeal meeting, post-dismissal, where he had , to quote from **Tab 87, at page 176**, "***interjected stating that he believed the Stores / Admin post to be unsuitable as he had carried out research on the internet regarding potential health risks, etc."***

99. We noted from the evidence led before us, and as stated in the copy notes of the appeal hearing produced at **Tab 87, page 178**, that the claimant had stated at his appeal that if he had been redeployed to an Admin Assistant post in Finance, which he stated he felt would have been suitable, then he would not have returned to work then, as he stated that his GP would still have signed him unfit. Further, and as noted at **Tab 87, page 179**, when Phil Walker, the appeals panel chair, asked him if he would be fit to return to work in any capacity at present, the claimant answered in the negative, stating that his GP had signed him unfit.

100. Further, we also noted from the evidence led at this Final Hearing that, when asked in cross-examination why he did not raise his concerns with the Stores job at the meeting on 30 July 2010 with Mr Hynes, as he had raised such concerns at the appeal meeting, the claimant stated that he "***wanted to move on***", as he felt he had an irretrievable breakdown in trust with the respondents, and he felt he could "***move on, and get my life sorted***".

101. Also, the claimant further stated to us that, around June 2010, give or take a month, he had decided to raise legal proceedings against the respondents at the Employment Tribunal, and for personal injury. While, at the appeal hearing, in answer to Carol Connelly, a member of the appeals panel, the claimant had replied (at **Tab 87, page 178**) that the respondents should continue to employ him until he felt ready to return to work, he commented to the Tribunal that "***the last thing I wanted was for the decision to dismiss me to be overturned."***

102. Asked why, in those circumstances, he had appealed against his dismissal by Mr Hynes, the claimant stated that he was then planning to take his employer to the ET, and he understood you had to let the employer deal with the issues, and to allow him to gather evidence for his case, and try to go through the respondents' grievance procedure to the third stage.

103. Where, at (13.11), the claimant stated that he followed GCSS's internal procedures before taking an employment tribunal, as such there should be

no time bar because he provided GCSS every opportunity to remedy the situation before taking a case to an employment tribunal, we have restricted our findings in fact about the claimant's use of the respondents' grievance procedure to those findings that we consider are appropriate and proportionate to set out as part of the factual matrix regarding the claimant's employment history with the respondents. We deal separately, with the issues of time-bar, where pled by the respondents, later on in these Reasons.

104. We return now to the issues relevant to our consideration of the unfair dismissal complaint, as discussed earlier in these Reasons when narrating the relevant law, particularly at paragraphs 73 to 78 of our Reasons above. We have paid particular regard to the guidance provided by the Court of Session in **B S v Dundee City Council [2013] CSIH 91**.

105. While, at paragraph 77 above of our Reasons, we quoted from paragraph 27 of the Court of Session's judgment in **BS**, in coming to our unanimous decision in the present case, we have had regard to the full terms of the judgment in **BS**, including paragraphs 28 to 34, where Lord Drummond Young, in delivering the Opinion of the Court, gives further detail about the 3 tests / themes identified at paragraph 27 of the Court's judgment.

106. On the evidence before the Tribunal, we are satisfied that the respondents have shown their reason for dismissal, being a reason related to the claimant's capability, and it was not contended by the claimant that the proffered reason was a sham, or not the real reason for dismissal. Indeed, the claimant's further particulars accepted it as the reason for dismissal.

107. The claimant's closing submission to the Tribunal was that the respondents' decision to dismiss him "***was not a reasonable response of GCSS to dismiss considering the resources of the organisation and the alternatives available to them"***, per page 1 of his written closing

submission. This was a theme picked up by him again, at page 5 of his written closing submission, where the claimant stated:-

> "***I do not consider the actions of GCSS to dismiss me reasonable considering all the circumstances of the individual case and the size and resources of GCSS. The expectation is to go the extra mile and put up with a longer period of absence than would normally be the case. Not the minimum that GCSS thinks they can get away with…".***

108. Further, we have had regard to another part of the claimant's written closing submission, where, at the bottom of page 7, and over onto the top of page 8, he further stated:-

> ***"It would have been sensible for GCSS to refer me back to BUPA as BUPA recommended if there was further concerns (tab 50. GCSS showed a lack of understanding of my disability throughout their testimony and also a lack of curiosity…. GCSS's cancelling of a further OH report prevented me from the opportunity to state my case and as such I consider an injustice had been done. I consider that this was a case where a referral could have resulted in a solution being found that would have allowed my continued employment at GCSS. As such it is right that a further referral to OH rather than cancelling such a referral would not have been superfluous."***

109. Against the background of the claimant's evidence to us at this Final Hearing, we regarded his references to a third Occupational Health report as being very much a "***red-herring***", given the fact that at his meeting with Mr Hynes, on 30 July 2010, and at his appeal on 27 August 2010, the claimant stated that he was not fit to return to working for the respondents in any capacity.

110. Once an employer has shown a potentially fair reason for dismissal, the Tribunal must go on and decide whether the dismissal for that reason was fair or unfair, and this involves deciding whether the employer acted reasonably or unreasonably in dismissing the employee for the reason given. As **Section 98(4)** makes clear, it is not enough that the employer has a reason that is capable of justifying dismissal, as the Tribunal must be satisfied, in all the circumstances, that the employer was actually justified in dismissing for that reason. There is no burden of proof on either party in this regard, and the issue whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

111. The test of whether or not the employer acted reasonably is an objective test, where the Tribunal must not substitute its own views, and decide what it would have done in the circumstances, but it must look at the way in which a reasonable employer in those circumstances, in that line of business, would have behaved. We refer, in this regard, to **Ladbrokes Racing Ltd v Arnott [1981] SC159,** a judgment from the Court of Session, where the Lord Justice Clerk referred to considering what "***would have been considered by a reasonable employer in this line of business in the circumstances which prevailed***".

112.. We agree with the claimant that, in terms of **Section 98(4),** the Tribunal must have regard, amongst other things, to the size and administrative resources of the employer, however, the size and resources of the respondents is but one part of a bigger picture that the Tribunal requires to take into account, for whether the dismissal is fair or unfair, having regard to the reason shown by the respondents, depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case.

113. As we noted earlier in these Reasons, at paragraphs 85 to 87 above, the ACAS Code of Practice on Disciplinary and Grievance Procedures does not

apply to capability dismissals due to ill-health: **Holmes v Qinetiq Limited [2016] UKEAT/0206/15.** However, where an employee is absent because of illness or injury, the guidance about how absence through ill-health should be handled by an employer, as set forth in Appendix 4 to the ACAS Guide to Discipline and Grievances at Work, should be followed. There does not appear to us to be any principled basis for the Tribunal to ignore the guidance contained in Appendix 4 which is clearly relevant to this case.

114. Indeed, given the ACAS Code and Guide are generally regarded as being benchmarks of appropriate behaviour by employers and employees in workplace disputes, it seems to us to be wholly appropriate that the Tribunal, in determining this case, should have regard to Appendix 4, and what the reasonable employer and employee might be expected to do in the situation of handling a long term absence through ill-health.

115. Further, we regard the EAT's judgment in **Holmes** as being a case dealing with the question of monetary uplift for failure to comply with the ACAS Code, which is a question distinct from whether the Tribunal may consider Appendix 4 in assessing fairness of a dismissal pursuant to **Section 98 of the Employment Rights Act 1996.** We are satisfied that this Tribunal may have regard to that Appendix 4.

116. Having looked at what that Appendix 4 suggests by way of how to handle a long-term absence through ill-health, it is clear from what the respondents did in this particular case that they took many of the steps suggested for what an employer should take by way of actions when considering the problem of a long-term absence.

117. In particular, on the evidence led before us, we are satisfied that the respondents here kept in regular contact with the claimant, e.g. through absence management meetings and correspondence, and kept him fully informed that there was a risk to his employment, as also facilitating a

medical examination of the claimant by an independent doctor appointed by the employer.

118. Further, and again as per Appendix 4, where the employee's job can no longer be held open, and no suitable alternative work is available, we are satisfied that the employer here informed the employee of the likelihood of dismissal, and, where dismissal action was taken, the respondents gave the employee appropriate period of notice and informed the employee of his right of appeal, which he then duly exercised.

119. In coming to our Judgment that the claimant had been fairly dismissed by the respondents, we had regard to the guidance provided by the Court of Session in **BS**. We deal with this part of our deliberations in the following paragraphs of our Reasons, under discreet subject headings which, for ease of reference, we have put in **bold** print, before then discussing each further.

120. **Could the respondents reasonably be expected to wait any longer before dismissing, and if so how much longer? This is a balancing exercise taking into account the nature of the illness, the likely length of the continuing absence, and the need of the employers to have the work performed. (BS v Dundee City Council @ paras. 27 and 28, and Spencer v Paragon Wallpapers Ltd [1977] ICR 301)**

121. The evidence of the respondents' key witnesses at this Tribunal, being John Hynes and Carol Connelly, as the dismissing and appeals managers respectively, was that the period of time over which the claimant had been absent from his work was a significant element in the decision to terminate his employment with the respondents. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer. That question is clearly of importance in the present case. The claimant's approach, as we have noted above, at paragraph 107 of these Reasons, is

that: "***The expectation is to go the extra mile and put up with a longer period of absence than would normally be the case."***

122. However, recognising that each case depends on its own facts and circumstances, the Tribunal was satisfied, having heard the evidence at this Final Hearing, that the respondents had properly balanced the nature of the illness, the likely length of the continuing absence, and the need of the employers to have the work performed. In the Tribunal's view, given the circumstances, there was no more that the respondents could usefully have done, and they could not reasonably have been expected to wait any longer before deciding whether or not to dismiss the claimant.

123. **Did the respondents consult with the claimant and take his views into account? Were these views properly balanced against the medical opinion? This is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. (<u>BS v Dundee City Council</u> @ paras 27, 29 and 30)**

124. Like the **<u>BS</u>** case, where the employer there had had repeated consultations with the employee, prior to dismissal, so too that was the case in the present case, where, as per the agreed findings in fact, there was a series of eleven absence management meetings between the claimant and management from the respondents during the period from 7 May 2009 until 30 July 2010, as also two Occupational Health referrals, first to Capita, and latterly to BUPA, all as per our detailed findings in fact at paragraph 48 earlier in these Reasons.

125. From the evidence led before the Tribunal, we are satisfied that the claimant did not wish to return to work, and that he did not see even a phased return

to work as a way back into his employment with the respondents. He was not open and candid with Mr Hynes at the meeting on 30 July 2010, and he raised matters at his appeal, on 27 August 2010, that he had not raised before with the respondents.

