EMPLOYMENT TRIBUNALS

Claimant: Mr S Ward

Respondent: Department for Work and Pensions

HELD AT: Blackpool **ON:** 11 to 20 September 2017
5 to 9 February 2018

Manchester 14 & 15 March 2018
12 April 2018 (In Chambers)

BEFORE: Employment Judge Holmes
Ms B Hillon
Mr G Barker

REPRESENTATION:

Claimant: Mrs L Ward, Wife
Respondent: Ms H Trotter of Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1.Save as set out below , all the claimant's claims which pre-date 22 October 2014 were presented out of time, do not constitute conduct extending over a period of time for the purposes of s.123(3) of the Equality Act 2010 , and it would not be just and equitable to extend time for their presentation. Consequently, the claims made in allegations nos. 59, 60, 61, 62, 63 , and 68 are dismissed.

2.The claimant's claims in respect of the conduct of his managers , and the respondent as his employer , from 13 January 2014 do potentially constitute conduct extending over a period of time, so as to make his claims in respect thereof, presented to the Tribunal on 12 March 2015, in time. In the alternative, it would be just and equitable to extend time for the presentation of these claims.

3.The respondent has no vicarious liability for the acts or omissions of O H Assist, and hence the claimant's claims which relate to any acts or omissions of that organisation , namely allegations nos. 81, 95 and 97, in relation to their conduct are dismissed.

4.The respondent failed to make reasonable adjustments for the claimant by:

a) failing by 11 November 2014 to provide him with a suitable workplace chair;

b) failing to provide him with laptop to enable him to work from home when he was unable to continue at work due to back pain;

c) failing to grant him special leave in October 2014 when delivery of his workplace chair was delayed;

5.The claimant's remaining claims (i.e those heard by the Tribunal) of direct discrimination, discrimination by reason of something arising in consequence of a disability, harassment, failure to make reasonable adjustments and victimisation, are all dismissed.

6.The claimant is entitled to a remedy. The claimant shall by **17 December 2018** prepare and serve upon the respondent and the Tribunal an updated Schedule of Loss.

7. The respondent shall serve and file any counter schedule by **11 January** 2019.

8. The parties are to seek to agree remedy, or such elements thereof as can be, and, if a remedy hearing is required, either party shall by **18 January 2019** request that a remedy hearing be held, specifying the issues to be determined, an estimated length of hearing , and dates to avoid.

9. The claimant shall by **17 December 2018** inform the Tribunal in writing as to whether he wishes to pursue those claims pre – dating January 2014 which have not been heard by the Tribunal, and if not, to confirm that he withdraws them, whereupon , unless the claimant gives good reason why they should not be, they will be dismissed.

REASONS

1. The claimant was represented by his wife, Mrs Ward, and the respondent by Ms Trotter of counsel. By a claim form presented on 12 March 2015, the claimant brings claims of disability discrimination against the respondent, his former employer. The ambit of the claims as originally presented was very wide, and sought to include claims going back in the claimant's employment history to 1997. Employment Judge Holmes had case managed the claims, and by orders made at a preliminary hearing held on 26 August 2016 , it was ordered that the Tribunal hear the claimant's claims in respect of the period 13 January 2014 to the end of the claimant's employment , i.e the most recent claims, arising in relation to a period of his employment commencing January 2014, when he returned to work after a prolonged sickness absence, into a new role, and under new management.

2. The Tribunal accordingly has heard evidence relating solely (save to the extent that the same may have been background material) to those claims, which are numbers 59 to 101 (with some deletions on withdrawal) in the claimant's Scott

Schedule. Disability was conceded, in two forms, firstly, the claimant's fused hip, which is a congenital condition , causing him extreme pain and difficulty in sitting or standing for periods of time, and depression, from which the claimant began to suffer around at least 2013, and which is conceded also to amount to a disability from that date, and certainly as at the time to which these claims relate, from January 2014 onwards.

3. The hearing, arranged at a local Magistrates Court to accommodate the claimant's physical disability, commenced on 11 September 2017. Unfortunately, due partly to the claimant's need for breaks, and then the indisposition of his wife, his representative, the hearing could not be concluded, and had to be resumed part heard on 5 February 2018. The Tribunal concluded the evidence and the parties' submissions on 9 February 2018, save for a further, short, written submission received from Mrs Ward on 12 February 2018, and a further submission , setting out more fully the respondent's case in relation to the s.15 claims, from Ms Trotter on 13 February 2018. The Tribunal convened in Chambers to deliberate on 14 and 15 March 2018. The Tribunal could not conclude its deliberations then, and met again on 12 April 2018 to do so. This reserved judgment is now promulgated, with apologies for further delays occasioned by pressure of judicial business, and the absence of the Employment Judge on other judicial deployment, and due to family illness.

4. The claimant gave evidence. His wife, Lea Ward, made a witness statement, which was read, but she did not give live evidence. For the respondent Janette Barrett, David Clayton, Sarah Smith, James Pigott, and Adrian Williams gave live evidence. Wendy Wallis was a witness for the respondent, but she was unable to attend in person. Her witness statement was received in evidence, and written questions were put to her by the claimant. Those questions and her answers have been received as her evidence to the Tribunal. Additional written questions were put during the course of the hearing, specifically relating to a chair used by another member of staff, and Wendy Wallis' answers have been taken into account as well. There was a Bundle of documents running to 3 ring binders, divided into years .i.e., Bundle 1 – 2013, Bundle 2 – 2014 , and Bundle 3 – 2015 and onwards. References to Bundle pages in this judgment will accordingly be in the format of , for example, "[2013 :107]", with the Bundle year first, and the page numbering following. There is one further file, the Supplementary Bundle , which contains additional documents , and for which references to page numbers are in the format [SB : ** , and another, a Pleadings file, which will be referred to in the format [Pldgs: **] . It has to be observed that the Tribunal's task has not been made any easier by the manner in which the Bundles have been prepared. In relation to e-mails there are frequent repetitions, though not always of the complete document , deletions of material which is then relied upon elsewhere, and reverse "chains" of e-mails , all of which has made assembling the evidence into a chronological and coherent order much harder than it need have been. Further, the use of monochrome copies of documents where the originals are in colour , which is essential to differentiate between who has made what contribution to the document, in an e-mail sequence, as was intended by the authors, has further tended to obscure rather than illuminate the facts which the Tribunal has needed to find, and has led to the hearing taking longer than it need have done. Pages 188 to 192 of the 2014 file , an e-mail chain with various contributors, is a glaring example of such a document. There are other instances of e-mails where responsorial comments have been added, but without

any differentiating font or colour being used , leaving the tribunal to disentangle whose comments are whose, without any assistance from either party in terms of presentation to the tribunal, which have similarly added to the opacity of some of the documentary evidence. Finally, there are clearly gaps in the documentation, which the preparation of this judgment has highlighted, where neither side has included them in the bundle , or supplementary bundle. Fortunately nothing turns upon any missing documents.

5. Having heard and read the evidence , and considered the submissions of both parties, the Tribunal unanimously finds the following facts:

5.1 The claimant suffered an infection at birth, which resulted in the need for an operation in which his hip was fused. This has resulted, over time, in his hip being at an angle which causes him difficulty with his posture, resulting in severe back pain, and limitation of movement. The condition has worsened over time, and has been conceded by the respondent to amount to a disability at all material times.

5.2 Further, the claimant has for some time (from precisely when is unclear, but the respondent concedes disability in this regard too at the material times with which this judgment is concerned) suffered from depression.

5.3 The claimant was first employed by the respondent as an Administration Assistant from 1 July 1997, at the respondent's offices at Warbreck House, Warbreck Hill Road, Blackpool.

5.4 In 2013 the claimant was employed as a Complaints Resolution Officer. His line managers were Martin Freeman and Laura Porter. He had no managerial responsibility in this role. Since 2009 the claimant had been provided with a workplace chair, known as a "Pledge" chair, and had been using this for some 4 years at this stage. He suffered back pain and discomfort, with the result that he commenced a period of sick leave on 2 January 2013.

5.5 On 23 May 2013 Evelyn Bird of Atos Healthcare, whose qualifications are not apparent from any documentation, but is described as a occupational health adviser, carried out a workstation assessment, with the claimant present. Her report is at [2013: 84 to 86]. In relation to his work chair , she reported that he had a Pledge chair with a coccyx wedge, and additional lumbar support, which she recorded as meeting DSE regulations, and providing adequate postural support. She noted, however, that at the time of the assessment the claimant was unable to sit with his back fully supported by the back rest due to his symptoms.

5.6 Evelyn Bird made recommendations [2013: 87] for modifications which might have been of assistance to the claimant upon his return to work. They included raising the height of his desk, and allocation of an eye – level locker. She also made reference back to a previous report, dated 30 April 2013 from Anita McCabe, in which recommendations for a change of role, where the claimant would not need to be seated for lengthy periods of time, and a temporary rehabilitation plan , were made.

5.7 On this occasion Evelyn Bird took measurements of the claimant, and completed a form [2013 : 91 to 92] in which she stated that no replacement chair was required.

5.8 The claimant's absence continued, and was managed by his managers. The claimant was concerned that his absence, if prolonged, may lead to his dismissal. Further, the claimant was given an end of year report, around May 2013, in which he was rated as "must improve".

5.9 The claimant accordingly raised a grievance about this rating [2013: 101 to 106] , which was dealt with by Linda Kempster, based at the Operational Intelligence Division in Northampton.

5.10 On 24 June 2013 Janette Barrett took over as the claimant's line manager. She informed him of this by ringing him that day to introduce herself, and establish contact. The claimant was still off work at this juncture.

5.11 In a "keep in touch" telephone conversation on 19 July 2013 [2013:116] the claimant asked if he could be provided with a laptop for use at home. Jannette Barrett questioned why this would help, and the claimant explained how he could take time out to stretch and lie down when he was working at home, which would help him. She said she would raise it with her managers.

5.12 On 22 July 2013 Linda Kempster wrote to the claimant to inform him that she was upholding his grievance [2013: 117 to 118] , in that she considered that his "must improve" marking was wrong, as it was based solely upon the claimant being subject to a performance improvement plan during the operational year. This did not mean that the claimant would automatically be given an "achieved" rating, but that a full review would need to be carried out for the period up to 1 April 2012.

5.13 On 13 August 2013 the claimant was assessed by Dr Bollmann, consultant occupational physician. Her report is at [2013: 125 to 126]. She reported that the claimant was unfit to work in any capacity, and there were no workplace adjustments which would facilitate an early return to work. She advised that the workplace assessment by RAST (the respondent's Reasonable Adjustment Support Team) had found his workstation to be satisfactory, but as there was no workplace barrier to his return to work, what barriers were stopping his return needed to be ascertained.

5.14 On 28 August 2013 , following a referral by Janette Barrett, a further occupational health assessment was carried out. The resulting report is at [2013 ; 134 to 135 and 136 to 139]. This referral was triggered by the claimant suffering psychological symptoms arising from his perception of how he had been treated at work, and relationships with certain colleagues with whom he felt he could no longer work. The report noted that he was unlikely to be able to return to work for some two to three weeks, and would benefit from a stress risk assessment to address what management interventions would be likely to assist him.

5.15 Janette Barrett kept in contact with the claimant, and made home visits, when this was acceptable to the claimant, and telephone contact the rest of the time.

5.16 On 17 September 2013 the claimant (through his then partner, now wife, Lea Mathers) submitted a grievance [2013: 146 to 152] about Rachel Thorpe (and potentially Laura Porter, his previous line manager), gossiping about him with another member of staff.

5.17 Janette Barrett continued to manage the claimant's absence, and sent him some documentation on 2 October 2013 [2013:166] which included guidance on ill heath retirement.

5.18 The claimant also on 3 October 2013 raised a further grievance against Laura Porter and Lynda Newhouse, and in relation to how his sickness absence was being managed [2013 : 167 to 169]. Attendance review meetings were held.

5.19 This last grievance was again referred to Linda Kempster, and her outcome letter , curiously dated 30 September 2013 , is at [2013: 158 to 160]. She upheld that grievance, and advised the claimant that her findings were that the attendance management procedures had not been fully deployed, and how his managers would be instructed to start the process afresh.

5.20 In a meeting on 14 October 2013 with Jannette Barrett the claimant was told that dismissal was now a possibility, and his case could be referred to a decision maker after a further 28 days. The claimant was at that time awaiting an MRI scan. The claimant said that he would require a new chair on his return, and Jannette Barrett informed him that one had been delivered. There was discussion of ill – health retirement, under the "classic" pension scheme, but the claimant said that as he was only 36 this was not an option he wanted to take anyway [2013 : 18-186].

5.21 At some point (the documentation is unclear, but it appears to be 17 October 2013) the claimant's grievance against Laura Porter was not upheld, and he appealed this outcome by a form GA1, dated 31 October 2013 [2013:194 to 196].

5.22 In a further telephone discussion on 1 November 2013 the claimant explained to Jannette Barrett how he could not return to work in Room 110, due to issues with other workers in that room. The stress risk assessment was discussed, and as this related to the issues with co-workers, and not the physical work or job role, it was agreed this was not appropriate at this stage. The new chair was discussed, the claimant expressing surprise that the chair had not been measured against him. It was explained that whilst not "bespoke", the chair which had been delivered could be adapted to fit numerous people with back problems [2013: 188].

5.23 Meetings and telephone discussions continued , and a further referral to occupational health was made , with the claimant being assessed by telephone on 20 November 2013 [2013: 203 to 204, 205 to 208]. This report records that the claimant was off work with depression, due to perceived work

related issues , which he stated involved bullying, harassment and victimisation. The advice was that a return to work was not likely until the issues had been addressed (the claimant could not cope either with a customer facing role) , and it was noted that he needed microbreaks of 5 minutes in each hour.

5.24 During this period, Linda Kempster sought new roles for the claimant. The claimant and Janette Barrett discussed what equipment and furniture would be available to him if he returned to his pre-absence role in room A110.

5.25 The claimant's fit note expired on 18 December 2013. He planned to return to work on 13 January 2014, taking annual leave up until then. He wanted to return to work on reduced (36) hours. He also wished to avoid contact with colleagues he had previously worked with, and against whom he had raised grievances. The arrangements for his return to work were discussed in telephone calls/messages on 17 and 24 December 2013.

5.26 The claimant was referred again to occupational health, and was assessed by telephone on 3 January 2014. The resultant report is at [2014: 1 to 2, 3 to 6]. The condition which was considered at that time was the claimant's depression, which was now considered , and advised by occupational health, to amount to a disability. The advice was that he would be fit for a return to work on a phased arrangement starting on 4 hours per day. The report noted that the claimant was responding well to treatment for his depression, but warned of the risk of relapse in the future. No further physical adaptations or adjustments in relation to his back condition were identified.

5.27 During his sickness absence from January 2013, the claimant's entitlement to sick pay reduced to half pay. In considering the claimant's grievance, and its resolution, Linda Kempster considered that the respondent's attendance management procedures had not been followed, and the claimant had been disadvantaged by this. She therefore recommended that he receive a "consolatory award", to restore the claimant's pay to full pay for the period of his absence [2013: 182-183]. The Tribunal understands that this recommendation was accepted and such a payment was made.

5.28 The claimant returned to work on 13 January 2014. He was working in a different room from that where he had worked previously, and away from colleagues whom he did not want to see. He was provided with the same chair he had been using when his absence began.

5.29 Janette Barrett held a return to work meeting with the claimant on 16 January 2014. A note of that discussion is at [2014: 13 to 14]. In that discussion the claimant confirmed that his chair and workstation were suitable. A DSE assessment was to take place, for the claimant to identify any issues. There was discussion of the claimant's part time hours, and how his return was to be managed. Janette Barrett told him that a formal return to work meeting (under the Attendance Management Policy) would be held within a few days. She sent the claimant the notes of this discussion by e-mail at 12.28 on 16 January 2014 [2014 : 9] , inviting him to sign , date and return them to her if in agreement, or to amend them if she had missed anything. The claimant

signed and returned the notes electronically at 12.38 , signed, and without amendment [2014: 9].

5.30 Janette Barrett had a discussion with the claimant on 17 January 2014 about a possible role in the Management Information and Assurance Team (MIAT).

5.31 On 20 January 2014 the claimant received an e-mail from Laura Porter. It was not addressed to him, but to Gerry Reardon (her manager) in these terms:

"Morning good weekend?
Is Simon ward coming to work for you on your new team?"

The e-mail was sent at 8.40 a.m. that morning, and had been accidentally sent to the claimant. Laura Porter was a previous manager of the claimant, and there was an outstanding grievance relating to her that the claimant had raised.

5.32 The claimant was concerned to receive this e-mail, and raised it with Janette Barrett that morning, seeing her to discuss it. He was worried that Laura Porter was gossiping about him, and wanted to know why she had sent this e-mail. Janette Barrett then saw Laura Porter to ask her about it. Laura Porter gave her an explanation that she was concerned because of the investigation, and was worried that she and the claimant would be working in the same room. Janette Barrett then saw the claimant again to convey the results of her enquiries. She advised the claimant to consider mediation with Laura Porter. The claimant sent an e-mail to Janette Barrett [2014 : 19] to confirm their discussion at 13.29 that day . He expressed his concerns, and asked Janette Barrett why Laura Porter had not approached her, and was she upset because she had been caught out. Whilst Janette Barrett sent her notes of the discussion [2014 : 20] to Laura Porter, she did not do so to the claimant.

5.33 During the course of that day, 20 January 2014, Janette Barrett sent the claimant an e-mail at 12.16 to re-arrange the time for his formal attendance review meeting. He replied at 12.17 , saying he accepted , and with a "smiley face" symbol [2014 : 18].

5.34 The claimant's formal return to work meeting under the Attendance Management Policy was held on 22 January 2014 , the outcome of which was that no first written warning was administered because the claimant's absences had been for disability related conditions, and he was going through a period of assisted return to work, with a good expectation of improvement. His consideration point under the Policy would be extended to 12 days, and would be reviewed in 12 months. This outcome was communicated to the claimant in a letter of 23 January 2014 [2014 : 26 to 27].

5.35 On 30 January 2014 a formal offer (no letter is contained in the Bundle, but this is not disputed) was made to the claimant of a role in the Management Information and Assurance Team (MIAT) . The claimant accepted this on 3 February 2014 (again, undocumented). The claimant's start date in MIAT was set for 10 February 2014.

5.36 On 4 February 2014 the investigation into the claimant's grievance against Laura Porter was concluded, and not upheld. The report dated 4 February 2014 [2014 : 28 to 34] was sent to the claimant.

5.37 From 10 February 2014 Wendy Wallis was the claimant's line manager in the Internal Assurance Team , part of Debt Management . Wendy Wallis was in turn managed by Sarah Smith.

5.38 The role was a completely new one for the claimant, and involved management of staff, which had not previously been a requirement of any of his roles. He had some misgivings about this role, which he voiced, but accepted it anyway.

5.39 Wendy Wallis was provided with a set of HR papers relating to the claimant by Janette Barrett, but the majority were sealed as "in confidence", and she did not therefore read them, nor did Wendy Wallis. They were therefore at that time unaware of the details of the claimant's medical conditions, and that they had both been recognised by then as constituting disabilities. Sarah Smith assumed that the claimant's back condition was a disability, because of the provision of the chair , and that he had been off work with stress from his previous role, but was unaware of any specific mental health issues.

5.40 The claimant used the same chair that he had been using in his previous role, the "Pledge" chair, which had been supplied during his absence in 2013. The claimant did in February 2014 discuss the chair with Wendy Wallis, who advised that as it had been recommended by occupational health, it would be right for him.

5.41 By 12 February 2014 the claimant was experiencing severe back pain at work, and increased his dose of Tramadol to 8 per day to cope. He told Wendy Wallis this.

5.42 Whilst Wendy Wallis claims that she asked the claimant to have DSE assessments in this period, none were carried out.

5.43 Around April 2014 (the precise date is uncertain) the claimant was attending staff engagement session held by David Clayton, a Group 6 Manager. This was for junior staff in general, but after it had ended the claimant sought a private discussion with David Clayton. In this discussion the claimant made reference to his previous grievance in 2013 , its outcome, and the subsequent appeal (or further grievance), which had been considered by another manager. No mention was made of the claimant's disabilities, nor was David Clayton aware of them. The claimant asked David Clayton what he should do next. David Clayton told him that the policies and procedures provided for appeals against decision, and that once the claimant had been through the two stages , that was the end of the process. He had "had his say", and this was quite a common outcome, where the employee continues to disagree with the decision. David Clayton said that if he was in the claimant's shoes he would accept that and move on. He told the claimant that he had himself been in a similar position, and had decided not to waste any more time and

energy on the matter. His was a very general conversation, in which the claimant made no mention of bullying and harassment.

5.44 In April and May 2014 Alison Cunningham and David Clayton were carrying out an exercise to consider ways of improving the BRMIA's assurance work . This resulted in consultation taking place, and the preparation by Wendy Wallis of a draft Assurance proposal document in April 2014. In that document [SB: 33/36 and a later iteration is at SB:37/39] there was a proposal that there would be an increase in the headcount of BRMIA staff of 2 FTE administrative officer posts. This document was shared with (amongst others) the claimant by e-mail of 30 April 2014 [SB:30] .

5.45 In due course (precisely when is not clear, and is not documented), but around early July 2014 this proposal was implemented, and the claimant was assigned 3 additional members of staff, 2 FTE's , to manage. He made no complaint about this at the time.

5.46 The claimant was off work sick with back pain on 3 July 2014. His absence was for one day, and notified his absence by a telephone call to Sarah Smith , stating that he was immobilised by severe back pain. She recorded this on a checklist [2014:41]. By this time that claimant had no further entitlement to paid sick leave, and was so informed [2014:42]. The claimant completed a self –certificate sick leave form upon his return to work [2014:42].

5.47 Between February and 4 July 2014 the claimant took 6 days of annual leave, on 4 April , and between 7 and 11 April 2014.

5.48 Sarah Smith conducted a return to work discussion with the claimant on 4 July 2014. A note of that discussion is at [2014:49], and a further , brief, handwritten entry is made at [2014:44]. Both record how the claimant told Sarah Smith that his chair was "not quite right", and Sarah Smith recommended a DSE assessment. She also suggested that the claimant tried a chair used by a colleague, Paul (also "Andrew") Groves, to see if that was any better for him. In this meeting the claimant discussed the possibility of ill health retirement, as he considered that his back problems were likely to worsen. An OHS referral was made.

5.49 The claimant was then off work again on 7 July 2014. He again notified this by telephone, Wendy Wallis taking the call and completing the checklist [2014: 45]. The reason was again back pain.

5.50 The claimant returned to work on 8 July 2014, and completed a self certification form [2014:47]. He had a return to work meeting with Wendy Wallis [2014:48]. He was still in some discomfort, but was well enough to come in. The claimant mentioned how his GP had advised that there was little more that could be done, and that the claimant should consider medical retirement. Wendy Wallis said she would look into the procedure, and , if necessary, discuss the matter with the HR business partner. She also noted that an OHS assessment had been booked, and she discussed with the claimant that is may be helpful for him to discuss reasonable adjustments with

the OHS assessor in terms of breaks, and their frequency, his workstation and chair.

5.51 That same day the claimant completed the first part of a DSE assessment, in the form of a checklist [2014:50 & 51, and at 80 to 81] . In it, he answered the following questions thus:

"Is the chair suitable?	*NO*
Is the small of the back supported by the chairs backrest?	*NO*
Do you still have a problem?	*YES"*

5.52 Wendy Wallis , as the claimant's line manager , also completed a checklist , part of the same document , on 15 July 2014 [2014:82 to 85] . In it she too answered the above questions about the claimant's chair in the same way that the claimant had. This document was forwarded to Trillium , as the supplier of the claimant's existing chair.

5.53 On 9 July 2014 the claimant was assessed in a telephone interview by Louise Warner , occupational health adviser, of OH Assist. Her report and notes dated 9 July 2014 are at [2014: 53 to 60].

5.54 The notes make reference to the claimant's back condition, and also to his depression, in "past medical history", where it is noted that this was "5 or more years ago". There is also reference in the notes to the previous absence in 2013, and a telephone consultation on 20 November 2013 , in which the claimant's main reason for absence was stated to be work related stress and depression. There is no mention of depression at all in the report that was produced.

5.55 The opinion expressed in this OH report was that the claimant was currently fit for work, although he was experiencing "intense and unremitting back pain". The claimant was by this time taking 8 50mg tablets of Tramadol per day, a high level of strong medication. The claimant's back condition was acknowledged to be a disability.

5.56 The advice for the immediate future was to reduce the claimant's hours to 50% for 2 to 3 weeks, and to have his DSE repeated. The claimant, however, had expressed concern at the financial implications of reduced hours, and the advice was accordingly that he be allowed to work reduced hours, but supported financially. The author noted that the claimant may need a softer seat padded area, and this may best be arranged by having an additional assessment.

5.57 Wendy Wallis had asked whether there should be an adjustment to the trigger points under absence procedure, which was supported by the occupational health adviser, to the extent that the business could reasonably accommodate such a variation.

5.58 Having received the report, Wendy Wallis sought advice from Civil Service HR Casework as to whether reduced hours with financial support was permissible. The advice she received [2014: 52] was that this would be permissible as a "one - off", but could not be supported for longer, without financial consequences for the claimant. Advice was also given about ill health retirement, as Wendy Wallis had also asked about this.

5.59 On 10 July 2014, following some discussion between the claimant and Wendy Wallis, either that day, or the day before, there was an e-mail exchange between the claimant and Wendy Wallis, following the OH report. The claimant initiated this exchange by his e-mail at 09.33 [2014:66] that day, in which he said this:

"I know you were a little shocked by my absence last year but can I please explain that it wasn't all down to my back. I was treated really badly by management which in turn made me depressed. It got to the point where I refused to work with these people again. I was told I would have to wait for a placement. all this time went on my sick. This is one of the issues I had to battle and still am as nothing was done for me. I'm now at the stage of banging my head against the brick wall."

5.60 Wendy Wallis replied at 09.44 [2014:65] to explain that she was not shocked, but had been considering how she should frame her request for an extended trigger point for the claimant.

5.61 The claimant replied at 09.58 [2014:65] saying this:

"Sorry you did explain that to me and I did understand – memory is a mess at the mo – don't know what's up with me recently. Please ignore me :) ."

5.62 Wendy Wallis then sent the claimant an e-mail [2014:61/62] at 13.04 that day setting out the actions that were being taken following his return to work meetings and the OH report. These were set out in bullet points, and included increasing his consideration trigger point under the absence procedure, arranging a Trillium (the chair providers) assessment , within the next 20 working days, to "look at replacing" the claimant's current chair, giving the claimant an eye level Tabour unit, providing him with details of the ill health retirement scheme, and dealing with a lighting issue which had been raised.

5.63 In relation to reduced hours working, Wendy Wallis advised that she would agree to the claimant working for 50% of his hours from 14 July 2014, for a two week period, with details of the actual hours to be worked. This would, however, be a "one off" reasonable adjustment, and if the claimant wanted to extend this after the initial period, he would have to make an application , and his salary would be reduced in line with any reduction of his hours.

5.64 Wendy Wallis then , that afternoon, sought advice from her HR business partner, Sue Fairbrother , as to what the claimant's revised trigger point should be (a process referred to as "DCEP") , and it was agreed that a further 5 days would be added to the period of 8 days which would otherwise have

applied [2014:63 & 64]. It is unclear whether, and if so, when and how this was communicated to the claimant.

5.65 On 15 July 2014 the claimant sent Wendy Wallis an e-mail [2014: 68] in which he asked if it was possible to change his working hours from 10.00 to 14.00 to 09.00 to 13.00 for the two weeks of the period that had been agreed. He stated as the reason for the request:

".... because I am up and about waiting around at home to start for 10.00. I'm up stretching around 6 - 6:30ish each morning (believe it or not hahaha) because I just don't sleep well..."

5.66 Wendy Wallis replied by e-mail later the same day [2014: 68] to say that she would like to keep to the hours agreed, as this ensured a presence on the claimant's team both in the morning and the afternoon. She also said that it was in accordance with DWP guidelines, that part time hours should be in the middle of the working day. She suggested that the claimant used the time as an opportunity to lie down and rest his back.

5.67 The claimant replied [2014: 67] later that day, saying:

"That's fine and I appreciate what you are doing to help (I'm not trying to take the preverbial here) :)"

"preverbial" being a typo for "proverbial", and being a reference to the claimant not wanting to be seen to be "taking the Mickey", taking advantage , or something similar.

5.68 Wendy Wallis replied [2014:67] later the same day, telling the claimant that she would not imagine that he would ever do that, and saying that in her decision making she would always try to hit the best balance between supporting the individual, the team and the business.

5.69 The claimant did not further pursue this change of hours, nor did he complain of Wendy Wallis' s response to his request. The claimant worked the part time hours that had been proposed and agreed to for the period of the next two weeks.

5.70 On 25 July 2014 Wendy Wallis made a referral [2014: 69 to 72] to the Reasonable Adjustment Support Team ("RAST") for the claimant's needs to be assessed. RAST is a part of the respondent department, based in Sheffield. In that document, she said, in the box giving her reason for the referral, this:

"Si was born with a hip issue and over the years he has over compensated for this , leading to back pain issues. Si has previously been given a special chair by Trillium , however, this is now not helping his back complaint and OHS believe he now requires a medical [sic] qualified person to undertake an individual assessment of Si's needs and provide a special designed chair."

5.71 In her covering e-mail to RAST [2014:73] Wendy Wallis referred to the attached referral for the claimant, *"requesting an individual chair assessment by a medically qualified person."*

5.72 RAST, a part of the respondent , was not staffed by medically qualified personnel. The claimant's case was assigned to James ("Jamie") Pigott, who has no medical qualifications. RAST was (and is) effectively a procuring organisation, liaising between the respondent's management, its occupational health advisers, and suppliers of chairs and other equipment , such as Trillium.