126. We also regard the appeal meeting as a further attempt by the respondents to consult with the claimant and take his views into account, and then properly balance his views against the medical opinion available to the employer. The agreed notes of the appeal hearing, produced at **Tab 87, pages 174 to 179**, show that the claimant was given the opportunity to put forward his case, in support of his grounds of appeal, and also to respond to the management case presented to the appeals panel. Of the 7 points in his own letter of appeal, when asked if he wished to expand on what was written, the claimant did not expand on his points 2 and 3, nor 5, 6 or 7.

127. **Did the respondents take reasonable steps to discover the claimant's medical position and prognosis? This merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered. (BS v Dundee City Council [2014] CSIH 91 @ para.27)**

128. For the respondents, Mrs Greig submitted, in essence, that the respondents did everything that an employer reasonably could have done to establish the claimant's medical position and prognosis. We agree, for on the evidence led before the Tribunal, the respondents have satisfied us that they took reasonable steps to discover the claimant's medical position and prognosis

129. Further, as is clear from the evidence led before the Tribunal, from the outset of the claimant's last absence from work from December 2009 onwards, there were submitted to the respondents Med3 certification by his GP of the claimant's unfitness to work. Such certification was uninterrupted and, although the relevant Med 3 certificates were not produced to us, bar the

final Med 3 certificate, dated 22 July 2010, certifying him unfit, on account of dermatitis, until 21 September 2010 (Tab 74, page 154), there was nothing led in evidence before us that any of those medical certificates by his GP said anything further, beyond certifying unfitness for defined periods.

130. In particular, on the evidence before us, nothing was stated by his GP that if available, and with his employer's agreement, the claimant might be fit for work and benefit from any of a phased return to work, altered hours, amended duties, or workplace adaptations. The GP's letter, of 4 August 2009, from Dr Ryan, addressed to the claimant, but given by him to his supervisor, Mr McMillan, as produced at **Tab 26, page 70**, sought transfer to another job not involving chemicals, and that led to the respondents instructing the first OH report from Capita.

131. The claimant's third point of appeal, in his appeal letter of 15 August 2010 (**Tab 83, page 166**), refers to the respondents at no time contacting his doctor to discuss suitability (of alternative position offered), or his condition, but that ground of appeal ignores the fact that the claimant had previously been asked to discuss matters with his GP, and he had given the respondents' managers the impression that he had done so, and at the appeal hearing, he stated that he had discussed the alternative duties in the Stores / Admin Assistant post with his GP(as recorded in the agreed notes, **Tab 87, page 177**).

132. Further, we also noted, from those agreed notes of the appeal hearing, as recorded in **Tab 87, page 177,** that it was made clear by Mr Smith, the senior HR officer, present as the management group's advisor, that GCSS would not directly engage with an employee's GP, but if there were circumstances to engage with a GP, then this would be via the Occupational Health procedures.

133. From the appeal hearing notes, at **Tab 87, pages 177 and 178**, the claimant seems to have been of the view that, despite being absent from work for 178

working days, he had a medical certificate from his GP which somehow precluded the respondents' management from taking action with regards to his continuous sickness absence, and further, he had submitted a medical certificate till near-end of September 2010, and, as per point 4 of his appeal letter, management were putting unreasonable pressure on him to make a decision about when he could return to work, despite him having produced a GP sick note.

134. While we can accept that that is the way the claimant was seeing things at that time, and he appears to continue to be of that view, notwithstanding the `passage of time, and the opportunity for reflection, with the benefit of hindsight, we cannot accept, on the evidence led before us, that the management then were subjecting him to any unreasonable pressure, and we are satisfied that they were simply seeking to try and get him back to work by progressing discussions with him, through the absence management procedures, about alternative duties, having regard to the advice and recommendations made by their commissioned OH reports. We regard their actions in this regard as being entirely appropriate and proportionate to the circumstances then pertaining.

135. **Length of service is not automatically a relevant consideration in deciding whether to dismiss or not. The critical question in every case is whether the length of the employee's service, and the manner in which he worked during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can. (<u>BS v Dundee City Council</u> @ paras 32 and 33)**

136. In the present case, the length of the claimant's employment with the respondents was not in dispute, and it was clear to us, from the evidence led from Mr Hynes and Ms Connolly in particular, that at the meeting with Mr Hynes on 30 July 2010, the claimant stated that he felt he had proven to be a loyal member of staff and that this should be taken into consideration when deciding as to whether his employment with the company should continue.

Indeed, it is so recorded in the agreed notes of that meeting, at **Tab 76, page 158**, and also in the dismissal letter issued by Mr Hynes to the claimant, on 30 July 2010, as produced to us at **Tab 77, page 159**. Mr Hynes referred to this at the appeal hearing too, as recorded in the agreed notes at **Tab 87, page 178.**

137. In the Tribunal's view, a reasonable employer, given the circumstances, would have given consideration to an employee's length of service in deciding upon the appropriate way forward in handling a long-term absence, particularly where, as here, there was nothing led in evidence before the Tribunal by the respondents to suggest that there was anything in the claimant's employment history, prior to his absence, to suggest otherwise than that he worked loyally and diligently for them for a number of years.

138. On the evidence before us, we are satisfied that the claimant's length of employment, and record being clear of default, were taken into consideration by the respondents. In conclusion, in addressing the balancing exercise required of the Tribunal, in terms of the **BS** judgment, we have decided that there was no basis for deciding that, in all the circumstances of this case, a reasonable employer would have waited longer before dismissing the claimant.

139. Further, having carefully reviewed the whole evidence led at the Final Hearing, we are satisfied that the respondents ascertained the medical position, met regularly with the clamant, and identified and offered alternative duties to him. He was given ample warning that the respondents were considering his ongoing employment, and he was accompanied at meetings, notwithstanding that this went beyond his entitlement to representation in terms of the respondents' own policy.

140. At the meeting with John Hynes, on 30 July 2010, when the claimant was dismissed, Mr Hynes, as the decision maker on behalf of the respondents, had no indication whatsoever from the claimant as to when he might be fit to

return to any position, and the claimant provided him with no further information. By that stage, the claimant had been absent for over seven months with no timeframe for return. The final sick note from his GP certified him as unfit until well into September 2010, and that was a significantly longer sick line than those previously submitted by the claimant's GP.

141. By that stage, we recognise that the claimant had exhausted his rights to full and ½ pay, and he was then on no pay. As per the agreed statement of facts, he had received the various payments detailed at finding in fact (19.6) above, at paragraph 48 of these Reasons. Despite having been offered Community Reparation driver duties in February 2010, and the Stores / Admin Assistant duties in May 2010, the claimant had not discussed the suitability of either with his GP, and he could give Mr Hynes no reason for his repeated failure to do so, and he simply advised him that he was unfit for work.

142. Mr Hynes, as the decision maker considered these factors, and took into account the factor advanced by the claimant that he had been a good and loyal employee, but he nonetheless concluded that the respondents, as employer, could not reasonably be expected to wait any longer, and we agree with Mrs Greig's submission, on behalf of the respondents, that that dismissal, for lack of capability, was fair and reasonable in all the circumstances, and further that it was within the band of reasonable responses which an employer might adopt.

143. Insofar as it might be thought that the respondents should have obtained more medical evidence prior to dismissal, we were satisfied that the respondents had established the medical position, consulted and discussed matters with the claimant, and obtained two Occupational Health reports, from Capita, and then from BUPA. We agree with Mrs Greig's submission that it was reasonable for the respondents, having obtained the BUPA report, in April 2010, to take the view that they had followed the medical advice

provided by BUPA, particularly in the absence of any contrary information from the claimant.

144. On that point, it seemed to us that the respondents, as employer, were perfectly entitled to take at face value the claimant's positive statements that he saw no problems with the Stores / Admin Assistant post, and it was not for the respondents, in the absence of any other information from the claimant, to further investigate the medical position.

145. We note how, in his written closing submission, at page 5, as we have reproduced it earlier in these Reasons, at paragraph 59, the claimant stated: "***The BUPA report also explained the necessity of a further referral to a doctor if there was further concerns, a failure to return to work should have flagged up this necessity, which never happened***.".

146. As we see it, however, the simple fact remains that the claimant raised no further concerns with the respondents, nor did his GP, or anybody else on his behalf, and we feel it is somewhat disingenuous of the claimant to turn that on its head and say that his continuing absence means the respondents should have referred him back to OH. We are satisfied, from the Court of Session's judgment in **BS** that an employer is to be judged by the standards of the reasonable employer, not by the standards of whether the employer left no stone unturned.

147. In her submissions for the respondents, Mrs Greig raised the question what effect it would have on the fairness of the claimant's dismissal, if the respondents were responsible for the claimant's incapacity. We have decided that we do not need to make any finding in fact as to whether or not the claimant's incapacity can be attributed to the respondents, as his employer, and we are aware, from the background history to these Tribunal proceedings, that the claimant raised civil proceedings for personal injury against the claimant, but that civil action was dismissed at the Sheriff Court in February 2016. What appears clear is that his graffiti removal duties, while

employed by the respondents, exposed him to an exacerbation of a pre-existing dermatitis condition.

148. Even if we had been in a position where we had been able to make a finding that the respondents were responsible for the claimant's incapacity, which we were not, for no such evidence was led before us, given the subject matter of the claim before the Tribunal, we note from **McAdie v RBS [2007] IRLR 895**, cited by Mrs Greig, that the Court of Appeal in that case made it clear that it may be relevant to whether, and if so when, it is reasonable to dismiss an employee for that incapacity, but that factor would not preclude an employer forever from effecting a fair dismissal.

149. The key issue remains whether the employer acted reasonably in all the circumstances, and as we have said already, in the present case, we are satisfied that the respondents' decision, through Mr Hynes, to dismiss the claimant, at the meeting held on 30 July 2010, was within the band of reasonable responses open to the employer.

150. Further, we are satisfied that that dismissal was procedurally fair, as, as per the agreed statement of facts in relation to the absence management meetings attended by the claimant, we are also satisfied that there was full discussion and consultation with the claimant, in a situation where we agree with Mrs Greig's submission that the respondents took steps to ascertain the true medical position, and it was reasonable for the respondents to believe that the prognosis in the BUPA report was accurate, and there was nothing to the contrary from the claimant to suggest that the BUPA report did not represent the up-to-date medical position.

151. Additionally, we have to say that with no information to the contrary being forthcoming from the claimant to Mr Hynes, it was reasonable for him, as the decision maker on behalf of the respondents, to believe that the Stores / Admin Assistant role met the recommendation of the BUPA report to discuss with the claimant the possibility of redeployment to a role where he would not be exposed to any chemicals.