5.73 The respondent's occupational health advice had previously been provided by Atos Healthcare, the trading name of Atos IT Services UK Limited, company no. 1245534. This company was, at all material times , an independent contractor to the respondent. By January 2014 the trading name of this company had changed to OH Assist.

5.74 Jamie Pigott arranged a workstation assessment for the claimant who, on 29 July 2014, provided his consent [2014: 76 to 79] to a further referral. Other than to provide the necessary basic information and necessary consents, the claimant provided no further specific information about his condition, or his existing chair, in that form.

5.75 The assessment arranged for the claimant was with Evelyn Bird, who had previously provided the report for Atos Healthcare of May 2013, but was now carrying out the same task for OH Assist.

5.76 The assessment was carried out by Evelyn Bird, with the claimant present, on 14 August 2014.

5.77 The claimant was not pleased to see that it was Evelyn Bird who was doing the assessment. He considered that she had been less than helpful when she did the previous assessment in May 2013.

5.78 In the course of the assessment the claimant considered that Evelyn Bird did not listen to him, and started the assessment by telling him that there was nothing she would be able to do for him. She made no enquiries about his condition, and how it may have changed since her last assessment, and did not make any suggestions, other than that he should manage his pain.

5.79 The claimant became upset during the assessment, and was seen shortly after it by Ann Harrison, another Manager in MIAT, who did not have any direct responsibility for the claimant, but who allowed him to go home. She was prompted by what she saw, and what the claimant said to her to write an e-mail to Wendy Wallis and Karen Stainton, copied to Sarah Smith, dated 14 August 2014, at 14.43 [2014: 100/101] in which she reported what she had seen and heard. In addition to relaying the claimant's comments upon the assessment, Ann Harrison added these comments of her own:

"Si had pinned his hopes on getting some advice to help him but was disappointed .. it seems OHS have been particularly useless and ineffective in

his case! Personally I find it unacceptable that there is nothing that can be done for him. Trillium have a small stock of specialist chairs that are suitable for most staff, but Si is probably be [sic] an exception to the rule with his underlying condition that creates his back problem. I think Si said the OHS report will also get copied to RAST so that may be an avenue to explore regarding having a custom built chair for him."

5.80 She continued:

"As he's not my member of staff I can't access the COSMOS application to be able to do much myself, however, I did suggest that whilst Si is at home this afternoon he makes a note of what he thinks will help him. This may be a custom built chair , a desk with a motor that allows it to be raised and lowered (standing for short periods sometimes helps him) or a laptop so that he can work from home when the pain gets really bad. If he's at work tomorrow (Friday) and has that list I'll forward it on to you to help with any discussions you may have with CCAS/OHS/RAST. We also discussed whether going part time may help him and this is something he has already thought about but will give some more thought to."

COSMOS was an internal system which managers could access to make occupational health or similar referrals.

5.81 There was no e-mail reply to that e-mail from Wendy Wallis, Karen Stainton or Sarah Smith. The claimant was not sent a copy of it. On 18 August 2014, however, Wendy Wallis did discuss its contents with Sarah Smith and Karen Stainton, in an e-mail [2014:100] , and asked them if they would support home working for the claimant, and a reduction in his working hours. Sarah Smith replied on 19 August 2014 [2014:99] that they should all three of them discuss the position the following day, and she was keen to hear how feasible her two colleagues thought it would be for the claimant to work from home or reduce his hours.

5.82 Wendy Wallis replied to that e-mail later on 19 August 2014 [2014: 99] saying this:

"A 3 way chat would be good and I guess we also need to be mindful of any decision we make may set a president [sic] *for others , but clearly the main point is supporting Si whilst maintaining business requirements."*

She went on to update Sarah Smith, as she had been asked to, on the ill health retirement position which had been discussed with the claimant. She said the claimant had said that he was not considering it, and she expressed unwillingness to *"push too hard*" in case the claimant felt that she was putting him under pressure to leave.

5.83 Evelyn Bird had completed a Chair Measurement Form [2014: 88 to 90], in which she set out the various measurements that she took of the claimant's anatomy during the assessment. On the second page of this document is a section headed thus:

"3.Is the Meridian Chair suitable (please tick):"

The ensuing boxes directed the person completing the form to complete section 4 of the form if the answer was "yes", and section 5 if it was "no". Evelyn Bird ticked neither box, but did go on to complete section 4, implying that she considered that the Meridian chair was suitable for the claimant , with one additional feature , a memory foam seat pad, which she stated would help provide seated comfort. She left the ensuing section 5, for use when the Meridian chair was not considered suitable, blank.

5.84 Adrian Williams , the Senior Executive Officer , Business Risk and Assurance, was also present in the office on the day of the assessment. He around this time had become the claimant's countersigning manager. He overheard parts of the assessment as it was being carried out. He formed the view that Evelyn Bird was not acting in a professional manner, and saw too the claimant's reaction to the assessment.

5.85 Evelyn Bird, in addition to this form , also provided a report , dated 14 August 2014, initially for Jamie Pigott, then copied to Wendy Wallis, which was also copied to the claimant. It is at [2014 : 93 to 96]. Ms Bird's qualifications are again not apparent from this report or any covering documentation, she describing herself as an occupational health adviser. In her report, she set out the claimant's history of current health problems, noting his long standing and constant lower back pain, with back spasm. His pain level was 8 out of a scale of 10. After going through a number of features of his workstation, on the second page she addressed the issue of the work chair, saying this:

"The chair in use, a Pledge, with additional lumbar support , meets the requirements of the DSE Regulations. The spine would be fully supported if an appropriate vertical seated position was to be adopted , but Mr Ward slouches whilst seated i.e. the spine is curved. Mr Ward tells me this is the only way he is able to be seated comfortably. The seat pan is reported to be uncomfortable and hard to sit upon. Mr Ward is seated and static for less than an hour at a time."

5.86 Evelyn Bird went on to discuss the need for the claimant to take breaks, 5 minutes in every hour, to stretch and change position, and how she had given general advice on good posture. In her recommendations for further action she said this:

"

- *Please replace the current chair with one that has a memory foam seat pan as this may help him find seated support. The chair order form is attached.*

- *A winged lumbar roll may help support the lower spine whilst Mr Ward continues to adopt a poor seated posture. Www.Posturite.co.uk has an example of such equipment."*

5.87 She considered that the claimant could continue working with the existing equipment until the new equipment was delivered. In her conclusions Evelyn

Bird went on to state that the provision of such equipment would not always eradicate all musculo – skeletal symptoms, but could aid symptom management. She considered that any further workstation assessments by OH Assist were unlikely to be of any benefit unless there was a change in the claimant's condition.

5.88 Jamie Pigott received the report of Evelyn Bird, and it was copied to Wendy Wallis and the claimant on 18 August 2014. In his covering e-mail Jamie Pigott explained to the claimant and Wendy Wallis what RAST could then do to implement the recommendations [2014: 97- 98].

5.89 The claimant, having received the full report of Evelyn Bird briefly e-mailed Wendy Wallis on 19 August 2014 [2014: 103] stating that he was not happy with what had been written. Wendy Wallis replied [2014 : 102/103] asking the claimant to clarify if he wished her to make a formal complaint about the occupational health report . He replied the following day , 20 August 2014 that he did want Wendy Wallis to make such a complaint, and she replied later that day that she would do so [2014 : 102].

5.90 The claimant and Wendy Wallis met on 20 or 21 August 2014 to discuss the occupational health report. The claimant made clear his dissatisfaction with it and the conduct and comments of Evelyn Bird.

5.91 By e-mail of 21 August 2014 [2014: 105] Wendy Wallis informed Jamie Pigott (copied to the claimant) of her meeting with the claimant , and his issues with the OH Assist report. She asked how the claimant could make a formal complaint . She informed Jamie Pigott that the claimant wished to pursue the option of supportive adaptations to his chair, i.e his existing chair. She continued:

"Should these adaptions [sic] *to his chair not offer the desired support, will you then be able to source a custom built chair based on the measurements taken by the OHS Assist visitor?"*

5.92 She went on inform Jamie Pigott of other adjustments she had agreed locally for 5 to 10 minute breaks , during which he could lie down on a bed located in the sick bay.

5.93 Jamie Pigott replied to Wendy Wallis on 22 August 2014 [2014: 107] . He expressed regret that the claimant was not happy with the way the assessment had been undertaken, and provided Wendy Wallis with a link to the OH Assist complaints procedure. This e-mail was copied to the claimant. He went on to say how he would ask Trillium if it was feasible to replace the seat on the claimant's current chair with a memory foam seat base, but if this was not so, he would ask them to supply the claimant with a Meridian chair with a memory foam seat pad. He was also to ask for a winged lumbar roll. He duly placed the order that day [2014: 110 to 112], initially omitting the winged lumbar roll, but adding this by further e-mail later that day.

5.94 On 21 August 2014 Wendy Wallis had asked the claimant, by way of reminder, for details of the part time working arrangements of one of his

team. The claimant replied on 22 August 2014 with the details required, and apologised for forgetting to provide these details , saying that he did not know what was wrong with him lately, and that he thought Tramadol may be playing a part [2014: 106].

5.95 Also on 22 August 2014 Sarah Smith raised, by e-mail, with Wendy Wallis how the claimant managed his back condition outside work. She asked if he had a special chair at home, or any other adjustments. She replied that it appeared (from previous chats, she did not specifically ask the claimant) that when in pain at home , or when travelling by car , he would lie down [2014: 113].

5.96 On 26 August 2014 Wendy Wallis e-mailed the claimant to ask if he needed any support with his complaint [2014 : 116]. The claimant's chair and support were being progressed by Trillium (also known as Cofely) and he was advised by e-mail of 27 August 2014 from Sharon Roby of RAST of a target delivery date of 7 October 2014 [2014 : 119/120].

5.97 On 28 August 2014 the claimant was suffering bad back pain at work, and at 13.19 he sent an e-mail to Wendy Wallis [SB:66/67] saying:

"Wendy

Really sorry but I am going to have to go – my back is causing me some serious pain today – hope this is ok?"

to which she replied:

"Want to support you as much as possible so happy for you to use your flexi accordingly , if that is what you're asking here or was you asking to go home sick?"

The claimant replied the following day:

"I just wanted to go home and thank you :) I know you have said in the past that there's no call time and I can use my flexi – I was just really letting you know yesterday and to check you didn't need me for anything."

5.98 On 2 September 2014 the claimant sent his complaint about OH Assist to Wendy Wallis [2014 : 121/122], asking her to forward it to OHS complaints on his behalf . In that complaint he said that Evelyn Bird had not wanted to listen to him, and had little or no understanding of how his disability affected his posture. He said that this had frustrated him , and had delayed the production of an appropriate chair for him. He expressed his anger at her suggestion that he "slouched" and did not sit properly, when his posture was affected by his fused hip and he could not sit up straight.

5.99 He went on to refer to the assessor's comments , made before the assessment started, that there was nothing that could be done for him. He went on to refer to how he knew of several other staff members with specialist chairs, and felt that he was being discriminated against by Evelyn Bird, as

others had been provided with such equipment. He remarked how all he had been offered was a memory foam base for his chair, and a lumbar support, which by then he had, and was not helping.

5.100 He referred to Evelyn Bird's previous assessment in 2013, and how that too had been unsatisfactory. He concluded by saying that he was no closer in September 2014 to getting an adequate chair, and was being forced to use an ill – fitting chair which was exacerbating his condition. He ended by asking to register an official complaint, and requesting an urgent new assessment to obtain an appropriate chair.

5.101 Wendy Wallis replied to the claimant's e-mail on at 17.03 on 2 September 2014 [2014:121] saying that she was happy to forward the complaint, but expressed that she could not see how the assessment had caused any delay on terms of the adjustments to the claimant's chair. She asked him to help her by explaining his rationale for this point. The claimant did not reply, and Wendy Wallis did forward the complaint to OH Assist.

5.102 At 16.25 on 3 September 2014 Wendy Wallis sent a further e-mail [2014:123] to Jamie Pigott, in which she pointed out that he had not responded to the specific question she had raised in her e-mail of 21 August 2014 (referred to in para. 5.84 above), as to whether he would be able to source a custom built chair in the event that the adaptations to the claimant's existing chair did not offer the desired support. She went on to say that the claimant had confirmed that the adaptations were exacerbating his condition, and it was important that she explored this point further. She ended this e-mail thus:

"The OHS assist took measurements in readiness should the adaptions [sic] *be unsuccessful. Si is keen to have a custom built chair, is this something you could help with or point me in the right direction?"*

5.103 At 17.03 on 3 September 2014 Wendy Wallis sent a further e-mail to Jamie Pigott [2014:126] in which she explained how she had attempted to raise the claimant's complaint to OHS over the telephone, but had encountered difficulties. The first was technical relating to the PDF format, but the second was OHS would only accept a complaint from Jamie Pigott, as the person who had commissioned the report. She therefore asked Jamie Pigott to raise the complaint on behalf of the claimant. Wendy Wallis, however, had been advised that she, as the claimant's line manager, could raise a complaint about the "behaviour" element of the complaint.

5.104 At 17.17 on 3 September 2014 Wendy Wallis sent an e-mail [2014:128] to the claimant in which she suggested that he remove the adaptation from his chair if it was exacerbating his condition. She also asked him what kind of chair he used at home, and whether he had made any adaptations to his chair or his car seat, her thinking being that , if he had made such adjustments, RAST/OHS could consider something similar.

5.105 At 08.19 on 4 September 2014 Wendy Wallis , in response to an e-mail from Jamie Pigott at 08.09, sent a further e-mail to him, incorporating the claimant's

complaint in full, and asking Jamie Pigott to forward the complaint to OHS on behalf of both herself and the claimant.

5.106 At 10.59 Jamie Pigott that day sent an e-mail to Wendy Wallis, copied to the claimant, setting out what he had ordered , in accordance with the assessor's recommendations. He explained how initially a decision would be made as to whether a seat base with memory foam could be added to the claimant's Pledge chair, and , if not, a Meridian chair with a foam seat pad would be provided.

5.107 At 11.15 on 4 September 2014 Jamie Pigott sent a further e-mail [2014:134] to Wendy Wallis in these terms:

"Thank you for sight of Si's complaint that I am happy to submit for you.

However, the final paragraph concerns me slightly.

Although I am happy to register an official complaint I think we should wait and see if the recommendations made improve Si's problem. If they don't then we can submit a re – referral. However, OH Assist will not arrange another referral until anything recommended has been trialled.

If Si wants me to submit without the final sentence asking for a re-referral than I am happy to do so. We have already got Cofely (Trillium) looking at the recommendations so we should be getting these to Si shortly."

5.108 Wendy Wallis replied to Jamie Pigott at 16.07 by e-mail the same day [2014: 134] in which she explained how the claimant had tried the foam cushion strapped to his chair, but had found it exacerbated his condition. Hence, she said , her asking whether they could proceed to order *"a specifically designed chair"* for the claimant. She ended by asking Jamie Pigott to forward the complaint *"in full"* , and for him to advise how long it would take to order a *"suitable chair".*

5.109 At 14.13 on 5 September 2014 Jamie Pigott replied to Wendy Wallis's e-mail by e-mail [2014:139] , saying he would now submit the claimant's complaint. He went on to say that there were two things she should bear in mind, the first was that if the claimant was finding the lumbar support uncomfortable , he should not use it. The second point he made was that he had , when ordering from Trillium, asked that if a different seat base could not be fitted to the claimant's current chair, could a new Meridian chair be supplied ? He asked Wendy Wallis whether she wanted him to cancel these orders. He went on to say that the Meridian chair was suitable for 95% of the population , so "should be suitable for" the claimant. He attached a document setting out the specification of the Meridian chair (this document has not, it seems, been downloaded and printed off in the Bundle). This e-mail was only sent to Wendy Wallis, and not copied to the claimant.

5.110 He went on to say that if the claimant did not want the Meridian chair ordering, then:

".. the only way we can obtain a new specialist chair is if one is recommended by an OH Assist assessor at a work station assessment. Then (sic) assessor then completes a chair measurement form and RAST send it off to Trillium to supply the chair.

The usual service level agreement for Trillium to supply a chair is 6 weeks from date of order. However, if as bespoke chair is needed this can take longer as chair may have to be built from scratch."

5.111 At 14.33 on 5 September 2014 Jamie Pigott forwarded the claimant's complaint to OH Assist by e-mail [2014:136/137] . It was in the form that the claimant had submitted it, with the final sentence, requesting an urgent new assessment to obtain an appropriate chair, still forming part of the complaint that was submitted. He went on to inform the claimant and Wendy Wallis of the acknowledgement he then received.

5.112 On 8 September 2014 at 10.00 Wendy Wallis sent an e-mail [2014 : 143] to the claimant informing him that his complaint had been submitted by the RAST team. She explained how this had not been as straightforward as she had hoped, and how she wanted to explain this in full to the claimant on his return (the claimant was on leave or off work) , and she also wished to ask his views on a few points relating to his chair adaptations.

5.113 Wendy Wallis spoke with the claimant on 9 September 2014 . In their discussion the claimant confirmed that he wished to proceed with a bespoke, made to measure chair. Wendy Wallis also asked the claimant how he managed his back pain at home, and he explained how he adapted his chair into a reclining or semi – reclining position, used memory foam seating, adjusted lumbar support, and adjusted all support settings, as a fixed setting made his condition worse.

5.114 This discussion, on 9 September 2014, between Wendy Wallis and the claimant covered other issues as well, in terms of actions for the claimant and his team.

5.115 Wendy Wallis sent the claimant an e-mail on 9 September 2014 at 16.17 [SB:71/72] in which she summarised their discussion. In this e-mail she asked the claimant for his suggestions as to how she could best support him going forward. She said she would ensure they had regular discussions to ensure that he had sufficient opportunities to highlight any concerns or support requirements.

5.116 Wendy Wallis went on in this e-mail to discuss , in bullet points, immediate actions for the claimant and his team, as follows:

"

- *Seating Plan updated on a rolling month basis until we are re – sited and every MOS on your team has a desk. The seating plan to be held in a central folder and location of the plan to be communicated to the whole team.*

- *Training Plan updated on a rolling month basis, until all new entrants no longer require a main training focal point.*
- *For you or your deputy to take responsibility of version/change control and communicate all changes across the team.*
- *Supportive of creative ideas/suggestions for improvements from across the team, but could I please be given the opportunity to be sited* (sic) *on the small changes and given the opportunity to consider/approve bigger changes i.e. methodology/staff related.*
- *Amend the On-ben methodology as per our discussion , prior to our planned team meeting this Thur. Thereafter , update as and when but also undertake 6 monthly deep dive reviews of the methodology . Communicate to the team where the On – ben methodology is located and also highlight within the methodology where the low process guide can be located (this will help the team).*
- *To add the summary procedural results and top 3 causes , to the monthly summary results.*
- *To review the error codes on a regular basis to ensure they support ROOT cause analysis, to help with the drafting of our quarterly report."*

5.117 Additionally Wendy Wallis referred to the need for the claimant to discuss performance standards with his team, and suggested that he add this to a meeting he was to have the following Thursday.

5.118 Wendy Wallis ended this e-mail with this:

"We discussed whether a stress risk assessment was appropriate and after sharing and discussing the process/guide, you are currently considering whether to undertake. I will leave it to you to advise me."

The claimant did not seek a stress risk assessment. Of the seven points discussed in the discussion and ensuing e-mail , the claimant accepted in cross – examination that they were largely management tasks that he could be expected to undertake, or were ways of doing tasks he was already carrying out, and were not totally new duties. Wendy Wallis stated that she was happy to discuss any of these points, but the claimant did not reply to this e-mail.

5.119 Wendy Wallis sent an e-mail to James Pigott at 17.29 later that day [2014: 144] in which she set out the discussion she had had with the claimant, and how he managed his pain at home. She confirmed that the claimant wished to proceed to the bespoke chair, and said that it would be good if James Pigott could include the information that she had provided to him with the measurements that would be made by the OH assessor.

5.120 On 9 September 2014 Christopher Nethercott, the OH Clinical Delivery Manager for OH Assist wrote to James Pigott [2014 : 145/146] in response to the claimant's complaint. He apologised for the fact that the claimant was unhappy with the service and the upset caused. He concluded that , as Evelyn Bird had taken all relevant medical issues into account, and

"appropriate advice" had been given , a further assessment did not appear necessary. He made the point that a replacement chair would never solve the symptoms that an employee was experiencing, and a chair not provide a "cure for pain". This communication was not sent to the claimant, but to James Pigott. From what later transpired (see [2015: 103 – 104]) whilst this complaint was closed by O H Assist on 8 October 2014, that was never formally communicated to the claimant. Jamie Pigott, however, around this time did relay to the claimant (probably by telephone) what Christopher Nethercott had said.

5.121 James Pigott's next communication with the claimant was by e-mail on 11 September 2014, at 13.02 [2014 : 153/154] . He explained how he had been in contact with Wendy Wallis regarding his chair requirements, and went on to explain the process for ordering chairs. After an explanation of the process, and the respective roles of RAST , the OH assessor, and Trillium, he said this:

"A meridian chair is a specialist chair that is often recommended by assessors and is over and above the normal chairs supplied by DWP and has been produced in conjunction with chair suppliers and health practitioners. It (sic) specifications mean that it is suitable for 98% of the population. The remaining 2% being those individuals who are over 6ft 7 inch tall, less than 4 ft 9 inch tall or weigh more than 23 stone. Individuals with progressive conditions such as curvature of the spine may also find the meridian chair unsuitable.

Looking at the chair measurements form provided by the OH Assist assessor your measurements are in line with those of a meridian chair.

Therefore at the moment we have told Trillium to:

Firstly see if it is possible to put a new seat base with memory foam on your current chair , and if that is not possible:

Order a meridian chair for you.

Do you want me to cancel the first part of the order and simply ask Trillium to provide you with a meridian chair with memory foam seat base?

Finally, it has to be remembered that a new chair will not cure pain nor stop pain. It will simply help you in the working environment."

5.122 On 12 September 2014 the claimant involved Adrian Williams in the issues with his OH Assist complaint, and his chair, and by two e-mails that day, at 14.43 [2014: 151] and 14.45 [2014: 153]) respectively . He copied Adrian Williams into his complaint and James Pigott's e-mail of 11 September 2014.

5.123 The same day the claimant sent an e-mail to Wendy Wallis [2014: 155] in which he sent her a copy of a flexi – sheet (part of the time recording system unitised by the respondent) which he had completed to reflect his working pattern, and amend his flexi – time position.

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5.124 On 15 September 2014 Wendy Wallis replied to the claimant about his flexi – sheet, which she wished to discuss with him [2014:155] . The same day the claimant asked Wendy Wallis if he could be granted Special Leave With Pay ("SLWP") to manage his back condition, as he was finding it hard to stay in work and manage full time hours. She referred this request to Sarah Smith and Adrian Williams by an e-mail at 14.15 that day [2014 : 156] . In her e-mail she set out the previous arrangement made in mid – July as a reasonable adjustment, and the CCAS advice at that time, which was that this should be a one - off. She pointed out the advice had been that there could only be a short term period of reduced hours without any effect on the claimant's pay, and that thereafter the claimant would have to apply for part time working with reduced salary. She had explained this to the claimant, and now sought her colleagues' views as to whether they agreed with her position. There is no recorded response from Wendy Wallis or Adrian Williams, but they did agree with Wendy Wallis' approach.

5.125 On 17 September 2014 Adrian Williams wrote to Jamie Pigott [2014:159] explaining that he had recently become the claimant's countersigning manager. He had observed the claimant at work , and had seen the pain that he was visibly suffering. He went through the options available to assist the claimant, as he understood them. He was aware that the Meridian chair may well be suitable for 95% of the population, but he did suggest that this may not be the best way forward for the claimant. He went on to say this:

"I and Si feel that the supply of a meridian chair is a step in the right direction and would appreciate this being progressed however we ultimately feel that a new work place assessment by another OH Assist Assessor is not only necessary but the right thing to do given the complaint by Si."

5.126 Adrian Williams went on to add that he had been present in the room when the claimant had his work place assessment, and how he too considered that it somewhat lacked professionalism. He therefore asked that a further work place assessment be sought at the earliest opportunity, which he assumed, would be without any further cost.

5.127 Jamie Pigott replied later that same day [2014: 158]. He said he was happy to continue with the order for the Meridian chair. In terms of obtaining a further assessment, however, he advised that Adrian Williams would have to pursue this directly with O H Assist, as the local site manager, in effect, taking up the complaint that the claimant had made. He also advised that if he submitted a further referral for an assessment , the respondent would be charged for it. In any event O H Assist may not even agree to carry one out. He suggested therefore that Adrian Williams may have more "clout" to achieve this.

5.128 On 19 September 2014 the claimant was in work, and by the afternoon was in great discomfort with his back. This was observed by Adrian Williams, who discussed with him whether he should go home. There was a discussion as to the effect that may have upon his flexi – time, and Adrian Williams allowed him to go home, and added a credit to his flexi – sheet. He reported this to Wendy Wallis by e-mail of the same day [2014: 160) , and suggested discussing the matter on his return, as he was then on leave for two weeks.

He remarked in this e-mail how it was not nice to see someone in such discomfort, and how there was a need to try to resolve the claimant's issues properly.

5.129 The same day as he so informed Wendy Wallis, Adrian Williams wrote to O H Assist, as suggested by Jamie Pigott. He did so by e-mail of 12.51 of 19 September 2014 [2014: 170/171] directed to O H Assist Complaints. In that e-mail he made reference to the claimant's complaint, and how he too had been present at the time of the assessment. He expressed his view that it lacked a certain amount of professionalism, and could have been carried out in a better way. He went on to "strongly request" another assessment at no cost. He said this was the fair and right thing to do, and he was not convinced that the assessment resulted in the correct recommendations. He therefore sought confirmation that a further assessment would be undertaken. In his absence Wendy Wallis would deal with the matter.

5.130 Wendy Wallis acknowledged Adrian Williams' e-mail (in his absence by then) on 22 September 2014 [2014: 160] , copied in to Sarah Smith, of whom she enquired if there was any immediate supportive action that she was required to take in relation to the claimant.

5.131 Before he started his leave, Adrian Williams had in an earlier e-mail on 19 September 2014 [2014: 162/163] to Wendy Wallis raised some key issues to be considered during his absence, one of which was the claimant's request for part time hours . He said that this should be discussed further between Wendy Wallis and Sarah Smith during his absence, and that Wendy Wallis will have seen Sarah Smith's response.

5.132 Wendy Wallis, however, had seen neither the claimant's application , nor Sarah Smith's response. Accordingly on 22 September 2014 she sent an e-mail to Sarah Smith [2014 : 162] in which she referred to the application and the response, and asked to see these. Further, she informed Sarah Smith (and the absent Adrian Williams) that the claimant had requested leave last Thursday morning, and that day (22 September) , which she agreed. On this occasion, however, he was seeking leave because he had hurt his hand whilst clearing out a drain, and she wondered how this should be recorded as she had already granted the leave before she knew this was the reason.

5.133 The claimant was , apart from this occasion, in work during this period, and was in contact with Wendy Wallis. As a result , by e-mail of 23 September 2014 [2014:164] she chased James Pigott as to when the claimant's new chair would be delivered. He replied on 24 September 2014 [2014:167] that the target date was 7 October 2014. This was communicated to the claimant by Sarah Smith on 24 September 2014 [2014 :165/166] and in this e-mail she mentioned the need for the claimant to take posture breaks. She commented to the claimant that it was easy sometimes to get wrapped up in what he was doing, and to forget to get up and stretch or move around. She ended by offering help, and saying : *"just shout ! Star jumps at 11 and 2 :)".*

5.134 The claimant replied 15 minutes later [2014:165] saying he did get wrapped up in his work, and did not get up as often as he should, but his back would not let him forget. His e-mail too ended with a “smiley face”.

5.135 Wendy Wallis joined this exchange at 15.57 that day [2014: 165], echoing the advice, and also ending with a “smiley face”.

5.136 In or around September 2014, Sarah Smith gave the claimant a task to complete in relation to co – ordinating and presenting the results from a team “temperature check”, some form of staff satisfaction assessment. The claimant did this task, but Sarah Smith was not totally satisfied with what he produced, and mentioned this feedback to Wendy Wallis, but not, at the time, to the claimant.

5.137 On or shortly before 1 October 2014 Wendy Wallis became aware that members of the team that the claimant managed were concerned that they had not yet had their Mid Year Discussion, a responsibility which the claimant had to carry out with his staff. She therefore sent him an e-mail on 1 October 2014 [2014: 169] raising this with him, and asking him to reassure her that the necessary arrangements were in hand.

5.138 On 2 October 2014 Tammy Barnes of O H Assist replied to Adrian Williams’ e-mail of 19 September 2014 in an e-mail [2014 : 170] in which she relayed the view of Christopher Nethercott, the Clinical Delivery Manager that from a clinical perspective another appointment for the claimant was not appropriate , because there were no clinical errors made (i.e by the previous assessor) and having another appointment would not change the outcome or recommendations that had been provided.

5.139 Also on 2 October 2014 (a Thursday) Wendy Wallis had a meeting with the claimant. This was not minuted , or recorded, nor is it expressly referred to in either the claimant’s witness statement , nor that of Wendy Wallis, so its contents have had to be gleaned from the ensuing e-mail correspondence between the participants on 6 and 8 October 2014 [2014: 188/192 ; 2014 192/194 and 2014: 196/197].

5.140 A number of points were discussed in this meeting. Firstly, the claimant’s recording of his flexi – time, which had been incorrect on a few occasions, or been presented late, was discussed. Secondly, the Mid Year Discussions for the members of the claimant’s team were discussed. Additionally, other aspects of the claimant’s performance, such as unread e-mails, were discussed, which Wendy Wallis stated would have led her to consider putting the claimant on a Performance Improvement Plan (PIP) had the claimant not provided her with reassurances. The continued potential for a PIP was discussed, with Wendy Wallis explaining what that would entail. There was also discussion (following previous discussions some two months previously) of a stress risk assessment being carried out. The claimant wished to progress this. Medical retirement was also discussed. In the meeting there was discussion of the claimant’s ability to meet the business needs, particularly in the light of his taking leave at short notice, or using flexi – time , to manage his pain.