152. Further, we are satisfied, again as set out in the agreed statement of facts, that the respondents followed their absence management policy procedures, including compliance with the procedures for long-term absence (defined as being any single period of absence amounting to 20 or more working days – **paragraph 4.4**), and lack of capability considerations, including that management should, in consultation with the employee, where appropriate, consider, amongst other things, redeployment to other work, etc, and where termination on the grounds of lack of capability should only be actioned after all other options have been explored, and the employee advised of the possibility of termination, as per **paragraphs 6.1 and 6.2**, all as produced to us at **Tab 13, pages 50 to 52**.

153. The claimant was advised of the possibility of termination of employment, and the availability of alternative employment was considered before deciding to dismiss him from the respondents' employment. He was allowed to be accompanied, beyond the respondents' normal policy, and there was a full and thorough appeal hearing, which confirmed Mr Hynes' original decision to dismiss the claimant.

154. While we have not found that there were any deficiencies in the dismissal process, which we find to have been procedurally and substantively fair, had we found any such deficiencies at the dismissal stage or earlier, then we would have been of the view that any such deficiencies were cured by the full and thorough consideration of the claimant's appeal by the appeals panel, where the claimant was permitted to, and given full opportunity, to bring up any matters at his appeal, as is evidenced by the agreed notes of that meeting produced at **Tab 87.**

155. From the claimant's written closing submission, on page 24, when he made certain references to the **ACAS Code of Practice**, as we noted earlier at paragraph 59 of these Reasons, he referred specifically to: **"*6 – allow employee to appeal. Deal with appeal impartially and where possible by***

a manager not previously involved". Having considered the **ACAS Code (2009)**, being the Code then applicable, it seems to us that the claimant is referring to **paragraphs 25 to 28** thereof, dealing with providing employees with an opportunity to appeal.

156. **Paragraph 26 of the ACAS Code** states: "***The appeal should be dealt with impartially and whenever possible by a manager who has not previously been involved in the case."*** **Paragraph 25** refers to appeals being heard without unreasonable delay, and **paragraph 28** provides that employees should be informed in writing of the results of the appeal hearing as soon as possible.

157. From the evidence led before us at this Final Hearing, and perusal of the relevant documents produced at **Tabs 78 to 88**, we are satisfied that the respondents complied with these provisions of the ACAS Code, although we also accept, as we are bound to do, by virtue of the EAT's judgment in **Holmes v Qinetiq Limited UKEAT/0206/15,** that the ACAS Code does not apply to ill-health dismissals.

158. Finally, and for the sake of completeness, we deal with two other matters which the claimant felt were relevant to the fairness of his dismissal, being the COSHH/ RIDDOR/ Accident Book, and his use of the respondents' Grievance Procedures.

159. Dealing with them in turn, we note firstly that parties agree that the reason for dismissal is lack of capability on grounds of ill-health. As such, we agree with Mrs Greig's written closing submission where she submitted that:

> *"Whether the Claimant's dermatitis should have been recorded in the Accident Book or considered under Health and Safety requirements is not a relevant consideration when considering the fairness of this lack of capability dismissal. The relevant considerations (medical*

evidence, consultation, likely length of absence etc.) were taken into account as set out above".

160. Secondly, we also agree with her further submission that the claimant's grievance is not relevant to the fairness of his dismissal. In this regard, for the sake of brevity, we gratefully adopt as our own view the views expressed in her written submission, as follows:-

"The fact that the Claimant had a live grievance at the time of dismissal is irrelevant to the fairness of this dismissal. It was reasonable in the circumstances for the Respondent to look at lack of capability in isolation. There was no information in the grievance that something was causing his incapacity for any role or preventing him from returning at that time.

In addition, had the Claimant wanted to raise any of the points made in his grievance at his dismissal meeting on 30 July 2010 or at the Appeal on 27 August 2010, he could have done so.

The Claimant's argument that a live grievance prevents the Respondent making a decision to dismiss is not well founded. Paragraph 7of the Grievance Policy [Bundle "C" pages 181-189] does not have the effect the Claimant suggests. The correct interpretation – that it is relevant to collective grievances rather than individual ones - is supported by reading both paragraphs of paragraph 7 together, and by the evidence of Carol Connolly."

161. For the purposes of clarification, we note and record here that the claimant laid emphasis on the ***status quo*** provision of the respondents' Grievance Procedure, at paragraph 7, which states as follows [**page 186 in claimant's additional bundle C**] : –

"***STATUS QUO***

In the event of any difference arising which cannot immediately be resolved, whatever practice, agreement or working conditions existed prior to the difference shall continue to operate pending a settlement or until the procedure has been exhausted.

Both parties accept the Status Quo clause imposes obligations on both Management and the Trade Unions to take no precipitative action whilst the issue is still under consideration and the procedure has been exhausted."

162. Insofar as the claimant seems to have believed that the respondents could not dismiss him from their employment, on grounds of lack of capability, while he was pursuing their internal grievance procedures, because he regarded dismissal as "***precipitative action",*** whilst his internal grievance was still under consideration, and that procedure had not been exhausted, we have to say that his view is not well-founded.

Relevant Law: Unlawful Disability Discrimination

163. The claimant's discrimination claims are made under the **Disability Discrimination Act 1995. ("DDA")** While the **Equality Act 2010** came into force on 1 October 2010, in terms of **The Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provision and Revocation) Order 2010** (**SI 2010 No. 2317**), it is the relevant statutory provisions of the DDA with which we must determine this case before the Tribunal.

164. The Disability Rights Commission issued a Code of Practice on Employment and Occupation in 2004 ("***the Code***"), and Employment Tribunals must take the Code into account under **Sections 53-54 of the DDA** and the Code is admissible as evidence. Again, given the **2010 SI** just cited in the preceding paragraph of these Reasons, it is the relevant statutory provisions of the

2004 DRC Code with which we must determine this case before the Tribunal.

Claimant's Disability Status, and Respondents' Knowledge of Disability

165. It is a matter of concession by the respondents in this case that they accept that the claimant was a disabled person in terms of **Section 1 of the DDA**, subject to a qualification about their knowledge of his disability. Mrs Greig set forth their qualification about knowledge, at page 8 of her written submissions for the respondents, which it is appropriate that we reproduce here, as follows:-

> *Knowledge of disability. The physical symptoms of the Claimant's condition evolved over time. Similarly the parties' state of knowledge (both the Claimant's and the Respondent's) evolved as time passed. The Claimant's evidence is that the terms of the first OH report from Capita (dated 1 December 2009 Tab 31) came as a shock to him. It was the first time the DDA and disability had been mentioned. It was the first time he had considered the DDA and disability. He agreed the Respondent was in the same position.*
>
> *The Respondent did not know that the Claimant was a disabled person until receipt of this Capita OH Report.*
>
> *No duties under the DDA arose until the Respondent had possession of the report - Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10. This was sometime after 1 December 2009 and before 7 December 2009 [Tab 32].*
>
> *John McMillan and painting duties*
>
> *No witness was clear as to the exact dates the Claimant was on painting duties. The time frame appears to be sometime after*

July/August 2009 (when temporary duties within community reparation ended and the Claimant returned to community enhancement). No duties under the DDA arose at that time. The Respondent did not know, and could not reasonably be expected to know, that the Claimant was a disabled person at this time. In any event the Claimant made no complaint to John McMillan. John McMillan's evidence was that the Claimant was happy to be out painting with his colleagues at this time. The absence of any record of any complaint by the Claimant at the time is significant.

166. We were referred by Mrs Greig, in her written closing submissions, to the EAT judgment, by Mr Justice Underhill, then President of the EAT, in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10.** As the learned EAT President noted, at paragraph 37 of that judgment, citing from Lady Smith's EAT judgment in **Secretary of State for Work & Pensions v Alam [2010] ICR 665,** an employer is under no duty to make reasonable adjustments, under **Section 4A of the DDA**, unless they know (actually or constructively) both (1) that the employee is disabled and (2) that the employee is disadvantaged by the disability , and element (2) will not come into play if the employer does not know element (1).

167. Having carefully considered the evidence available to us at the Final Hearing, and our detailed findings in fact, at paragraph 48 (59) to (81) of these Reasons, we are satisfied that the respondents did not know that the claimant was a disabled person until 7 December 2009 when they received Dr Robert Smith's OH report from Capita Health Solutions dated 1 December 2009.

168. The compelling fact we accepted from the claimant's testimony to us that he was "***shocked"*** and "***emotionally overcome***" by the contents of that Capita OH report confirms to us that if he did not know until that point that his condition was being regarded as a disability under the DDA, then the respondents cannot be criticised for not being aware at any earlier date.

Relevant Law: Duty to Make Reasonable Adjustments

169. In considering this aspect of the claimant's case against the respondents, we have reminded ourselves of the relevant statutory provisions, as set forth in **Sections 3A, 4A and 18B of the DDA,** as follows:-

> ***3A Meaning of "discrimination"*** *….*
>
> *(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.*
>
> ***4A – Employers: duty to make adjustments***
>
> *(1) Where –*
>
> *(a) a provision, criterion or practice applied by or on behalf of an employer, or*
>
> *(b) ….., places the disabled person concerned at a* ***substantial disadvantage*** *in comparison with persons who are not disabled, it is the duty of the employer to take such steps* ***as it is reasonable****, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature,* ***having that effect****….*
>
> *(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –…*

*(b) in any case, that the person has a disability and is likely to be affected in the way mentioned in subsection (1). [**Emphasis added**.]*

18B - Reasonable adjustments: supplementary

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to –

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

(g) where the step would be taken in relation to a private household, the extent to which taking it would –

(i) disrupt that household, or

(ii) disturb any person residing there.

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments –

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support."

Discussion and Disposal: Failure to Make Reasonable Adjustments

170. Having considered the relevant law, we turn now to consider parties' competing submissions to the Tribunal. We reminded ourselves firstly of the main points of the claimant's reasonable adjustments complaint, as per the narrative provided at paragraphs 4 to 7 of the further and better particulars for the claimant dated 11 November 2011. A full copy of those further particulars for the claimant was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 2, pages 6 to 13**.

171. For present purposes, we focus on those paragraphs 4 to 7, as reproduced at **Tab 2, at pages 7 to 10**, as follows:

> ***Reasonable Adjustments and Substantial Disadvantage***
>
> *4. The Claimant considers that the Respondents were under a duty to make reasonable adjustments as he was place at substantial disadvantage in comparison with other persons in the workplace and that the Respondents failed in their duty towards him.*
>
> *5. On 26 June 2009, the Claimant attended the Dermatology Department at Glasgow Royal Infirmary. He was advised of the Consultant Dermatologist's diagnosis that the chemicals which he came into contact with were the cause of Dermatitis. On 27 June 2009, the claimant advised his supervisor, John McMillan, of the diagnosis. He was advised by Mr McMillan that his job was at risk given that he could not work with chemicals.*
>
> *6. The Claimant considers that reasonable adjustments would have included (1) ensuring that the Claimant`s duties were restricted in order that they id not involve the use of, or coming into contact with, chemicals which could exacerbate his disability (2) redeployment with suitable training where relevant*

or transferring him to fill an existing vacancy including within a different place of work. The Claimant considers that the Respondents have failed in their duty to make reasonable adjustments and that the following practices, provisions or criterions placed him at substantial disadvantage in comparison to persons who did not suffer from a disability to which the respondents could and should have made reasonable adjustments:-

a. *The Respondents ought to have considered redeployment on the basis of him being unable to work with chemicals due to the exacerbation caused to his condition and disability. There were numerous vacancies within the Respondent's organisation in which the Claimant could have been redeployed.*

b. *In particular, on or around 3 July 2009 the Claimant applied for a job as a reparation officer. The duties entailed supervising clients who where undertaking community service work. The Claimant considers that a reasonable adjustment ought to have been to redeploy him to that role without the requirement of an interview or to compete with other applicants. Furthermore, the Claimant considers that the Respondents acted unreasonably by widening the application process to include those working outwith the Claimant`s role. Furthermore, the Claimant considers that the Respondent acted unreasonably by fixing interviews and filling all available positions during a three day period when the Claimant was on holiday. The Respondents did not act consistently as other applicants were otherwise accommodated.*

c. *The Claimant advised his employers at a meeting on 21 May 2009 that paint was also causing irritation. A reasonable adjustment would have been for the Respondents to provide duties to the Claimant which did not involve working with paint or other chemicals. A reasonable adjustment would have been for them to redeploy the Claimant accordingly.*

d. *In July/August 2009 the Claimant was advised that he would be returning to his role to include graffiti removal. The Claimant required to advise that he could not work with graffiti due to his disability. The Claimant was advised that he could lose his job. A reasonable adjustment would have been to ensure the Claimant was not required to continue to work with chemicals.*

e. *The Claimant provided a letter to his supervisor John McMillan on 5 August 2009. A letter from his GP requesting that he be provided with alternative duties.*

f. *The Claimant was further advised by his supervisor, Pat Low, that he was required to continue to work with graffiti removal notwithstanding that he advised that the chemical residue within the duties he was undertaking at that time was affecting and exacerbating his condition.*

g. *The Respondents have not treated the Claimant consistently. Other employees with skin complaints had been referred to Occupational Health in a substantially short period than that in which occurred in the Claimant`s case. He first experienced symptoms in December 2008. He was absent from work due to ill health in April 2009. In June 2009, the Claimant`s*

supervisor was expressly told by the Claimant that his disability was work-related. An Occupational Health Consultation did not take place until 30 November 2009. An Occupational Health Report dated 1 December 2009 was provided to the Respondents. This confirmed that the Claimant`s Chemical Dermatitis was likely to have been caused b work and would have certainly been made worse by further work activities. The report recommended that the Claimant be restricted from working with chemicals. The report recommended at that the straight forward solution was to permanently redeploy the Claimant from use of chemicals or similar types of chemicals and ensure that the restriction is permanent. Resolution would only occur with complete restriction from exposure. The Respondents accordingly ought to have followed the advice of the Occupational Health Report and restrict all exposure to those chemicals or similar chemicals. They ought to have redeployed the Claimant. They ought to have provided training for any available role where relevant.

h. *In a letter dated 4 February 2010, following from a meeting on 28 January 2010, the Respondents advised that they would continue to find alternative duties or employment within the company. They asked if the Claimant was making an effort to find employment elsewhere.*

i. *On 1 April 2010 the Respondents advised that they would not be considering any options in terms of the Respondents absence management policy which include phased return, part time/reduced hours, ill*

health, redeployment and termination of the grounds of capability

j. The Claimant require to apply for the following vacancies within the company: literacy tutor and administrative assistant. He was encouraged to make these applications by the Respondents however the Claimant required to compete with other applicants. The Claimant was not successful in his applications to either of these roles. A reasonable adjustment would have been for the Respondents to redeploy the Claimant to those positions and provide appropriate training where relevant.

k. By letter dated 28 June 2010, the Respondents advised that a redeployed role would be available at a stores/admin assistant. At a meeting regarding sickness and absence on 9 July 2010, the Claimant confirmed that he did not consider that there would be any issues with the redeployment offer. The Claimant had been absent from work due to ill health related to his disability from 15 December 2009. At that time he continued to suffer from the symptoms of ill health due to dermatitis. At a meeting on 30 July 2010, the Claimant was dismissed from his employment on the basis of his level of attendance and that there was no indication of when he would be returning to work. This was notwithstanding that the Claimant had advised tat he did not foresee any issues with the redeployed role. In any event, the Respondents unreasonably delayed in making the adjustment given the length of time which has passed. Furthermore, the post that was offered was on a like for like basis. It included duties to assist with setting up

stock systems and other additional responsibilities for which the Claimant would require training. No such training was offered. A reasonable adjustment would have been to ensure that appropriate training was offered in relation to any redeployed role and that this was communicated to the Respondent accordingly.

7. The Respondents have rules and procedures dealing with health and safety. The Respondents have placed the Claimant at a substantial disadvantage by not following those procedures as follows:-

a. They did not record the work related injury in the accident log book;

b. They did not inform the named health and safety representative;

c. They did not offer the Claimant advice and assistance in connection with his disability which was work related

d. They did not report the case to the Health and Safety Executive.

e. They did not comply with the policy and procedures and regulations pertaining to the control of hazardous substances so as to remove hazardous exposure to the Claimant.

f. They did not arrange an Occupational Health Consultation within a reasonable period of time of becoming aware of the disability which was work related.

172. Next, we have referred to the respondents' grounds of resistance to the reasonable adjustments complaint, best summarised, we feel, at paragraphs 22 and 23 of the respondents' additional information, provided to the Tribunal on 5 April 2012, a copy of which was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 7, pages 29 to 31.**

173. For present purposes, we focus on those paragraphs 22 and 23, as reproduced at **Tab 7, at page 31**, as follows:

> *"22. It is denied that the respondent failed in its duty to make reasonable adjustments under section 4A of the DDA 1995. As detailed above, the respondent offered alternative duties and posts to the claimant.*
>
> *23. Having offered the claimant alternative posts as a Community reparation driver and as a Storesperson as detailed above, the respondent had fulfilled any duties incumbent upon it under section 4A. Esto there was a breach of section 4A (which is denied) it was not a continuing breach and had ended by no later than 24 May 2010, if not earlier. The claim having been lodged on 28 October 2010, it is out of time in terms of paragraph 3 of schedule 3 to the DDA."*

174. Finally, we have considered Mrs Greig's written closing submissions for the respondents, at pages 10 to 13, where she advanced the following points:-

> ***The importance of assessing all elements of the statutory test***
>
> *The EAT in Royal Bank of Scotland v Ashton [2011] ICR 632 stressed the importance of identifying the various elements of the statutory test when considering whether there has been a failure to make reasonable adjustments, particularly the identification of the PCP concerned and the precise nature of the disadvantage which it*

creates. The employment tribunal considering a reasonable adjustment claim must identify:-

- *The provision, criterion or practice applied by or on behalf of an employer, or the relevant physical feature of premises.*
- *The identity of non-disabled comparators, where appropriate.*
- *The nature and extent of the substantial disadvantage suffered by the claimant, in comparison to the non-disabled comparators.*

Provision, criterion or practice, substantial disadvantage and comparators

It is for the Claimant to identify the PCP. If the Claimant fails to do so, the claim will fail. The claim as pled does not disclose the PCP the Claimant is relying upon. (The only reference to a PCP is at Tab 2, page 7, paragraph 6. The phrase is used, but no PCP is identified.) The Respondent's first submission is that this head of claim should be dismissed for failure to identify a PCP.

The Claimant is not legally represented. If the Tribunal wishes the Respondent to address it on identification of the PCP, the Respondent refers to Archibald v Fife Council 2004 IRLR 651 HL (an "old" DDA claim which refers to "conditions" or "arrangements" rather than PCPs). Adopting the findings of the House of Lords, the PCP may be that the Claimant should at all times be physically fit to do his job as a community enhancement operative. The substantial disadvantage may be that if he was physically unable to do the job he was employed to do he was liable to be dismissed, in comparison with others in the same employment who were not so at risk.

Steps/reasonable adjustments

It is necessary to identify the "step". The making of the adjustment is not an end in itself. The step must have the effect of removing the substantial disadvantage of that PCP. A reasonable step would be to find alternative duties or an alternative job for the Claimant. This would remove the substantial disadvantage, namely dismissal if physically unable to do his existing job.

The statutory duty is not to make <u>all</u> adjustments to remove disadvantage, but only to make <u>reasonable</u> adjustments.

The Respondent complied with the statutory duty. At the time the community reparation driver job was offered, it was a reasonable adjustment, given the information available to the Respondent. This information was the Capita OH report [Tab 31] and information from the Claimant at the February 2010 meeting, when he indicated that he had no concerns and intended to return, subject to discussing the duties with his GP. However the Claimant's evidence in cross was that even at this point in February 2010, he did not consider this a reasonable adjustment because it may still expose him to chemicals. He decided to withhold this information from the Respondent, revealing it only via the BUPA OH report of April 2010 [Tab 50]. In all the circumstances the offer of the community reparation driver role was reasonable at the time it was made.

Once the Respondent was in receipt of the additional information provided through the BUPA OH report, it offered the Claimant the stores/admin assistant role, on a temporary basis initially and then on a permanent basis. The Respondent also relied upon information from the Claimant that he saw no problem with the role. However again the Claimant's evidence was that he did not consider the role to be a reasonable adjustment because it may still expose him to chemicals

or irritants. However again the Claimant decided to withhold this information from the Respondent.

The offers of the two roles were reasonable adjustments in all the circumstances of the case. The Respondent complied with its duty.

Would transferring the Claimant to an existing vacancy without competitive interview be a reasonable adjustment?

No. Archibald raised transferring a disabled employee from a post she can no longer do to a post which she can without competitive interview as a possible reasonable adjustment. This would depend on all the circumstances of the case.

But the EAT in Wade v Sheffield Hallam University 2013 EqLR 951 considered Archibald was not authority for the proposition that such an adjustment would be reasonable in every case. The University did not fail in its duty to make reasonable adjustments by not waiving the requirement for a competitive interview process.