5.141 In this meeting Wendy Wallis also raised with the claimant the feedback that Sarah Smith had given her about the claimant's completion of the task relating to the results of the "temperature check".

5.142 In his e-mail of 6 October 2014 to Wendy Wallis [2014:196/197] at 15.35 , referring back to the meeting on 2 October, the claimant accepted that his flexi hours were down. He expressed his distress at the suggestion that the time off he was taking was affecting his work, when he was waiting for a suitable chair, and had complained about O H Assist. He explained how the chair he was to receive that week was a standard chair which was given to 95% of employees, but that he fell into the 5% that it did not suit. He had waited a number of months for a chair he knew would not improve his working environment, and had made this clear. He had been made to wait for it, and questioned what would then happen after he had undergone a short trial. He asked if he would be then be eligible for Special Leave with Pay whilst a bespoke chair was made, which he had been told could be 4 to 6 months, during which time he could not simply sit and suffer as this was exacerbating his condition.

5.143 He also mentioned the stress risk assessment (referred to as the "ISRA") , which had been discussed previously, and which he wished to progress. Whilst he felt that he was too young to consider medical retirement, he felt it had to be considered and asked that Wendy Wallis investigate it and inform him if it was an option.

5.144 He picked up on a comment that Wendy Wallis had made about his not meeting the business needs, and that alternatives may have to be considered. He asked what these may be, and expressed how he found her comments threatening and distressing, causing him loss of sleep over the weekend. He ended by making reference to the allegation that he had failed to make arrangements for Mid Year reviews for his staff, and how he seemed to be blamed in his absence for anything that went wrong in his team. Whilst he did not mind Wendy Wallis checking on his performance, he found her language threatening .

5.145 Wendy Wallis then sent an e-mail to the claimant, copied to Sarah Smith , and Adrian Williams, at 18.47 on 6 October 2014. It was her summary of the matters discussed at the meeting. It covered , and expanded upon, topics discussed at the meeting, namely the claimant's use of , and recording of, flexi-time and annual leave, his sickness absences, the Mid Year discussions for his staff, his performance issues, the stress risk assessment, DSE assessments, and his chair.

5.146 Wendy Wallis said this [2014:193] in this e-mail:

"The above sums up any specific concerns I have in terms of flexi and annual leave.

As you know , I have always accommodated any requests that you have made for time off for AL and FL".

5.147 In relation to the stress risk assessment , she referred to previous conversations, and how she understood matters to have been left, with the onus being upon the claimant to get back to her, which he had not done. She now would progress the matter if the claimant could now confirm to her whether he wanted an alternative manager to undertake that assessment, and if so, from where.

5.148 In relation to the claimant's performance , she explained that a PIP was still a possibility, and what it entailed. She took into account, she said, the claimant's ill health issues, the business would support him as far as possible, but there was "delicate balance" between supporting the individual and the impact to the business.

5.149 Discussing the claimant's chair, Wendy Wallis said this:

"I'm curious as to how you know , prior to receiving or trialling the chair that's on order, that you are part of the 5% of the population that the chair would be unsuitable for?

5.150 In the body of this e-mail [2014:195], Wendy Wallis addressed Sarah Smith directly (she was copied into it), explaining that she had included the feedback that she had provided to her about the claimant's completion of the temperature check task in the discussion with him on 2 October 2014. She suggested that Sarah Smith may want to give the claimant her view, and have an opportunity to discuss the matter with him.

5.151 There was much activity on 7 October 2014. Wendy Wallis brought to the attention of Sarah Smith and Adrian Williams the comments that the claimant had made in respect of feeling threatened by her. Adrian Williams had accordingly agreed to be involved in any future discussions with the claimant . Wendy Wallis confirmed this in an e-mail to them both at 10.47 that morning [2014 : 172]. She suggested they have a three way discussion the next day, and that the advice of CCAS be sought when considering their action plan.

5.152 At 11.39 that day Sarah Smith sent an e-mail to Wendy Wallis and Adrian Williams, not copied to the claimant at the time [SB : 73/74], with the Subject "Staffing", though it clearly relates solely to the claimant

5.153 In it she said that she was looking to both her colleagues to continue to proactively manage the situation and take all appropriate steps at the correct time. She made observations that :

- The stress risk assessment should be undertaken as soon as possible;
- Documentation relating to performance, sickness and DSE assessments should be maintained;
- Contact should be made with the appropriate advisors to ensure there was no falling foul of HR processes or policies;

- Advice should be sought from RAST as the claimant dismissing the new chair , and whether there were guidelines as to what would be seen as reasonable or unreasonable;
- CCAS (Complex Cases Advisory Service) advice should be sought on the request for Special Leave and whether it was a reasonable adjustment, despite the equipment being supplied on OHS advice;
- Could there be a management consultation with O H Assist (a.k.a. ATOS) as to any further assessment being carried out;
- There was an element of one manager being played off against another and it was essential that the three of them were a united front , with no one being open to criticism for being unreasonable or less willing to do something than another manager;
- The use of the claimant's name should be avoided, and he should be referred to only as "MoS" (Member of Staff) . She was feeling uneasy as to where this may end up, and if a Subject Access Request were made she did not want any one of them to be open to criticism;
- Whilst it was necessary to manage the claimant, this was difficult for Wendy Wallis, as the claimant had suggested he felt threatened.

5.154 She ended this e-mail with this:

"I'm afraid that this does reinforce my earlier view that the MoS may not have done sufficient to justify an Achieved marking at their mid – year point regardless of whether a PIP is in place and I share the concerns that Wendy has voiced previously regarding sick – related issues deflecting attention from capability shortcomings. ***Adrian*** *– as CSM you need to be certain that the standards are applied robustly in all cases."*

5.155 The reference to the "Achieved" marking was in the claimant's mid – year review .

5.156 At 12.55 that day, Wendy Wallis sent an e-mail to Jamie Pigott [2014 : 174] informing him that the claimant had complained about the delay with his chair, which was due that day, but had not arrived by the time of her e-mail. She sought an explanation for the delay, and informed him that the claimant had sought special leave whilst his chair was delivered.

5.157 She went on to raise two further points. The first was that the claimant had told her that he was in the 5% of persons for whom the chair would not be suitable. She asked if there was any requirement that the claimant should trial a reasonable adjustment before dismissing its suitability, and was there any way, without trialling the chair, that he would be in the 5% of persons for whom it would not be suitable. Secondly, she asked if the claimant did dismiss the chair as unsuitable, was there then a requirement that a bespoke chair was commissioned.

5.158 Jamie Pigott responded by copying Wendy Wallis into an e-mail he had sent to the supplier (Cofely UK) [2014 : 177] chasing a delivery date. He then, in a further e-mail [2014 : 178/179] went on to reply to the points that Wendy Wallis had raised. He told her that the advice he had received from O H Assist

was that an individual should try a new chair for at least a month before rejecting it. He also said that there was no way the claimant would know the chair was not suitable until he trialled it and gave his body the opportunity to get used to the chair. It is unclear if this too was advice relayed from O H Assist, but Jamie Pigott himself has no medical qualifications. In relation to Special Leave , he told Wendy Wallis that before agreeing to this she would have to contact CS HR Framework colleagues. He went on to say that the respondent could only order chairs as specified by an OH practitioner. In this case the practitioner had recommended a chair with a memory foam seat pad, and had not said that a Meridian chair would not be suitable. Therefore no other chair would be provided without a further assessment. He went on to say this:

"If the chair does prove suitable after a trial we can try and arrange a further workstation assessment to see if a different type of chair is recommended or we/you can order an Occupational Therapist (OT) assessment which is the next step up and whatever they recommend will be final. It may even be a meridian chair."

5.159 The rather crucial word "not" (or "un" before the word "suitable") has clearly been omitted after the first four words of this paragraph. He went on the say how the cost to the local budget would be £392.07, and that O H Assist had very strict criteria for agreement to an OT assessment, and a request form would have to be completed.

5.160 Wendy Wallis acknowledged this and thanked Jamie Pigott for his advice.

5.161 Wendy Wallis then sought advice on the claimant's application for Special Leave from the Civil Service HR Casework service, speaking to a "Julie" at 13.30 that day. She summarised what she had been told in an e-mail to Sarah Smith and Adrian Williams that day [2014: 176] as follows:

".. Julie spoke to HR case worker and advised me of the following:

- *We should enquire with RAST as to whether they are prepared to review the suitability of the chair that's on order;*
- *There is no more as a manager that we can do , other than the above question;*
- *They would not advise giving special leave with pay while awaiting a suitable chair;*
- *After all, there is no "magic chair" that will resolve his back condition;*
- *It is reasonable to expect the individual to manager* [sic] *their back condition as best they can"*

5.162 She discussed with her colleagues in this e-mail how to proceed, and they would need to discuss the options further. The claimant was not copied into this e-mail.

5.163 Later that day Cofely advised Jamie Pigott of the reasons for the delay (which were that there had been an initial request for two things, and a site visit was necessary) , which he passed on to Wendy Wallis.

5.164 At 15.45 on 7 October 2014 a caseworker from the Civil Service HR Casework team sent an e-mail to Wendy Wallis summarising the discussion and confirming the advice given [2014 : 182] . This was confined to the issue of Special Leave, the understanding of the caseworker being that *"OH advice states that the officer would be able to manage with his existing chair for the interim period and this is a reasonable expectation".* The advice therefore was that Special Leave pending delivery of the chair would not be supported.

5.165 On 8 October 2014 Wendy Wallis sent a further e-mail to Adrian Williams and Sarah Smith [2014 : 183]. She expressed her disappointment at the position with the delivery date for the chair, and expressed her concerns at how this was likely to make the claimant feel. She explained how she wanted to manage his expectations, and to outline how obtaining a bespoke chair may not be in their (i.e. management's) gift , and would ultimately be the call of OHS (i.,e O H Assist). She quoted , with correction , from Jamie Pigott's e-mail of 7 October 2014 his advice as to what would be needed if the chair were to prove unsuitable, and asked Sarah Smith if she would approve the further cost of £392.07 if they went down the line of requesting a further assessment.

5.166 Wendy Wallis continued to press Jamie Pigott for an update on when the chair would be delivered, and he in turn pressed the supplier.

5.167 On what seems likely to have been the morning of 8 October 2014 Wendy Wallis held a meeting with the claimant , and Adrian Williams. It was described as a performance review. Again no notes appear to have been taken, and what occurred has had to be gleaned largely from the parties' subsequent accounts in e-mails after the event.

5.168 In this meeting the claimant was told that his chair had not arrived, and it was not known when it would be delivered. The claimant was told he would not be granted Special Leave with Pay . The stress risk assessment was discussed, and Adrian Williams was to take that forward. His performance was reviewed, and it was identified that there were areas where he needed coaching, and again there was discussion of the possibility of a PIP if there was insufficient improvement. The claimant had expressed concern at what he saw as threats, and asked that he have a representative or a colleague with him in any future meetings. The claimant also asked if he could move to another post, at EO (Executive Officer) level , but with no staff, and the chance to work at home. The claimant became upset , and the meeting was terminated.

5.169 Later that day, the claimant sent an e-mail to Wendy Wallis, replying to her e-mail of 6 October 2014 , which he copied in the text of his e-mail, and to which he added his comments in blue (not reproduced in colour in the Bundle, pages 2014 : 188 /192, and replicated , in part, at 2014 : 192/196) .

5.170 He asked Wendy Wallis to choose her words carefully, as he had found them not supportive and he had been left feeling stressed and pressurised. He referred to how he had thrown himself into his role, which involved managing three members of staff, which had been increased by a further three which he discovered via a group e-mail.

5.171 The claimant's specific comments then were firstly in relation to the flexi – time issues, and his explanations for any errors that may have been made, or that in some instances there were in fact no errors. He mentioned that he had been working through lunchbreaks.

5.172 He responded further to the Mid Year review issue, and in relation to the stress risk assessment he said that this must have been a misunderstanding, as he had been happy for Wendy Wallis to undertake it. He suggested action points be drafted in future. He noted that it had been agreed that morning that Adrian Williams would take the stress risk assessment forward.

5.173 He went on to ask if medical retirement was his only option.

5.174 At some point (it is impossible to tell from the documents, and Wendy Wallis was not called to be asked) Wendy Wallis sent a further e-mail to the claimant, probably on 6 or 7 October 2014. Her e-mail , in its original form is at 2014 : 195/196. The claimant's comments upon it are at pages 2014 : 191/192, but not in colour. The font he uses is slightly smaller than that in the body of the e-mail. His comments appear to have been added on 8 October 2014. This is a significant document, and it is therefore necessary to refer extensively to it.

5.175 Wendy Wallis's e-mail starts with *"Si, I have and I will continue to support you, but I do need to address performance issues."* She explained how she had tried to be supportive, but the claimant's response was that the wording and approach she had used meant he did not feel confident in approaching her for guidance and support, as he felt he was under the microscope, and she was simply waiting for him to trip up.

5.176 In her e-mail Wendy Wallis had said that if the claimant was not fit to attend work he should take sick leave, and not attend work. Only he knew when he was or was not fit to attend work. She referred to asking Sarah Smith to agree a DCEP and to ring fence previous sickness absence. The claimant sought clarification of what this meant.

5.177 In Wendy Wallis's e-mail she went through the steps she had taken since the claimant joined her team to get him a DSE assessment, resulting in the current adaptation of his existing chair, with new chair due by close of play on 7 October 2014, which she would chase up if it did not arrive.

5.178 The claimant, writing on 8 October, commented upon the failure of the delivery of the chair on 7 October, with no alternative date provided. He said he was "speechless". He recited a history of his working, suffering in silence, through pain and discomfort , which was affecting his work and home life. He said he was taking the maximum does of Tramadol, which was affecting his

memory and concentration , his dosage having quadrupled since he transferred into the team. He attributed this to the lack of adequate equipment. He made reference to his condition being supported by the "Disability Discrimination Act".

5.179 In reply to Wendy Wallis' comment [2014:195] that she was *"curious as to how"* the claimant knew, prior to receiving or trialling the chair that he was part of the 5% of the population that the chair would be unsuitable for, the claimant's said this [2014:192]:

"You are curious to know ? I am deeply offended by the words in this question. In order to satisfy your curiosity , I know that the new chair will not be suitable as it is the same as the one I am currently using (does the same things but looks different) except it has a memory foam base. This is not going to resolve the issue as it does not allow the movement I require and is the same as Ann's chair which I test drove in her absence. The bespoke chair I require is the same as Paul's. In my first email I have asked about where I stand regarding conditions for SLWP and this morning you told me that I would not be entitled to SLWP because I am able to get into work. Please can you provide guidance as to the eligibility criteria. Now that my chair has been delayed is that still the case?