In the present case competitive interviews were a condition of external funding. The Respondent did not fail in its duty to make reasonable adjustments by not waiving the requirement for a competitive interview process, or to waive the essential criteria for posts. There was no suggestion in Archibald that the Claimant was to be appointed to a role for which she did not meet the essential criteria.

The Code at p66 states " - transferring the person to fill an existing vacancy – An employer should consider whether a suitable alternative post is available for an employee who becomes disabled…". It confirms at p65 that transferring to an existing vacancy is an example to be considered.

By offering the stores/admin assistant role the Respondent fulfilled its duty under s4A. The Claimant expressed no concerns about the nature of the duties. The Claimant explicitly advised that he did not foresee any problems with them. It was a permanent post at the same salary with fewer hours. The Respondent, having fulfilled its duty, was not under any further duty. In any event at the appeal the Claimant advised that even if he had been offered the admin assistant finance post he would not have been fit to take up the post.

Would recording the Claimant's condition in the accident book/to the Respondent's H&S officer/to the HSE/via COSHH or RIDDOR be a reasonable adjustment?

Salford NHS v Smith 2011 EqLR 1119 - Reasonable adjustments are limited to those that prevent a PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. They are primarily concerned with enabling the disabled person to remain in or return to work with the employer. If the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment within the meaning of disability discrimination legislation.

The Claimant confirmed that none of these steps would have any effect on his ability to return to work.

The Code at p74 states:- "it is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to the disabled person."

Employer caused disability?

HM Prison Service v Johnson 2007 IRLR 951 – that the disability was caused at least in part by the employer's failings is potentially relevant

to the assessment of reasonableness. It may require an employer to do more by way of reasonable adjustment than would be necessary in other circumstances but it cannot give rise to an unlimited obligation to accommodate the employee's needs.

Time bar

Esto there was a breach of section 4A (which is denied) it was not a continuing breach and had ended no later than 24 May 2010, if not earlier. The claim having been lodged on 28 October 2010, it is out of time in terms of paragraph 3 of schedule 3 to the DDA. (see Respondent's additional information, Tab 7, page 31, paragraph 23.)

175. We turn now to address each of the competing points from both parties, and give our views. In coming to our final determination, on the reasonable adjustments part of the claim, we have addressed, in turn, each of the following specific issues, which we note and record here, **in bold**, with our discussion detailed below on each of the specific issues, as follows:-

(a) **the date of the respondents' knowledge of the claimant's disability.**

- As per paragraph (2) of our Judgment, the respondents having accepted that the claimant was a disabled person, in terms of **Section 1 of the Disability Discrimination Act 1995**, the Tribunal finds that the respondents did not know that the claimant was a disabled person until 7 December 2009 when they received an Occupational Health report from Dr Robert Phillips at Capita Health Solutions dated 1 December 2009.

- Further, and as we stated earlier in these Reasons, at paragraph 168 above, it bears repeating that the compelling fact we accepted from the claimant's testimony to us that he was "***shocked"*** and "***emotionally overcome***" by the contents of that Capita OH report confirms to us that if he did not know until that point that his condition was being regarded as a disability under the DDA, then the respondents cannot be criticised for not being aware at any earlier date.

(b) **Identification of the provision, criterion or practice ("*PCP*") applied by the respondents, and complaint of failure to make reasonable adjustments.**

- We agree with Mrs Greig that, as per the EAT's judgment in **Royal Bank of Scotland v Ashton [2011] ICR 632**, it is important to identify the various elements of the statutory test when considering a reasonable adjustments claim.

- In her written submissions, Mrs Greig stated that the claimant had failed to identify the PCP being relied upon, and that the only reference to PCP was the reference in the claimant's further and better particulars of 11 November 2011 (at **Tab 2, page 7, paragraph 6**) where the phrase "***practices, provisions or criterions***", rather than PCP, had been used (by the claimant's then lawyer, Mr Ryan) in the context of the claimant's lawyer then describing factors (a) to (k), described as PCPs placing the claimant at substantial disadvantage.

- In our view, the drafting of those further and better particulars for the claimant shows a conflation and

confusion as regards PCP and substantial disadvantage, but they were the claimant's formal pleadings before this Tribunal.

- Further, we note that factors (a) to (f), at paragraph 7 of those further and better particulars for the claimant (at **Tab 2, page 10**), listed various matters that the claimant's lawyer stated placed the claimant at a substantial disadvantage by the respondents not following their health and safety rules and procedures, but in our view these matters are more akin to general complaints that the respondents did not do certain things, and they are not properly identified PCPs.

- When this matter was addressed by the claimant, in his oral reply to Mrs Greig's closing submissions, he was frank and candid with us in stating that he did not know what a PCP is, and accordingly that he could not assist the Tribunal further in any discussion on this point.

- While Mrs Greig's first submission on this point is that the reasonable adjustments head of claim should be dismissed for failure to identify a PCP, we felt, having heard evidence on this part of the claim, it was appropriate to consider matters with the benefit of the evidence led by both parties at the Final Hearing conducted by them before us, and not to take too legalistic an approach, as a short-cut, by simply dismissing that part of the claim for failure by the claimant to identify the PCP he was relying upon in his complaint against the respondents.

- Instead of simply dismissing the reasonable adjustments part of the claim for failure to identify a PCP, a pleading / fair notice point that had not previously been taken by the respondents during the currency of these ongoing Tribunal proceedings, we preferred to take Mrs Greig's suggested alternative approach.

- That approach was to say that, if the Tribunal wished to be addressed on the matter of a PCP, we should consider the respondents' suggested PCP that the claimant should at all times be physically fit to do his job as a community enhancement operative, and that the substantial disadvantage may be that if the claimant was physically unable to do the job he was employed to do, then he was liable to be dismissed, in comparison with other non-disabled persons in the same employment who were not so at risk.

- Proceeding on that alternative, suggested basis, proposed by Mrs Grieg, we noted that the claimant did not himself suggest any other alternative approach for our consideration.

- In particular, the claimant did not suggest, as we have seen argued in other disability cases pursued before the Employment Tribunal by other claimants against other employers, that the respondents, as employer, should have made adjustments of some sort or another to their Absence Management Policy so as to make specific provision for his dermatitis, and how his absences from work on account of that condition were treated by them. In any event, the claimant was dismissed by the

respondents for lack of capability, and not due to the level of his attendance at work.

- We have ourselves considered as a possible PCP whether the claimant should at all times maintain a significant level of attendance at work, and be required to work with paints and chemicals, with a substantial disadvantage, in connection with this PCP, being that he was likely to suffer a substantial disadvantage by his dermatitis being exacerbated if he was required to be at work, and to be working with such materials.

- However, having heard the evidence led at the Tribunal, we have come to the conclusion that the evidence before us is insufficient for the claimant to have established that there was a failure to make reasonable adjustments, and we are satisfied that the arguments advanced by Mrs Greig, in her written closing submissions to the Tribunal, are well-founded, and that we should dismiss this part of the claim against the respondents.

- In our view, on this part of the claim, we paid particular regard to the claimant's confirmation, in his evidence at this Final Hearing, that none of the steps identified in his pleadings, of recording his condition in the accident book, or to the respondents' Health & Safety officer, or to the HSE, via COSHH or RIDDOR, all being reasonable adjustments suggested on his behalf, would have had any effect on his ability to return to work, as they are clearly not reasonable adjustments as they do not alleviate the disabled person's substantial disadvantage.

- Further, we were satisfied that that the requirement for a competitive interview for the Admin Assistant post, required as a condition of external European funding for that post, could not be waived by the respondents, by way of a reasonable adjustment, as shown by the EAT's judgment in **Wade v Sheffield Hallam University 2013 EqLR 951**, one of the case law authorities relied upon by Mrs Greig for the respondents.

- Further, we have also considered another aspect of the claimant's complaint about the respondents' failure to make reasonable adjustments. Although we were not referred to this case law authority by either party, we have reminded ourselves that we should have regard to the judgment of the Employment Appeal Tribunal in **NCH Scotland v McHugh [2006] EATS/0010/66**, where the EAT held that the duty to make reasonable adjustments only arises, or is triggered, to use the phrase from the EAT Judge, His Honour Judge McMullen QC, where an employee indicates that they are intending or wishing to return to work.

- We refer, in this regard, to paragraph 41 of the EAT's judgment in **NCH Scotland v McHugh**, where HHJ McMullen QC, stated as follows:-

> *"We agree that a managed programme of rehabilitation depends on all the circumstances of the case, but it does include a return to work date. And certainly, if additional management and supervision is to be required, they must be arranged in advance and not in a vacuum.*

Similarly, if additional costs were to be incurred by (not this case) the purchase of new equipment to counteract the effect of the environment on the disabled person, there would be no need to spend that money in advance of a clear indication that the Claimant was returning. In our judgment, applying the trigger approach cited above, it was not reasonable for the Respondent to pursue the possibilities which the Tribunal noted until there was some sign on the horizon that the Claimant would be returning."

- It is an agreed fact in the present case that the claimant was absent from work, on and after 15 December 2009, up to and including his dismissal on 30 July 2010, effective 19 August 2010, and that he was absent from work on account of medically certificated dermatitis. Even at his appeal hearing, on 27 August 2010, the claimant confirmed that he was not in a position to confirm a return to work date. This therefore is another reason for dismissing this part of the claim brought against the respondents.

- Overall, as per paragraph (3) of our Judgment, we were satisfied that the respondents did not fail in their duty to make reasonable adjustments for the claimant, in terms of **Sections 3A, 4A and 18B of the Disability Discrimination Act 1995,** and accordingly that part of his claim against the respondents is dismissed by the Tribunal.

(c) **whether the claim was time-barred in any respect.**

- While Mrs Greig's written submissions took this time bar point, we note and record here that it was not raised earlier by the respondents during this Final Hearing, although it was raised far earlier on during the currency of these Tribunal proceedings. Indeed, it was first raised at paragraphs 23 and 24 of the respondents' additional information, provided on 5 April 2012, as per **Tab 7, at page 31.**

- Thereafter, at the Case Management Discussion, held on 31 January 2013, before Employment Judge Iain Atack, the respondents' then solicitor, Mr Farrell, from Glasgow City Council, raised a possible issue of time-bar in respect of some of the claims, but he did not feel that a Pre-Hearing Review (as that type of Hearing was then known, now a Preliminary Hearing) would be of any benefit, and the issues would be best dealt with at a full Hearing: paragraph 7 of that Judge's CMD Note refers.

- When, following a Case Management Preliminary Hearing, held on 18 March 2016, before Employment Judge Laura Doherty, this case was listed for this Final Hearing, Mr Wallace, the respondents' then solicitor, from Glasgow City Council, accepted that the claimant was a disabled person, but no preliminary issue of time-bar, was reserved : paragraph 8 of that Judge's CMPH Note refers.