5.180 Wendy Wallis in her e-mail had set out the position in relation to working from home, as follows:

"In terms of working from home, as I have said previously, the role you undertake is very much about managing people and if you are not in the office this would fall to others to manage. Therefore , this option would not benefit the business or business delivery. However, if you would like me to enquire whether you could be found an alternative role in the business that would accommodate such a working arrangement I would be happy to contact the HRBP and engage their support to do so, just need to drop me an email to confirm your request?

5.181 The claimant replied [192:2014] thus:

"I have not asked to Work from Home [sic]*, I have asked to work on a laptop which would allow me some flexibility i.e I could work from home on occasion or leave early and work at home. This request was denied without reasonable consideration. I would appreciate it if you could make enquiries as to whether there is an EO position with no management responsibilities."*

5.182 The exchange ended with the claimant agreeing that future meetings should have another manager present, but he also went on to say that he would appreciate notice of future meetings in order to arrange "representation".

5.183 Wendy Wallis sought further advice from Civil Service HR Casework on 8 October 2018. The summary of the issues she raised, and the advice she received is at pages 2014 : 198/199 of the Bundle.

5.184 The advice as to whether the claimant could have representation at future meetings was that he could not, in accordance with the relevant policies and procedures. Wendy Wallis also discussed the issue of a move of post for the claimant , and the advice she received was to refer her to the policy on Equality Act moves. The advice was that it was not possible to create a job for the claimant, but Wendy Wallis should contact her HRBP and ask if there were any jobs available. The advice continued, however, if the employee's disability did not have an impact on his ability to complete his current job, such a move would not be considered.

5.185 By e-mail at 17.35 on 8 October 2014, Wendy Wallis informed the claimant of the advice she had received from CCAS about his right to be represented at any future meetings. She suggested that Adrian Williams be present in future. She went on to explain how she was keeping in contact with RAST, and encouraged the claimant, in the meantime, to take breaks, do his exercises, and lie down in the sick room. She asked him also to clarify what he meant by his request for an EO role with no management responsibilities, whether he was looking for a role where he could work from home, and what locations or business areas would not be suitable for him.

5.186 Wendy Wallis had been chasing Jamie Pigott for a delivery date for the claimant's chair. He informed her on 8 October 2014 that he was still awaiting an update, but clearly it was not going to be the proposed date. Wendy Wallis informed the claimant by e-mail at 09.11 on 9 October 2014 [2014:200] of the delay. In this e-mail she went on to say how the management team would continue to support the claimant , whilst he was awaiting his chair, with an increased level of comfort breaks , to continue to support him to undertake his physiotherapy exercises, and to make the best use of the sick bay. She said she was happy to discuss these issues further.

5.187 The claimant's next e-mail to Wendy Wallis was at 12.45 on 9 October 2014 [2014 : 203]. He said he had no objections to Adrian Williams attending their next meeting. He went on to say this about the possible move to another EO post:

" ..... I agreed to you looking for another vacancy because of the laptop issue and the fact that you informed me that due to me having staff I would not be able to have a laptop. The laptop suggestion was in case I had to leave early due to pain and so that that time would not eat into my flexi – likewise with taking AL. I'm using leave to cope with my back and not using it for what it is there for – time off. So answering your question – Please can you enquire about EO jobs not managing staff with the option of working from home if needed."

5.188 Wendy Wallis replied at 13.44 that day [2014: 202] pointing out that he had not said anything about location or business areas in his e-mail. She went on also to say this:

"If you are unfit to attend work then you are unfit to attend work and sick leave would be appropriate. No one expects any member of staff to use their flexi or annual leave to cover sick absences. The judgement call as to whether to

seek sick leave , annual leave or flexi leave is absolutely down to the individual. A manager can not dictate to a member of staff how to use their leave , only consider whether they can support the request for leave."

5.189 The claimant replied at 13.58 [2014 : 202] saying that Warbreck House was the only location he could manage as travel caused him great discomfort and pain. In relation to leave , he explained how he needed to use annual leave as his sick pay was now exhausted because of the length of time he was off work the previous year. He ended:

"You have been most accommodating for me with regards to leave and it is and was much appreciated however, I am using my leave for a purpose it is not there for."

5.190 That afternoon Wendy Wallis again chased RAST for news on the delivery of the claimant's chair. She was told that it was to be delivered at the latest on 20 October 2014. She communicated this to the claimant at 16.06 that day [2014:206].

5.191 Wendy Wallis sought advice from Sue Fairbrother, of HR, about the process in an e-mail at 15.43 that day [2014:205]. In that e-mail she explained the reasons why the claimant could not work from home in his current role, because of the need for him to support his team, and the risk of imbalance if he was not required to be in the office to carry out his role. She enquired about an equality move, and sought further information about such a move, having failed to find any specific guidance under that term in the respondent's published policies and procedures. She therefore was seeking guidance and advice as to the next steps.

5.192 Sue Fairbrother's reply at 16.49 [2014 : 211] informed Wendy Wallis that the relevant guidance was under review at the time, but she said that the first requirement was for the employee to compete a CV so it could be passed on to Strategic Resourcing and the HR BP team in the locations specified by the employee. She pointed out that as the claimant had only specified Warbreck House, this would be rather limited, and that his CV would only be considered if a vacancy arose, and alongside any other Equality Act moves. She advised Wendy Wallis to manage the claimant's expectations, as a move may not happen immediately and could take some significant time.

5.193 Wendy Wallis forwarded this e-mail to the claimant at 16.55 that day [2014 : 211] , and asked him to complete his CV for her to forward on. She also advised that it may be in the claimant's interest to register on Civil Service Jobs.

5.194 Wendy Wallis also on 9 October 2014 made an approach to Doug Williams, the Debt Accounting and Finance Strand Manager to see if there was any vacancy into which the claimant could be moved as an equality move. He replied , very swiftly, to the effect he had no such vacancy, and had just filled one. She copied this to Sue Fairbrother [2014 : 208/209]. She also informed the claimant of the results of this enquiry [2014: 210].

5.195 The claimant's chair was finally delivered on 20 October 2014. The claimant trialled it for half a day ,that day, and found that it caused him more discomfort. He ceased to use it, and reverted to his previous chair.

5.196 The claimant met with Wendy Wallis and Adrian Williams on 21 October 2014. They discussed the issues, and Wendy Wallis produced an e-mail after the meeting in which she set out the actions that were agreed in that meeting [2014:213]. They were that:

Adrian Williams would discuss further with Sarah Smith the option of homeworking

Adrian Williams would discuss with Sarah Smith the option of further funding for a further O H Assist assessment

The claimant would complete his CV

The claimant would consider the option of applying for a part time contract

The claimant would consider the option of applying for Ill Health Retirement

The claimant would watch out for a possible voluntary severance opportunity in November

Adrian Williams would conduct a stress risk assessment

5.197 In the course of that discussion the claimant explained how he had tried the new chair, but had found it increased his discomfort. He was advised, however, to continue to trial it for a month. The claimant also raised the issue of why he had been refused SLWP.

5.198 The claimant replied to Wendy Wallis' e-mail thanking her for the meeting and her e-mail, adding a request for written confirmation of why the request for special leave was refused.

5.199 On 30 October 2014 Wendy Wallis made a further enquiry of CS HR Casework, asking for advice in relation to the claimant's trial of his chair , which he had found to be unsuitable. The advice she received is summarised at page [2014:215] . Wendy Wallis is recorded as having told the HR adviser that she (Wendy) had been advised that the chair would be suitable for 99% of the population, and may be uncomfortable for about a month, but that it should be discontinued is the chair aggravated the symptoms. The claimant had said that it was worsening his condition.

5.200 The advice was that rather than risk a claim if the claimant was dismissed for absence , when his complaints about the chair had been ignored, the alternative was a new O H consultation. The observation was made that this could result in there being a recommendation for the same chair again, but this would put the employer in a stronger position.

5.201 In relation to SLWP , the advice was that this was a local decision, but it would normally only be appropriate where a staff member *"can not possibly do their job without the specialist equipment"*. As , however, Wendy Wallis had made what were described as "special arrangements" for the claimant whilst he had been awaiting his chair, these could be reasonably continued for the time being.

5.202 On 30 October 2014 Wendy Wallis , Sarah Smith and Adrian Wallis met. It was agreed that the respondent would fund a further O H assessment.

5.203 In reply to an enquiry by Jamie Pigott as to how the trial of the chair was going, Wendy Wallis e-mailed him to inform him of the claimant's findings after trialling the chair for half a day [2014:216] . This is the only record of the discussion that three managers held, and of the decision to fund a further assessment . She went on to say that she had been advised that one outcome of the assessment may be that the same chair was recommended, but it was felt that there was value in exploring this option, although there were no guarantees that the assessment would result in any other option than the one that had already been trialled.

5.204 That e-mail was copied to the claimant, who thereby learned that a further assessment would be funded, but also that it may lead to the same recommendation.

5.205 Wendy Wallis then went on a month's leave , and was therefore absent for November 2014. She asked Adrian Williams to progress matters, and report upon progress of the next O H assessment.

5.206 As Wendy Wallis left she sent the claimant an e-mail [2014:221] on 31 October 2014, enclosing his draft mid – year report. This required him to populate certain sections, which she asked him to do , so as to be awaiting her on return.

5.207 On 5 November 2014 Adrian Wallis and the claimant met to discuss a Stress Reduction Plan (although neither the claimant nor Adrian Williams refer to this in their witness statements, nor does any resultant documentation appear in the Bundle).

5.208 On 7 November 2014 the claimant returned his signed consent form for a further O H assessment.

5.209 On 11 November 2014 the claimant was signed off work sick for a period of 2 weeks. He had rung in that morning, and spoken to Adrian Williams. He asked for a day's annual leave. Adrian Williams told him that he could not have annual leave, and that if he was unwell, he should report this as sickness absence.

5.210 The claimant never returned to work thereafter.

5.211 The following day, 12 November 2014, the claimant sent an e-mail to Sarah Smith [2014: 234/236]. In it he initially referred to the conversation of the

previous day, which he said he considered to be a revocation of a reasonable adjustment (that of allowing him to take annual leave when otherwise he would be off sick, with adverse financial consequences) , without consultation or discussion.

5.212 His e-mail went on to set out the history of his return to work, the O H assessment by Evelyn Bird, the delays and failure to provide him with a suitable chair. He referred to his disability, and the duty to make reasonable adjustments. He raised again the issue of SLWP, and how this should be a reasonable adjustment. He wished to dispute the decision not to award him this leave. He referred to his mental exhaustion at trying to get a resolution. He had been left feeling stressed, anxious, unsupported and in severe pain. He recited how he had reluctantly accepted the role after his long term sickness absence, and had expected more support.

5.213 He referred to the fact that they were still, after 18 months, going round in circles , making no progress whatsoever. He went on to say that he felt he was discriminated against because he could not sit up straight in a standard chair. After making further references to disability discrimination law, he ended by stating that he hoped they could reach an agreeable resolution , as , for the sake of his physical and mental health, he could not continue on the current path.

5.214 Between 14 and 17 November 2014 Adrian Williams arranged with James Pigott a further OH workplace assessment (see the e-mail communication between them at [2014 : 248 - 251, albeit in reverse order] . In a reply on 14 November 2014 James Pigott explained the parameters for a new re – referral, and also referred to the possibility of a bespoke Occupational Therapist . He set out the relevant guidance about Bespoke Services. Adrian Williams replied that day, explaining why the assessment was needed , and the previous assessment history.

5.215 On 17 November 2014 a further referral was made to O H Assist [2014 : 226 to 228. The referring manager is identified as James Pigott. The reason for referral identifies the previous assessment that had been carried out, and how it had resulted in provision of chair which had led to an exacerbation of the claimant's condition. In the "additional questions" section reference was made to the claimant's complaint against the previous assessor, and a different one was requested. It was also requested that the claimant's line manager (Adrian Williams) be present at the assessment.

5.216 On 20 November 2014 the claimant (through his wife) tried to submit a complaint to James Pigott at RAST, in relation to the previous assessment by Evelyn Bird, and the subsequent response to it. That complaint is (in part) at [2014 : 231]. It was addressed to james.piggott@dwp.gsi.gov.uk." James Pigott's correct e-mail address uses his name as it is correctly spelt, with only one "g". He did not receive it, though as it did not "bounce back", the claimant was unaware of this.

5.217 On 21 November 2014 Adrian Williams responded to the claimant's e-mail to Sarah Smith of 12 November 2014 [2014 : 232 – 234] . Again this e-mail was

commented upon by the claimant, and the version at the pages cited includes not only Adrian Williams' response to the claimant's previous e-mail, but the claimant's comments upon that response.

5.218 Adrian Williams in this response apologised for the way the claimant felt, and stated how it was not the intention to create any more pressure for him, but to work together to facilitate a return to work.

5.219 In respect of the use of leave for periods of sickness absence , Adrian Williams said he was not aware, due to Wendy Wallace being on leave, of the arrangements she had previously made for the claimant. He reiterated, however, the policy that if an employee is unfit to work, and absence had to be recorded as sick leave.

5.220 The claimant's response was that he was aware of the policy, but it now seemed that this reasonable adjustment , as he saw it, should not have been put in place. He went on to say that he was not "sick", but that this and previous absences were the result of using inappropriate equipment. His current absence was due to work related stress, depression and back pain. The department , in forcing him to use inappropriate equipment , had exacerbated his condition.

5.221 Adrian Williams' comments went on to refer to the workplace assessment , and to inform the claimant that he had arranged a further assessment for 2 December 2014 with a different assessor.

5.222 The claimant's response was that , whilst he appreciated this, he had been copied into an e-mail from Wendy Wallis stating that the assessment would *"most likely"* result in the same equipment being recommended , which he did not feel was a supportive measure. He went on to say that he had undergone several referrals over the past 18 months and was no closer to getting the equipment he needed.

5.223 The claimant's reference to Wendy Wallis' e-mail was, it is most likely, to her e-mail of 30 October 2014 referred to above [2014: 216] which was addressed to James Pigott, but copied to the claimant, in which she actually said :

" OHS have advised that the outcome of another OHS Assist assessment could result in the same chair being advised but we/Si's management team feel there is value in exploring this option , although there are no guarantees that the assessment would result in any further chair options than the one that has already been trialled."

5.224 The claimant's interpretation of what Wendy Wallis had said was therefore inaccurate, and overstated the position, though this was doubtless a consequence of the way in which the claimant was at that time feeling as a result of his stress , and frustration at the lack of progress.

5.225 Adrian Williams went on to inform the claimant also that he had made an OH referral relating to his musculoskeletal related absence, and this was to be carried out by telephone on 24 November 2014. The referral for this

assessment was added to the Bundle, and inserted at pages [2014 : 240 – 241]. It was prepared by Adrian Williams as the referring manager. In the questions section, in addition to the usual questions that would be addressed in any assessment, the following were added by Adrian Williams:

- *"In your medical opinion would you expect Si's medication to cause significant memory issues at work*
- *In your medical opinion , are their* (sic) *coping strategies that Si could use to compensate for his memory issues at work ? and his back/hip pain*
- *Are there any reasonable adjustments that will quicken the return to work?"*

5.226 Returning to the e-mail, the claimant's response was to query whether, if Wendy Wallis had not used the previous arrangements for annual leave to "mask" sickness absence, such an assessment would not have been completed many months ago.