- Neither party raised any outstanding time-bar point at the start of the Final Hearing before this full Tribunal. However, time bar is a jurisdictional matter, of which the Tribunal must take note, whether or not previously raised by a party. Parties cannot waive any time-bar

argument, and the Tribunal requires to address any time-bar argument arising, as and when it is raised by a party, or by the Tribunal, acting on its own initiative, as it is a fundamental matter going towards its jurisdiction to deal with a particular complaint before the Tribunal.

- In her written submissions, Mrs Greig did not address us on the relevant law regarding time-bar, and so, as the claimant did not address this matter either, in his own written submissions, we have required to give ourselves a self-direction on the relevant law regarding time bar, and the grounds for any extension of time to allow an otherwise late application to proceed, notwithstanding the expiry of the normal statutory time limit for making a Tribunal complaint.

- We reminded ourselves that **Section 17A of the Disability Discrimination Act 1995** deals with enforcement, remedies and procedure, concerning complaints to the Employment Tribunal, and that **Section 17A(8)** states that **Part I of Schedule 3 to the DDA** makes further provision about the enforcement of **Part II of the Act** in the employment field, and about procedure.

- **Paragraph 3 of Schedule 3 to the Disability Discrimination Act 1995** deals with the period within which proceedings must be brought, as follows:-

Period within which proceedings must be brought

3(1) An employment tribunal shall not consider a complaint under section 17A or 25(8) unless it is

presented ***before the end of the period of three months beginning when the act complained of was done.***

(2) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(3) For the purposes of sub-paragraph (1)—

(a) where an unlawful act . . is attributable to a term in a contract, that act is to be treated as extending throughout the duration of the contract;

(b) any act extending over a period shall be treated as done at the end of that period; and

(c) a deliberate omission shall be treated as done when the person in question decided upon it.

(4) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of this paragraph to decide upon an omission –

(a) when he does an act inconsistent with doing the omitted act; or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to

do the omitted act if it was to be done." ***[Our emphasis added]***

- Where an employer operates a discriminatory policy - a discriminatory regime, rule, practice or principle - that will amount to an act extending over a period (**Barclays Bank plc v Kapur and Ors [1991] IRLR 136 HL**), which is to be distinguished from the continuing consequences of a one-off decision (**Owusu v LFCDA [1995] IRLR 574 EAT**). That said, the identification of conduct extending over a period does not necessitate the specific identification of a policy, rule or practice; rather (see **Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548)**, something wider is required, which might be an ongoing process or proceedings or a continuing state of affairs. Here, there was no complaint pled by the claimant that there was "***a continuing state of discriminatory affairs"***, as per the Court of Appeal's judgment in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**.

- When a claim is brought out of time and the Employment Tribunal is considering whether it is just and equitable to extend time, the relevant principles are as set out by the Employment Appeal Tribunal in **British Coal Corporation v Keeble [1997] IRLR 336 EAT:-**

  "*8. … It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to - the length of and reasons for the delay; the*

extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

- However, as per Mr Justice Langstaff, then President of the EAT, in **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13/LA**, those principles are to be read as guidance and not a statement of statutory requirements. It has, further, been held to be necessary for Tribunals, when considering the exercise of such a discretion, to identify the cause of the claimant's failure to bring the claim in time; see **Accurist Watches Ltd v Wadher UKEAT/0102/09,** and **Morgan**, where the EAT ruled: -

  *"52. Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see **Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298** at para 25, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per **Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 CA**). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding*

whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

- Having considered most carefully the time-bar point raised by the respondents in the present case, we have decided that as regards the complaint of failure to make reasonable adjustments, even if, on its merits it were a well-founded company, which we do not find it to be, it is, in any event, time barred, where the alleged failure occurred more than 3 months prior to the presentation of the ET1 claim form. Further, it has not been explained to us in evidence from the claimant why it is that the primary time limit, for acts more than 3 months old, has not been met; and insofar as it is distinct issue, nor has it been explained to us why after the expiry of the primary time limit a complaint, in respect of this complaint was not brought sooner.

- As per paragraph (4) of our Judgment, we were satisfied that even if we had found that there was a **Section 4A** breach by a failure by the respondents to make reasonable adjustments, it was not a continuing breach, and it had ended **no later than 24 May 2010**, being the date of the attendance management meeting with the claimant, chaired by Derek Brown, at which John McGaughrin, the respondents' Assistant Operations Manager, attended for part of the meeting, to discuss the role of Storesperson in the Uniformed Services division, offered to the claimant as a redeployment opportunity.

- The Tribunal claim having been lodged on 28 October 2010, that part of his claim against the respondents is out of time in terms of **paragraph 3 of Schedule 3 to the Disability Discrimination Act 1995**, and accordingly that part of the claim against the respondents is dismissed by the Tribunal as being time-barred, it not being just and equitable to allow that claim late.

Relevant Law: Harassment

176. Next, in considering this aspect of the claimant's case against the respondents, we have reminded ourselves of the relevant statutory provisions, as set forth in **Sections 3B and 4 of the DDA**, as follows:-

3B Meaning of "harassment"

*(1) For the purposes of this Part, a person subjects a disabled person to harassment where**, for a reason which relates to the disabled person's disability,** he engages in unwanted conduct which has the purpose or effect of-*

(a) violating the disabled person's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

*(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should **reasonably be considered** as having that effect.*

4 Employers: discrimination and harassment…..

(3) It is also unlawful for an employer, in relation to employment by him, to subject to harassment –

(a) a disabled person whom he employs; or

*(b) a disabled person who has applied to him for employment. [**Emphasis added**.]*

Discussion and Disposal: Harassment

177. Having considered the relevant law, we turn now to consider parties' competing submissions to the Tribunal. We reminded ourselves firstly of the main points of the claimant's harassment complaint, as per the narrative provided at paragraphs 12 to 14 of the further and better particulars for the claimant dated 11 November 2011. A full copy of those further particulars for the claimant was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 2, pages 6 to 13**.

178. For present purposes, we focus on those paragraphs 12 to 14, as reproduced at **Tab 2, at pages 12 and 13**, as follows:

Harassment/Victimisation

12. The Claimant considers that John McMillan and Pat Lowe in particular subjected him to harassment on account of his disability. The Claimant considers that those persons perpetrated a period of harassment against him which was unwanted conduct and which was for a reason relating to his disability. The Claimant considers that this behaviour towards him had the purpose of creating an intimidating, degrading and

hostile environment within which he had to work. The Respondents were aware of these acts and failed to take reasonable steps to stop the harassment.

13. The Claimant raised a grievance against the Resp0ndents on 30 July 2010 in relation to issues with respect to adjustments due to his disability and further general difficulties. The Respondents failed to take any adequate steps before his dismissal in respect of the harassment. The Claimant does not consider that the Respondents adequately addressed his grievance. He raised a "Stage two" grievance which failed to adequately address his grievance. The Claimant considers that he has been treated adversely due to having to raise a grievance and as a consequence of enforcing his rights.

14. The Claimant considers that the following acts created such an environment:-

a. On 7 December 2009, the Claimant`s supervisor Mr McMillan advised the Claimant had he would require to work with chemicals. The Claimant again referred his supervisor to his disability and his condition. The Respondents and the supervisor were aware of the Claimant`s disability and that this was work related. Notwithstanding this, the Claimant then required to wait in the staff room for 2 hours until he was ultimately provided with other duties.

b. On 14 December 2009, the Claimant was required to work from one of the graffiti vans notwithstanding that he continued to suffer from his disability and ought to have

been restricted from working with chemicals or being placed in a situation where exposure or contact with chemicals or chemical residue was a possibility. The Claimant advised a supervisor, Ms Low, that he was unable to continue to work from the graffiti van.

c. *In a letter dated 4 February 2010, following from a meeting on 28 January 2010, John McMillan advised that the Respondents would continue to find alternative duties or employment within the company. He had also asked if the Claimant was making an effort to find employment elsewhere. This was unreasonable in light of the Respondents` duty to make reasonable adjustments and created a hostile environment.*

d. *On 11 December 2009, Ms Lowe reprimanded the Claimant for arriving at his workplace at 10am rather than 9am notwithstanding that he had received prior approval.*

e. *On, or around, 11 December 2009, the Claimant was accused of leaving his shift early at 12 noon rather than 3pm which was not the case.*

179. Further, we have referred to the respondents' grounds of resistance to the harassment and victimisation complaint, best summarised, we feel, at paragraph 24 of the respondents' additional information, provided to the Tribunal on 5 April 2012, a copy of which was produced to the Tribunal in the respondents' core bundle ***A*** at **Tab 7, pages 29 to 31.**

180. For present purposes, we focus on that paragraph 24, as reproduced at **Tab 7, at page 31**, as follows:

"24. It is denied that the claimant was victimised or harassed. Ms Lowe raised legitimate workplace issues with the claimant. Both Ms Lowe and Mr McMillan dealt with the claimant's absence appropriately in December 2009 / January 2010. In so far as the claimant seeks to rely on events from December 2009 – January 2010, his claim is out of time."

181. Finally, we have considered Mrs Greig's written closing submissions for the respondents, at pages 14 and 15, where she advanced the following points:-

"HARASSMENT

The Code gives examples at p50 – 51.

[We note here that, in her oral submissions to the Tribunal, Mrs Greig, the respondents' solicitor, referred us to the relevant part of the DRC Code, discussing **Section 3B(2) of the DDA**, as produced in her bundle of authorities, and identified by her as being paragraph **4.39** of the Code – "***What does the Act say about harassment ?***"]

The allegations of harassment appear on pages 12 – 13 of Tab 2. There is no evidence before the Tribunal that supports a finding of harassment. The Respondent's position is as follows:-

14(a) – John McMillan did not advise the Claimant that he would require to work with chemicals. Requiring the Claimant to wait in the staffroom while other duties were found is not "unwanted conduct" within the meaning of section 3B. In any event, John McMillan did not know at this time that the Claimant was "disabled".

14(b) – The Claimant's own evidence was that he was in the graffiti van of his own volition, having agreed to a colleague's request for a favour. He was not in the graffiti van as a result of conduct by his supervisor Pat Lowe.

14(c) – The letter at Tab 41 states " It was however recommended that you should seek employment elsewhere, in the event that we are unable to find redeployment/alternative duties and Mr Carlyle advised you that should you require any assistance in applying for positions then you can contact him." The evidence of Martin Carlyle should be accepted, that this statement was made in the context of there being a recruitment freeze at that time (December 2009/January 2010) and there being very few opportunities. Martin Carlyle's evidence should be accepted that the context was "don't miss out on an external opportunity". The letter also confirms that the Respondent was continuing to look for alternative duties or redeployment. This is supported by the continuing actions of Martin Carlyle, and the alternative duties identified in February 2010 with Jamie Callaghan (described in Tab 46).