5.227 Continuing with his comments in this e-mail, Adrian Wallis went on to discuss reasonable adjustments, and referred to the advice that had been sought from HR Casework on 30 October 2014, in relation to Special Leave with Pay. He summarised that advice. The claimant's response was to ask for a copy of it, and of the "local" decision taken not to grant it to him.

5.228 In responding to para. 6 of the claimant's original e-mail to Sarah Smith (although no numbered paragraphs were in fact used, but this appears to be a response to the paragraph on page 2014 : 235 , which begins *"I am mentally exhausted.."* and goes on to refer to the claimant's expectations of support when he was given the post upon his return to work) Adrian Williams stated that he believed the department had been very supportive, and explained why. The claimant's comments were to the contrary, and he referred to the additional responsibility for three more staff members, the removal of his reasonable adjustment and refusal to provide the equipment he needed . He went on to explain also how he had asked for a laptop to enable him to work from home, should he need to leave early because of his back pain. He added that the department had *"misunderstood"* this request on several occasions, taking it to mean that he wished to work from home on a permanent basis. He had tried to clarify this, but to no avail.

5.229 Adrian Williams went on to refer to other information on ill health retirement and reduced hours that had been provided to the claimant , and the Stress Reduction Plan that he had discussed with the claimant on 5 November 2014. The claimant's response was that the latter was *"too little too late"* , and that his stress levels were now considerably higher than when the need for such an assessment was initially discussed with Wendy Wallis. He also pointed out that the original recommendation in January 2014 in the Return to Work Plan had been for one to one meetings on a regular basis, and these had not been implemented.

5.230 On 24 November 2014 the claimant underwent the OH assessment organised by Adrian Williams in relation to his absence for his current absence, as referred by him on 19 November 2014. The assessment was by telephone, and was conducted by Carol Maher, an occupational health adviser. Her assessment is at [2014 : 238 – 239]. She concluded that the claimant was unfit for work in any capacity due to significant symptoms he was experiencing, both physically and psychologically. She suggested a further referral in three weeks, and in answer to the specific questions she considered that his memory would be affected by his medication, his back pain and his psychological symptoms. Coping strategies were being addressed during his absence from work, and until his symptoms were more manageable, she did not consider any reasonable adjustments would expedite his return to work.

5.231 On 28 November 2014 Adrian Williams , by e-mail to James Pigott [2014: 248] , cancelled the claimant's workplace assessment for 1 December 2014, on the grounds that the claimant had submitted a further sick note, and was not available for the assessment. He did not first discuss this with the claimant, nor did he consider whether the claimant could nonetheless have attended work for the assessment , despite being off work sick. Whilst Adrian Williams refers in his witness statement to pages 254 and 255 of the 2014 bundle, this is a record from O H Assist, where the reason for cancellation of the 1 December assessment was given as "cancelled by manager". Nothing in it supports any suggestion that the claimant had indicated that he would not be available, this was more likely to have been an assumption by Adrian Williams based on the claimant's continued sickness absence.

5.232 The claimant's absence was then dealt with under the Attendance Management Policy. This provided for a telephone call after 14 days absence, and a keeping in touch meeting after 28 days. The claimant asked that Adrian Williams conducted such meetings, which was agreed, and that his wife be present, which was also agreed. On 9 December 2014 Adrian Williams conducted a home visit with the claimant, which is noted at [2014 : 264]. They discussed his possible return to work, and what assistance could be given. The claimant said he felt that the chair and equipment were not in place for him, and he felt that management had put obstacles in his way in the past. Adrian Williams assured him that a further OHS referral would be done for him on his return to work, by which he presumably meant the workplace assessment .

5.233 The claimant was referred by his GP to Dr Graham Johnson , a consultant in pain management. He provided a report to the Claimant's GP dated 12 December 2014 [2014: 265 – 266]. That report records how the claimant had held discussions with his employers about ergonomic assessments , and his concern that nothing had been done, and that his employers felt *"that he does not warrant any input".* He had agreed a treatment plan for the claimant, and said that he thought there was *"a significant amount of mileage yet to be gained with regards his bad back".* The treatment plan involved trigger point injections, TENS treatment, exploration of rehabilitational physiotherapy, and relaxation. It is unclear whether this report was provided to the respondent, but is seems likely that it was.

5.234 The claimant remained signed off sick until 22 December 2014, and thereafter for a further period up until 19 March 2015 (the relevant fit notes do not appear in the bundle, but there is no dispute as to this).

5.235 Jamie Pigott enquired of Adrian Williams on 31 December 2014 about the claimant's return to work date. He too appears to have regarded the claimant's sickness absence as a barrier to the workplace assessment being carried out , as he said that once a definite return to work date was obtained he could then book a new workstation assessment [2015 : 1].

5.236 A further keep in touch meeting under the Attendance Management Policy was conducted by Adrian Williams on 6 January 2015 , and is noted at [2015 : 2 - 3].

5.237 In this meeting Adrian Williams discussed the possibility of the claimant undergoing a further workplace assessment, and asked if he would come in for one whilst still on sick leave. The claimant declined, saying that he considered that the respondent had already failed in its duty of care to him, in not supplying him with a chair that met his needs. The discussion rather focussed on the lack of support that the claimant felt he had experienced.

5.238 There was also discussion about the previous arrangements for the use of annual leave which the claimant maintained had been agreed, but of which Adrian Williams had been unaware. The claimant intimated a grievance would be considered, and consultation with the ombudsman was also mentioned.

5.239 Medical retirement , or redundancy , was also discussed, and Adrian Williams agreed to provide the claimant with the necessary information after the meeting.

5.240 By e-mail on 14 January 2015 Adrian Williams [2015 : 4 – 12] sent the claimant details of the ill – health retirement scheme.

5.241 On 19 January 2015 the claimant submitted a further fit note for one month.

5.242 A further occupational health referral was made and the claimant was assessed by telephone on 28 January 2015 , by Carole Maher. The resultant report is at [2015 : 19 – 24]. The conclusion was that the claimant remained unfit for any work, but was undergoing treatment, in the form of pain management. His two conditions , physical and mental, were linked, and when his back symptoms were sufficiently controlled he should be able to carry out normal duties.

5.243 In answer to a specific question as to whether the claimant would fill the criteria for ill health retirement , the occupational health advice was that he would be unlikely to , due to all treatment options remaining to be explored.

5.244 On or about 31 January 2015 , probably between that date and 5 February 2015, the claimant completed an application form IHR1 – P1 for ill health retirement [2015 : 30 – 51]. In that application form he made reference to

being made to suffer using unsuitable equipment, how he felt the conduct of his recent managers had been discriminatory and inappropriate . In answer to a question about barriers to his working in his usual job he said this:

"I am unable to sit or stand without experiencing extreme pain and discomfort. The high dosage of medication I require in order to function impairs my cognitive ability."

5.245 He provided the necessary medical consents, and submitted the form. On pages 4, 6, 8, 9, 11, and 14 of the document [2015 : 31, 33, 35, 36, 38, and 41] in the box for his signature, he typed in his name, and dated the form 31 January 2015.

5.246 On 3 February 2015 a further keeping in touch meeting was held by Adrian Williams and claimant, with his wife and a scribe present, at his home. The notes are at [2015 : 87]. There was a discussion of the recent OH report, and how Carole Maher had indicated she would not support an ill health retirement application. It was agreed that Adrian Williams would see if this could be reconsidered. The claimant was undergoing a course of treatment for his pain management, and Adrian Williams said that there was no harm in him putting in his ill health retirement application whilst he was undergoing this treatment. The claimant had part completed the form at that stage, and would consider sending it in.

5.247 The claimant duly submitted that application to Adrian Williams by e-mail on 5 February 2015 [2015: 66A].

5.248 By letter of 16 February 2015 [2015 : 59], the claimant's MP , Paul Maynard, wrote to Jamie Pigott on the claimant's behalf, raising with him the apparent refusal to provide the claimant with a suitable chair, and asking how he intended to facilitate the claimant's return to work. Jamie Pigott forwarded this to Adrian Williams for a reply. Adrian Williams does not refer to this in his witness statement, and there is no reply in the Bundle.

5.249 Adrian Williams completed the employer's part of this form , the IHR1 - P2, on or about 18 February 2015, dated it that day, and submitted it on or about that day [2015: 52 – 55]. The form requested details of the particular CSPS pension scheme which the claimant belonged to, and Adrian Williams indicated, as was the case, that the claimant was in the "classic" scheme, with pension age of 60 [2015 : 54].

5.250 Adrian Williams on 19 February 2015 contacted the claimant seeking his consent to contact OH Assist for information relating to his health and absences that may assist the application, which the claimant duly provided by return e-mail [2015 : 62].

5.251 On 19 February 2015 , by e-mail to Adrian Williams, having enquired what the position was, and learning the claimant had submitted a further sick note Jamie Pigott closed down the claimant's RAST referral [2015 : 64 - 65]. He went on to say how the claimant should contact Shared Services on his return

to work, explain the previous involvement of Jamie Pigott, and ask for him to be the RAST manager so he could then carry on the case.

5.252 On 12 March 2015 the claimant presented his claim form to the Tribunal initiating these proceedings.

5.253 A further keeping in touch meeting was held on 17 March 2015 [notes at SB:78, not 88 , as stated in para. 38 of Adrian Williams' statement] . After general discussion about his treatment, and whether his condition had improved (it had not), Adrian Williams told him that his ill health retirement application had been sent off. The claimant asked if his MP had been in contact and was told that he had, and a response had been sent. This was so, and is at [2015 : 85-86 dated 10 March 2015].

5.254 Adrian Williams made a further offer in this meeting for the claimant to come into the office for a further workplace assessment with regards to a "bespoke" chair, and Adrian Williams said he was willing to arrange an "out of office" assessment. The claimant said he appreciated the offer but felt he was unable to move forward on this yet.

5.255 Sometime after that meeting, and before 10.01 on 19 March 2015 Adrian Williams received notification that the claimant's ill health retirement application was not acceptable to Capita, the organisation processing it, because he had used typed signatures in a number of places on the application form, where his actual signature was required.

5.256 Adrian Williams rang the claimant about this on 19 March 2015, and sent him an e-mail at 10.01 that day [2015 : 66B(i)] in which he confirmed their discussion, and identified the pages of the form where the signature was required, explained also how a tick was required for a box on page 3, and provided the claimant with the address to which the forms were to be returned.

5.257 There ensued on 25 March, 31 March, 1 April and 2 April 2015 further e-mail communication between the claimant and Adrian Williams [2015 : 66A – 66F]. The claimant first signed the IHR1 form and returned it (it seems by e-mail) to Adrian Williams on 25 March 2015. In that e-mail he questioned whether the Employers Details section had been completed, and sent to Capita. He repeated this question again on 30 March 2015, and Adrian Williams replied on 31 March 2015 that it had. He also said that the claimant should submit his form separately, and that the signatures had to be by hand, and not by computer. He later that day confirmed that a hard copy was required. The claimant, however, wanted sight of the completed employer's section (the P2 part of the form), which was then provided. Following further difficulties the claimant on 2 April 2015 asked Adrian Williams to print out a copy of the completed form, and leave it at the front gate for collection. He duly collected it, and on or about 8 April 2015 he sent the duly signed form [2015 : 50B, 50D, 50F, 50G, 50H and 50I] to Capita by recorded delivery. He did not re-date the form.

5.258 The claimant was a member of the CSPS pension scheme, his scheme being the “classic” scheme, with a retirement age of 60. This was a relevant factor in his ill health retirement application, as the scheme he was in would have a bearing on what benefits he would receive if his application was successful.

5.259 In early 2015 the claimant, doubtless along with all other members of the respondent’s pension schemes, was notified (unfortunately neither party saw fit to include any documentation relating to this issue in the Bundle) that a new pension scheme , the “alpha” scheme was coming into effect from 1 April 2015, and that members of the existing “classic”, “classic plus”, premium” and “nuvos” schemes may be transferred into this new scheme from that date.

5.260 The claimant’s perception of this was that if his ill health retirement application was deemed to have been made after 1 April 2015 , he was at risk of being assessed on the basis that he was a member of the new alpha scheme, and that the benefits he would thereby receive would be less than he would have received under the previous “classic” scheme. Whether this would or would not actually have been the case is not something upon which the Tribunal has sufficient information to make a decision, but for the purposes of these claims the Tribunal will assume in the claimant’s favour that his perception was correct, although it accepts that it may not have been , and makes no actual finding as to whether, as a matter of fact, the claimant would have been worse off if his ill health retirement application had been accepted on the basis of his membership of the alpha, rather than the classic, scheme.

5.261 Adrian Williams received an acknowledgement from Capita on 10 April 2015, and notification that further medical evidence would be required from the claimant’s consultant on 16 April 2015 [2015 : 95 and 96].

5.262 On 22 April 2015 the claimant (or rather his wife on his behalf) sent an e-mail to RAST referring to the claimant’s previous complaint, and enclosing a further copy of the complaint he tried to make on 20 November 2014. The claimant had been told that his complaint had been closed on 8 October 2014.

5.263 Jamie Pigott responded to this e-mail by speaking with the claimant. On 27 April 2015 Jamie Pigott spoke again with the claimant, who asked him to forward the complaint to O H Assist. He clarified that the complaint was about them, not RAST. Jamie Pigott did submit the claimant’s complaint to O H Assist on 27 April 2015 .He also informed Adrian Williams of this contact with the claimant in an e-mail that day [2015: 107] and also mentioned the offer of a further assessment , which he could arrange if the claimant would come into work for a couple of hours. He asked Adrian Williams if he thought this was a feasible option.

5.264 He replied [2015:108] that he had mentioned this to the claimant on many occasions , but the claimant had not taken him up on the offer.

5.265 The claimant’s MP had written further on his behalf on 30 March 2015 (but a copy of this document does not appear to have been included in the Bundle). Adrian Williams replied to this by letter of 1 May 2015 [2015 : 110/111]. The MP’s letter presumably made allegations of harassment and discrimination, as

Adrian Williams' reply is largely a refutation of such allegations. He did, however, reiterate the offer for the claimant to undergo a further workplace assessment , and to offer as much support as reasonably and practically possible.

5.266 On 5 May 2015 Adrian Williams wrote to the claimant to arrange a further home visit as he had been absent from work for 6 months by that stage. Adrian Williams made a further occupational health referral on 13 May 2015. That day Adrian Williams carried out another home visit with the claimant [SB:86] . He again offered the claimant the chance to have a further workplace assessment with a different assessor, but he declined.

5.267 On 18 May 2015 Jamie Pigott enquired of the claimant whether he had received a response to his complaint from O H Assist [2015 :124] . On 27 May 2015 the claimant did receive a response, from Neil Freeman of O H Assist, to the effect that they did not have a record of his complaint. He informed Jamie Pigott of this, and copied him into the e-mail he had received. There ensued more e-mail traffic on 28 May 2015 in which the claimant sought confirmation of the original complaint being submitted, and clarified that he was referring to his complaint of November 2014.He made reference to his discussion with Jamie Pigott in which he had informed the claimant of Mr Nethercott having made the decision . Jamie Pigott suggested that the claimant rang Neil Freeman . The claimant explained that his complaint was no longer about the chair. Jamie Pigott suggested that the claimant's original complaint may have been sent to an old inbox address, which would have meant it would not have been seen. He confirmed the correct e-mail address. [see 2015 :124 - 127] .