14(d) and (e) – the evidence of Pat Lowe should be preferred. To the extent that the Claimant was asked about his whereabouts, this amounts to normal management of staff. Her actions were unrelated to the Claimant's disability. It does not meet the test set out in section 3B to amount to "harassment".

In any event the acts relied upon by the Claimant in his harassment claim took place more than 3 months prior to the presentation of his tribunal claim on 28 October 2010 (see Respondent's additional information, Tab 7, page 31,

paragraph 24). They are out of time. It would not be just and equitable to allow the claims late."

182. We turn now to address each of these competing points from both parties, and give our views. In doing so, we look to the evidence heard at the Final Hearing. In his evidence in chief, when asked about the harassment allegations at paragraph 12 of his further and better particulars of 11 November 2011, the claimant stated that the harassment by John McMillan was not the whole period from January 2007 until August 2010, but the period from mid/late October 2009 up to December 2009, and by Pat Lowe, it was in the few weeks prior to him going off sick in December 2009, when he alleged that she was not taking seriously his concerns about going out to work in the graffiti van, and allegations about him arriving late for work at Westergate, and leaving early.

183. During the first 2 weeks of December 2009, the claimant was still rostered to, and from, Blochairn depot, but he was allocated alternative duties at Westergate, where he was engaged, along with other staff, in a "***clear and dump job",*** as he described it to us, on the abandoned third floor of the Westergate offices premises of the respondents, which offices were being refurbished. The on-site Facilities Manger was not the claimant's boss, who remained John McMillan, supervisor at Blochairn.

184. Further, the claimant spoke in his evidence at this Tribunal of there being ***"a wee bit of a barrier"*** between himself and John McMillan, and "***raised voices, nothing more***", in November 2009, when the claimant asked why he had not yet been sent to Occupational Health, after he gave Mr McMillan a copy of his GP's letter, and he alleged that Mr McMillan told him that "***you'll end up losing your job."*** When he enquired why others were being sent to Occupational Health, the claimant stated that, at that time, Mr McMillan told him that his GP's letter was "***not good enough***", and that he needed a letter from the consultant dermatologist, which the claimant supplied to the respondents, as requested by Mr McMillan.

185. Having carefully considered this part of the case, we have decided that the acts relied upon by the claimant to found his complaint of disability related harassment by the respondents, contrary to **Sections 3B and 4 of the Disability Discrimination Act 1995,** as specified at paragraphs 14(a) to 14(e) of the further and better particulars for the claimant dated 11 November 2011, alleged to have taken place more than 3 months prior to the presentation of his Tribunal claim on 28 October 2010, those acts complained of by the claimant are out of time in terms of **paragraph 3 of Schedule 3 to the Disability Discrimination Act 1995**, and accordingly that part of the claim against the respondents is dismissed by the Tribunal as being time-barred, it not being just and equitable to allow those claims late. We refer, in this regard, to our discussion on the relevant law on time-bar in the preceding section of these Reasons addressing the reasonable adjustments head of claim.

186. Further, and in any event, even if those complaints of disability related harassment had not been dismissed by us as time-barred, we are satisfied that the respondents did not harass the claimant, contrary to **Sections 3B and 4 of the Disability Discrimination Act 1995,** and accordingly that part of his claim against the respondents would have been dismissed by the Tribunal in any event. We accept as well-founded Mrs Greig's submissions, on behalf of the respondents, that Mr McMillan and Ms Lowe were doing no more than their duty is appropriately managing and supervising the claimant in the course of his employment with the respondents, and their actions complained of do no constitute harassment of any sort.

Relevant Law: Victimisation

187. In considering this aspect of the claimant's case against the respondents, we have reminded ourselves of the relevant statutory provisions, as set forth in **Section 55 of the DDA**, as follows:-

55 – Victimisation

(1) For the purposes of [Part 2] … a person ("A") discriminates against another person ("B") if –

(a) he treats B less favourably than he treats or would treat other persons whose circumstances are the same as B's; and

(b) he does so ***for a reason*** *mentioned in Sub-Section (2).*

(2) The reasons are that –

(a) B has –

(i) brought proceedings against A or any other person under this Act; or

(ii) given evidence or information in connection with such proceedings brought by any person;

(iii) otherwise done anything under, or by reference to, this Act in relation to A or any other person; or

(iv) alleged that A, or any other person, has (whether or not the allegations so states) contravened this Act; or

(b) A believes or suspects that B has done, or intends to do, any of those things.

(3) Where B is a disabled person, or a person who has had a disability, the disability in question shall be disregarded in

comparing his circumstances with those of any other person for the purposes of Sub-Section (1)(a).

*(4) Sub-Section (1) does not apply to treatment of a person because of an allegation made by him if the allegation was false and not made in good faith. [**Emphasis added**.]*

Discussion and Disposal: Victimisation

188. Having considered the relevant law, we turn now to consider parties' competing submissions to the Tribunal. The claimant's further and better particulars, dated 11 November 2011, produced at **Tab 2, pages 6 to 13,** included reference to the word "***victimisation***" in the subject heading at the bottom of page 11, where it stated "***Harassment / Victimisation***", just immediately prior to paragraphs 12 to 14 on pages 12 and 13 of those further particulars for the claimant. We have reproduced those paragraphs 12 to 14 at paragraph 178 above of these Reasons, to which we refer back for the sake of brevity,

189. For present purposes, we also refer back to earlier in these Reasons, at paragraph 180 above, where we reproduced paragraph 24, from the respondents' additional information, provided to the Tribunal on 5 April 2012, as reproduced at **Tab 7, at page 31**, as follows: " ***"24. It is denied that the claimant was victimised or harassed."***

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190. Further, we have also considered Mrs Greig's written closing submissions for the respondents, at pages 15 and 16, where she advanced the following points:-

"VICTIMISATION

The Note following the Case Management Discussion on 31 January 2013 [Tab 12] records claims of both harassment and victimisation.

However in the Claimant's case as pled [Tabs 1, 2 and 4] the Claimant makes no distinction between the two. The word "victimisation" appears only once in the case as pled (as part of the heading at the bottom of page 11, Tab 2).

The Code gives examples at p47 – 48.

[We note here that, in her oral submissions to the Tribunal, Mrs Greig, the respondents' solicitor, referred us to the relevant part of the DRC Code, discussing **Section 55(1) & (2) of the DDA**, as produced in her bundle of authorities, and identified by her as being paragraph **4.33** of the Code – "***What does the Act say about victimisation ?***"]

The Respondent adopts the same factual response as above. In addition, there is no evidence that at this time (December 2009) John McMillan or Pat Lowe believed or suspected that the Claimant intended to "do anything" under or by reference to the DDA. Indeed the Claimant admitted that at this time (December 2009) he himself had not yet formed an intention to do anything under or by reference to the DDA."

191. We turn now to address each of these competing points from both parties, and give our views. Firstly, we have considered, as a preliminary point, whether there was any properly pled victimisation complaint before the Tribunal as part of the claim brought by the claimant against the respondents.

192. In his original ET1 claim form (**Tab 1, pages 1 to 5**), the claimant set forth his claim with simplicity and brevity. At section 5.1, he ticked that he was complaining of unfair dismissal, and discrimination on grounds of disability, and at section 5.2, in detailing the background and details of his claim, he stated that the respondents, amongst other things, had not followed proper procedures, or selectively followed procedures, and, for present purposes,

he stated ***"bullying & intimidation"***, citing "***7/12/09 attempt to force back into previous employment",*** and ***"12/05/10 threat to withdraw sick pay."*** (at **Tab1, page 3).** His further and better particulars dated 11 November 2011 provided further detail of his claim, in particular at paragraphs 12 to 14 (**Tab 2, pages 12 and 13**).

193. In the respondents' additional information, provided on 5 April 2012 (**Tab 7, page 31**), in response to the claimant's further and better particulars, they denied that the claimant had been victimised or harassed. At the Case Management Discussion, held before Employment Judge Iain Atack, on 31 January 2013, as per his copy written Note & Orders of the Tribunal, produced to this Tribunal, he noted (at paragraph 4 of his Note, at **Tab 14, pages 44 and 45**), how Mr Raymond Farrell, Glasgow City Council solicitor, then appearing for the respondents, had clarified the claims before the Judge Strain Tribunal as being four-fold, namely:

> ***"(1) A claim for unfair dismissal.***
>
> ***(2) A claim for failure to make reasonable adjustments under the Disability Discrimination Act 1995.***
>
> ***(3) A claim of victimisation under that Act.***
>
> ***(4) A claim of harassment under that Act."***

194. However, it is fair to note that nowhere in the claimant's pleadings, whether ET1 claim form, nor subsequent further and better particulars, is there any pled case of victimisation contrary to the **Disability Discrimination Act 1995**. The only use of the word "***victimisation***" is in the subject heading ""***Harassment/Victimisation***" used as the preamble to paragraphs 12 to 14 of his further and better particulars dated 11 November 2011.

195. As has been made clear by the Employment Appeal Tribunal, the ET1 claim form plays an important and integral part in Tribunal proceedings, as commented upon by Mr Justice Langstaff, sitting in the EAT, in **Chandhok v Tirkey [2015] IRLR 195.** Further, as it is also material to a proper understanding of the relevant law, it is necessary to quote directly from the learned EAT President's judgment, at paragraphs 16 to 18, as follows:

> "***16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.***
>
> ***17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties.***

However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the

> ***expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."***

196. This is an important point, and one which we feel is worthy of note. Further, it is trite to note that an Employment Tribunal can only determine issues of which notice was originally given in the ET1 or ET3, or included as a result of further procedure before the Tribunal, whether by it allowing further and better particulars of a claim or response, or a formal amendment allowed by the Tribunal following an application for leave to amend by a party: **Chapman v Simon [1994] IRLR 124,** a judgment of the Court of Appeal**,** and **Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/06,** an unreported judgment by Lady Smith in the EAT on 3 October 2007.

197. Having carefully considered parties' respective positions, we accept, as well-founded, Mrs Greig's closing submissions on behalf of the respondents. Insofar as the claim before the Tribunal may have included any complaint of victimisation of the claimant by the respondents, contrary to **Section 55 of the Disability Discrimination Act 1995**, that complaint is not well-founded, as the claimant has not pled any protected act in terms of **Section 55(2),** and accordingly that part of his claim against the respondents is dismissed by the Tribunal.

Respondents' application for Costs against the Claimant

198. In her written submissions for the respondents, Mrs Greig, at page 16, stated simply that: "***The Respondent reserves its position in relation to costs***."

Conscious of that reservation, at paragraph (8) of our Judgment, we have directed that any application by the respondents for the Tribunal to consider making an award of expenses against the claimant, in terms of **Rule 76 of the Employment Tribunals Rules of Procedure 2013,** should be made by written case management application, within 28 days of the date on which this Judgment is issued to parties, as per **Rule 77**.

199. We further direct that if any such application is made by the respondents, then they shall, when making their application, indicate whether or not they seek an Expenses Hearing, or they are content to proceed by way of written representations only, and we also direct that the claimant shall have the usual 7 days to intimate any objections or comments, by making written representations to the Tribunal in response to that application, and to request that an Expenses Hearing be assigned for the Tribunal to hear from both parties on any opposed application for expenses, and to have regard to the claimant's ability to pay, in terms of **Rule 84**, if the Tribunal were to decide, having heard from both parties, to make any award of expenses against him in favour of the respondents.

200. In the event that any such application for an award of expenses is made by the respondents, then, on receipt of the claimant's objections or comments, further procedure before the Tribunal will be decided by the Employment Judge, and intimated to both parties.

Closing Remarks

201. As we have dismissed the claimant's various complaints in their entirety, by this our unanimous Judgment, we do not, strictly speaking, need to go on and address the competing submissions advanced before us in respect of remedy, in the event that the claim, in whole or in part, was successful before the Tribunal.

202. However, the Tribunal feels obliged, given the terms of the claimant's Schedule of Loss, and the respondents' written comments thereon, as well as the evidence led before us, to make some closing remarks. Further, in her written submissions, Mrs Greig made specific submissions on the matter of remedy, in the event of the unfair dismissal complaint being upheld. In her oral submissions, she invited us to dismiss the claim in its entirety and, even if we found the claimant had been unfairly dismissed, she submitted that there should be zero compensation.

203. She spoke of a unique aspect of this case being "***a degree of surrealism***", where the claimant's written submissions, at the top of page 8, had referred to an "***injustice"*** being done to him by GCSS, where his written statement, that he had a desire to remain in their employment, was in "***direct contradiction to his evidence"*** to the Tribunal the previous week when he stated that he had decided not to come back to GCSS.

204. Her written submissions did not address remedy, in the event that the unlawful disability discrimination part of the claim were upheld, but she addressed that in her oral submissions, when invited to address the Tribunal on that *lacuna* in her written submissions. She did so simply by adopting her written submissions about mitigation of loss, and submitted that there should be no award for injury to feelings.

205. By way of further oral submissions on that point, Mrs Greig stated that, from the claimant's own evidence at this Final Hearing, it appeared to the respondents that the claimant has admitted that since February, or June 2010, he has been "***playing a game***" with the respondents, and his behaviours show that he has not suffered distress or injury to feelings, for either of failure to make reasonable adjustments, if proven, or harassment or victimisation, if established.

206. Indeed, she commented, his behaviours had been an "***enticement***" to the respondents to dismiss him, and in evidence he had admitted bringing

Mrs Dawkins along to a meeting to entice the respondents to deny him her representation, and he had also withheld information, and misled the respondents. In her submission, these are not actions of an individual who needs compensation for distress and injury to feelings on account of being discriminated against by the respondents.

207. She also referred us to the detail of the claimant's Schedule of Loss, and the Counter Schedule that she had lodged on behalf of the respondents, and stated that, even if unfair dismissal was found, and compensation awarded, there were statutory caps on compensation for unfair dismissal that the claimant had not taken into account.

208. When the claimant was asked questions by members of the Tribunal, at the close of his cross-examination on 9 August 2016, in reply to Mr Ross, he stated that he had been assessed as 5% disabled for life and, accordingly, he accepted that he was 95% fit for work. We accepted as well-founded Mrs Greig's' written submission that the claimant has failed to mitigate his loss, and this is evidenced by the fact that, other than a few shifts with Enable in 2011, the claimant has failed to secure any new paid employment, whether temporary or permanent, since his dismissal by the respondents in August 2010.

209. While we accept that the claimant entered into full-time education, no reason was provided to us in evidence from the claimant to show good cause why the claimant could not, as many students regularly do, seek to engage in some form of paid employment, as well as studying. While, in certain situations, a decision to enter into full-time education, and studying for a qualification, can be evidence of reasonable mitigation, we were not convinced, in the circumstances of the claimant's termination of employment, that his decision that he would not seek blue collar work was a reasonable decision.

210. Further, the claimant stated in his evidence before us that his caring responsibilities for his mother were arising from January 2016. He did not elaborate on what those caring duties are, or how they impacted on his ability to work. There was no specific evidence led before us to show that being his mother's carer impacted on the claimant's ability to take up work on his own account. While, in his evidence, he spoke of a lot of "**personal issues**" to deal with, which he stated prevented him from looking for new employment, he did not elaborate on whatever were those issues, or when they arose.

211. One of them was undoubtedly his attention to prosecuting this claim against the respondents, through the Employment Tribunal process, over many years, as also his civil litigation against the respondents, for damages for personal injury, but many claimants who bring Tribunal proceedings, even those who are fortunate to secure new employment, post dismissal by a former employer, are able to both work and earn a living, as also prosecute their claims before the Tribunal.

212. Further, the claimant sought an injury to feelings award against the respondents. However, no evidence was led by him before this Tribunal as to the nature and effect of any injury to feelings. Indeed, there was no real mention at all in his evidence to the Tribunal of anything about his feelings having been injured.

213. While we have dismissed his claims against the respondents, in their entirety, and so such an award does not fall for us to determine, again we consider it appropriate to state that an award for injury to feelings is not automatic, and evidence in support of any claimed injury to feelings requires to be led before the Tribunal by a claimant, and open to cross-examination by the respondents, and questions from the Tribunal.

214. In that regard, the Tribunal reminds itself of the judicial guidance provided by His Honour Judge David Richardson, in the Employment Appeal Tribunal, in

the unreported judgment of 23 May 2013 in **Esporta Health Clubs & Another v Roget [2013] UKEAT/0591/12**, where the ET in that case made an award for injury to feelings based on what was said in a closing submission without receiving any evidence on the question.

215. In allowing the employers' appeal, the EAT stated that the closing submission was no more than comment and argument and did not constitute material evidence, and that some material evidence of injury to feelings was required, so the matter was remitted back to the ET for evidence to be heard and the question of injury to feelings considered afresh. In the present case, no material evidence was led by the claimant during the course of the Final Hearing before us.

216. Further, we wish to note and record here that, even if the claimant had been successful in any part of his unlawful disability discrimination part of the claim, we would not have awarded him the £30,000 damages which he sought, assessed at highest **Vento** band. Put simply, no evidence has been led as to the nature and extent of any injury to his feelings. In the absence of any evidence we considered the claimant had failed to establish the nature and extent of any injury and, even if we had found in his favour, we would have decided to award no compensation under this heading.

217. Indeed there was no mention at all in the evidence of anything about the claimant's feelings having been injured. The only mention was in the closing submissions, when he confirmed he sought the various amounts detailed in his final, revised Schedule of Loss. No evidence from a relative, or a family friend, or any treating medical practitioner, was spoken to, or produced to us, as is regularly the case in other claims heard before the Tribunal where a claim for injured feelings is being actively pursued by a claimant.

218. In his Schedule of Loss, the claimant stated that he believed there is a causal link between his dismissal and his decision to take up studies, and he further stated that he believed there is a causal link between his dismissal

and failure to find and retain new employment. In our view, his beliefs in both respects are not well-founded.

219. So too, we state, is his further assertion in his Schedule of Loss that he should have been the subject of early retirement due to ill-health, similarly not well-founded. In his dismissal letter, from John Hynes, dated 30 July 2010, produced at **Tab 77, pages 159 and 160,** it was expressly stated that the claimant did not meet the criteria for retirement on the grounds of ill-health, in accordance with the **Local Government Pension Scheme (Scotland) Regulations**.

220. We had noted, from the respondents' Absence Management Policy, produced at **Tab 13, pages 48 to 52**, that as part of **section 6**, "***Lack of Capability Considerations"***, at **page 52**, reference is made, at **Note 1**, to the situation where a phased re-introduction to work is not viable, the only remaining alternatives are for management to consider premature retirement because of ill-health or terminate the contract on the grounds of lack of capability.

221. Mr Hynes decided to terminate the claimant's contract on the grounds of lack of capability, as confirmed in the agreed notes of the meeting held on 30 July 2010 (**Tab 76, pages 157 and 158**), and the letter of dismissal dated 30 July 2010 (**Tab 77, pages 159 and 160).**

222. While the claimant appealed against his termination of employment, decided upon by Mr Hynes, and that appeal was considered and rejected by the respondents' appeals panel, on 27 August 2010, the claimant did not make any appeal or complaint about his pension rights, although the letter of dismissal advised of his right to do so. He queried, at this Final Hearing, whether there had been, as Mr Hynes' letter dated 30 July 2010 expressly stated, consultation with the company's Occupational Health provider.

223. We noted that neither the Capita report of 1 December 2009 (**Tab 31, pages 81 to 83**), nor the subsequent BUPA report of 28 April 2010 (**Tab 50, pages 112 and 113**), make any express reference to the claimant being considered for early retirement on ill-health grounds. Indeed, the BUPA report (at **Tab 50, page 113**) anticipated that the claimant should be able to resume his duties within the next 2 to 3 weeks, if consideration could be accommodated to the Occupational Health recommendations that a meeting be arranged between management and him to discuss the possibility of a redeployment.

224. It is a matter of agreement between the parties that that BUPA report led to the subsequent absence management meeting with the claimant and Derek Brown, Service Manager, on 24 May 2010 (**Tab 52, pages 115 and 116**), and Robert Smith's letter to the claimant, on 11 June 2010, as per **Tab 56, pages 122 and 123.**

225. Given the claimant's evidence at this Final Hearing that he was going to resign from the respondents' employment, if he had not been dismissed through capability, the Tribunal does not consider that, even if we had been satisfied that the claimant was unfairly dismissed, that it would have been just and equitable in all the circumstances to have awarded him a compensatory award for unfair dismissal to the extent sought by him in his final, revised Schedule of Loss.

226. We considered it as significant that, in his evidence to us, at this Final Hearing, the claimant openly stated that (as we have already recorded above at paragraph 97 of these Reasons) he would have left GCSS's employment within a maximum of one year, but probably a lot sooner, even if he had returned to work, and, at paragraph 101 of these Reasons, his further statement to us that : "***The last thing I wanted was for the decision to dismiss me to be overturned."***

Employment Judge: Ian McPherson
Date of Judgment: 11 April 2017
Entered in register: 11 April 2017
And copied to parties