5.268 A further occupational health report was prepared , dated 27 May 2015 [2015: 113 - 114] , by Tina Sippe, an occupational health adviser. She reported on the claimant's ongoing significant symptoms of depression and spinal pain. He remained unfit for work, and she was unable to offer any timescale for a foreseeable return to work. She escalated the case for further opinion.

5.269 Whilst it is unclear quite what communication had been received by them, in or about May 2015, O H Assist had been contacted by the claimant's wife by telephone and e-mail. On 8 June 2015 O H Assist wrote to the claimant, to inform him that they could not deal with his complaint by speaking with his wife, and , further, that they could not respond to a complaint unless it was made by a manager, and not directly from a DWP employee [2015:119]. He was told to re-submit it via any manager.

5.270 On 10 June 2015 Dr Stanislava Saravoiac of Capita reported to Adrian Williams that the claimant's ill health retirement application was being delayed by the lack of any medical evidence, particularly from the claimant's specialist. She accordingly was approaching the claimant's GP for a report. [2015 :120].

5.271 The claimant, through his wife, continued to try to advance the complaint he wished to pursue about O H Assist. She wrote on 22 June 2015 to Jonathan Russell of HR specialist services for assistance in advancing the complaint,

and enclosed a form of consent that she had been advised was necessary. She did not receive a response and had to write again on 14 July 2015 [2015:133].

5.272 A report by Dr Richard Archer , consultant occupational physician with O H Assist , dated 2 July 2015, was prepared as a result of the escalation by Tina Sippe. In the report the doctor said this:

".... He has very complex and unusual ergonomic requirements due to his hip fusion, and it is beyond the scope of my practice to say exactly what ergonomic adjustments would best suit his needs."

5.273 He also recorded this:

"From speaking to Mr Ward it is evident that he feels very aggrieved with management as he feels he has been inadequately supported in respect of his condition at work. Obviously I am not in a position to judge management actions in the past, but you need to be aware that this is a barrier to return to work. His grievance has led to anxiety and low mood as well as frustration. He has anxiety and depression, and is on appropriate medication for depression from his GP. This condition is also likely to be covered by the Equality Act."

5.274 He went on to discuss the ergonomic and management issues, and advised that a return to work was only possible if both could be resolved.

5.275 A report, dated 15 May 2015, but not printed until 8 July 2015 , from Sunil Pai, Orthopaedic Fellow, in Oxford, who had been involved in treating the claimant was sent to Dr Evans of Capita [2015 : 130 – 132] for the purposes of the ill health retirement application, though it is unclear when it was received.

5.276 On 14 July 2015 Pamela Bruce of HR specialist services asked Jamie Pigott to re-submit the claimant's complaint to O H Assist, which he agreed to do, and sent her the acknowledgement he then received [2015: 137-139].

5.277 On 15 July 2015 the claimant was provided with his end of year report ("EOY" report) by e-mail [2015:134]. The relevant entry , dated 13 July 2015, signed by Adrian Williams, and countersigned by Sarah Smith, reads as follows [SB:74G – 74H] :

" Si's performance dipped during the 2nd part of the reporting period. In Sept Si failed to control the volume of checking across the team in accordance with the methodology and considering the team had been checking an increasing volume of checks. The failure to deliver a key monthly objective (the drafting and issuing of the On – Ben assurance report), the large number of unactioned emails (200) which despite assurances of a correctional plan increased to over 300 as well as not auctioning (sic) *a key email asking TL's to meet with teams and discuss the FG People Performance process and timetable. Performance discussions with Si in early October centred around these issues, the need for a potential Performance Improvement Plan however assurances given by Si around the Mid Year process this was not implemented.*

Si went off on sickness absence on the 11th November and has been absent ever since. Subsequently considerable issues were identified with the September quarterly report that Si had drafted with inaccuracies in the figures, narrative and issue with the graphs which resulted in significant rework by others.

Si was given the opportunity to meet at year end with his lime (sic) *Manager to discuss his performance but this was declined."*

5.278 On the last page [SB :74I] the claimant's "Agreed final rating" was 3, the lowest , meaning "must improve" , though this was not agreed with him.

5.279 On 16 July 2015 Jonathan Russell wrote further to the claimant's wife, referring to an earlier letter of 22 June 2015, and hers of 30 May 2015 (neither of which the Tribunal can find in the Bundle) and the complaint about O H Assist. He apologised for the delay and confusion about this process, and confirmed that RAST had been instructed to re-submit the complaint. He went on to reiterate the offer to the claimant to come into work to undertake a further workplace assessment, with a view to obtaining a bespoke chair. He stated how this offer was still available, and could be arranged through the claimant's line manager.

5.280 By letter of 23 July 2015 Neil Freeman of O H Assist wrote to Jamie Pigott to suggest that the claimant's complaint could be resolved by a further referral, by way of face to face appointment, to reassess his sitting needs and issues, with a different practitioner, if at all possible [2015:141].

5.281 On 27 July 2015 Adrian Williams wrote to the claimant to arrange a further home visit. The claimant replied , questioning the purpose of the meeting, referring to the "current obstructive manner" in which management were dealing with his requests for information , and what he termed the "malicious comments" that Sarah Smith had written in his end of year report. He was reluctant to allow Adrian Williams into his home, saying the trust had completely gone. He asked for David Clayton's e-mail address , as he wished to raise a grievance.

5.282 On 13 August 2015 a further keeping in touch meeting (or at least a discussion) took place , although there is no note or other record of it apart from the reference to it in Mr O'Reilly's letter to the claimant of 10 September 2015 [2015 : 161H - 161M]. In this meeting or discussion between the claimant and Adrian Williams there was again discussion of a further assessment , and the claimant confirmed that he did not feel able to move forward on this at that time.

5.283 After some confusion as to the correct e-mail address, the claimant did submit his grievance, on a form G1. It is undated, but can be seen at [2015 : 161A to 161G]. It was received on 25 August 2015. In it the claimant complains about his EOY rating, and makes a number of points as to why it was not fair. In particular [2015: 161B] he makes reference to the pain medication he was

taking, its effects upon his memory during the period January to November 2014, and the fact he had been forced to use a chair which did not offer him adequate support. The outcome he sought was for his rating to be reviewed , and for the marking to be changed to "Achieved" , which reflected his performance fairly and accurately.

5.284 A letter was sent by Angela Dunlop, who, the Tribunal was informed, was the Chief Medical Officer of O H Assist, dated 1 September 2015 , in response to the claimant's complaint . It is unclear who it was sent to, and it has not, unfortunately been produced by either party , but it is referred to, unfortunately with the wrong date of 1 September 2013 , in Mr O'Reilly's letter to the claimant of 10 September 2015.

5.285 On 9 September 2015 the claimant's application for ill health retirement was refused, by letter from Dr Stanislava Saravoiac [2015 : 154 - 157]. This letter is addressed to Adrian Williams, and it is unclear when the claimant was sent a copy, or made aware of its terms, but at some point he clearly was. The main reason that the application was unsuccessful was that Dr Stanislava Saravoiac felt that there was the possibility of treatment leading to the claimant regaining his functional stability , and more effective pain management, subject to the provision of adjustments, including ergonomic adjustments, to suit his health needs. Thus, whilst she accepted that the claimant was prevented by ill health from discharging his duties, she did not consider that the incapacity was likely to continue until scheme pension age, and he therefore did not satisfy the scheme criteria for ill health retirement.

5.286 On 10 September 2015 at 10.43 Adrian Williams wrote to the claimant, acknowledging receipt of his grievance [2015 : 157A - 157B] , and noting that attendance management procedures were still on – going. He went on to say this:

"You were invited to an (sic) *monthly Attendance Review meeting in August but you asked if this could e* (sic) *changed to a KIT as you didn't want me to come to your house. We had a kit on 13th August."*

He ended by arranging a meeting on 23 September 2015 to discuss the grievance.

5.287 The claimant replied at 12.58 the same day [2015 : 158 - 159] , saying this:

"You have stated that i refused my 9 month review; please can you provide the email you sent and the response from myself where i refuse it as i do not have a record of this contact in my emails from yourself."

The claimant also responded to, or queried , other items in Adrian Williams' last e-mail.

5.288 Adrian Williams replied [2015:159 – 160, reading backwards] explaining that the meeting in question was a monthly attendance meeting, and certainly not a 9 month review. He went on to deal with other aspects of the e-mail

exchange and sought confirmation that the date for the grievance meeting was acceptable.

5.289 Also on 10 September 2015 Kevin O'Reilly wrote an open letter to the claimant. In it he referred to the letter from Angela Dunlop, referred to above, of 1 September 2015. He quotes from it [2015 : 161I] as follows:

"Based on the most recent report by an Occupational Physician on 2 July 2015 , Mr Ward is in constant and severe pain. However, although Mr Ward perceives the chair to be the issue, I do not consider that the chair/equipment is going to progress this case as a new chair is not a cure for the symptoms and an ergonomically designed chair which he has would not cause the symptoms. I therefore consider the original Workstation Assessment undertaken by the practitioner , where another chair was not recommended , was correct. Often such ongoing pain is best managed by treatment or some other advice and if further assessment takes place, it should include assessment around capability also.

If a further assessment is to be requested, then RAST needs to consider that type of assessment they require. Undertaking a further Workplace Assessment, which focuses on equipment, will likely not progress this case and would not resolve Mr Ward's perception that there is an equipment solution to his problem. Whilst the most recent Occupational Physician report has indicated the ergonomics are looked at, I do feel it must not just focus on the chair or equipment but needs to include an evaluation of Mr Ward's capability to progress this case. It may be that a Workplace Assessment is considered appropriate , or if DWP criteria is (sic) *met , an Occupational Therapy referral could be made."*

5.290 Mr O'Reilly in this letter went on offer the claimant an occupational therapist's assessment, "despite reservations about the effectiveness of a chair" in relation to his symptoms. He then set out the history of the meridian chair, and the further assessment .Under "reasonable adjustments" he referred to a discussion he had held with the CMO of O H Assist (presumably Angela Dunlop). This discussion included adjustments that the claimant had sought such as use of a laptop, which was discounted on the basis that the claimant ought primarily to have a properly designed workplace. He also sought to re-assure the claimant that the next assessment would be by an ergonomist, not an occupational health adviser or physician.

5.291 He went on to discuss the fact that the claimant had not been paid since his absence commenced in November 2014. He told the claimant of the advice he had received from the CMO of O H Assist to the effect that the claimant's absence since November 2014 was because of his disability, not because of any failure to make reasonable adjustments. The view of the CMO was that the claimant's pain was related to the progression of his arthrodesis, and not the adequacy of his workstation.

5.292 He went on to make an offer (open, for this letter was expressly not "without prejudice") to the claimant that the respondent would reinstate his pay from July 2015, if he would now agree to a further assessment , by an ergonomist.

The payment would be maintained if the claimant continued then to co-operate with the respondent.

5.293 He went on to say this [2015:161L]:

"It is possible that you are in such pain that no reasonable adjustments could be made in order to facilitate your return to work. If that is the case then the attendance management procedures must take their course."

5.294 There is no document in the Bundle showing the claimant replied to that letter, but, in any event, he did not accept that offer, no workplace assessment was carried out, and he continued to receive no pay.

5.295 On 23 September 2015 Adrian Williams met with the claimant at his home to hear his grievance. The claimant's wife was also present, along with a notetaker. The notes are at [2015 : 162 - 163].

5.296 In the meeting the claimant explained why he felt his ranking was unfair, having regard particularly to his medication, and how he felt victimised.

5.297 Adrian Williams, having considered what the claimant had said, and made his own enquiries, decided to uphold the claimant's grievance, and to issue him with an "Achieved" End of Year marking . He communicated this to the claimant by letter of 2 October 2015 [2015 : 164].

5.298 The claimant appealed the decision to reject his application for ill health retirement (this document does not appear in the Bundle), and for this purpose he obtained a report from his GP, dated 2 November 2015 [2015: 166 - 167]. This report sets out the claimant's medical history in relation to his hip condition and his depression. He referred to the claimant's issues at work, and the occupational health recommendations, which he understood had not been implemented. His understanding was that these issues were contributing to both the claimant's back pain and depression. He stated that the main contributory factor to the claimant's depression was the "discrimination" he received from work. He went on to express his opinion that , from a mental health perspective , he was no longer fit to work in his current employment on psychological grounds. He supported the claimant's application for ill health retirement on the basis of his depression and mental health alone.

5.299 The claimant saw Dr Ahmad , for the purposes of his appeal, on 3 February 2016. No copy of that report has been provided to the Tribunal.

5.300 The claimant's appeal was duly considered by Dr Glyn Evans of Capita. His decision is set out in a letter to Adrian Williams of 11 February 2016 [2015:168 - 170]. He had sight of the previous reports, and that from Dr Ahmad from his examination on 3 February 2016. His view was that the claimant's incapacity was likely to be permanent. He considered [2015: 170] whether there was any prospect of further treatment , or workplace adjustments , mitigating the consequences of the disability. In reaching his decision, he said this:

"The outcome of the application depends upon whether future medical treatment , or other interventions such as workplace adjustments , will bring about sufficient benefit that Mr Ward would not only be able to return to the workplace but also provide regular and efficient service in his normal role. It is also relevant to consider whether such benefits would be likely to be realised before Mr Ward reaches the scheme retirement age , which is in 2037."

5.301 He went on to refer to Dr Ahmad's opinion that improvement was unlikely, which he agreed with, and concluded that future treatment was unlikely to alter the permanence of the claimant's incapacity. He therefore upheld the claimant's appeal, on the basis of his back problems alone, although he had noted his GP's report to the effect that the claimant's mental health would also be cause of permanent incapacity. He did not feel it necessary to make such a finding, as he was satisfied, on the claimant's physical condition alone, that he met the criteria for ill health retirement. He issued the appropriate acceptance certificate (which was described as "Classic").

5.302 The claimant's employment ended on or about 28 February 2016, though no documents relating to this appear in the Bundle.

5.303 The claimant, however, did not receive his pension from the outset, and made enquires as to why this was. He was informed that there was an issue with the IHR forms, as by now (early 2016) the alpha pension scheme was in place, and there was an issue with the Certificate that had been issued referring to the "classic" scheme.

5.304 The claimant made enquiries, and sent an e-mail on 3 May 2016 to Adrian Williams [2015: 173A] seeking evidence of the original submission of the application. He was then sent by Adrian Williams on or about 2 June 2016 further IHR forms to complete. The claimant sent him a further e-mail on 4 July 2016 asking why he had done this. Adrian Williams replied on 6 July 2016 [2015: 173G] and told the claimant to re-submit IHR forms . The claimant did not do so, so Adrian Williams sent him a further e-mail on 8 August 2016 [2015: 173D] asking him if he had done so, to which the claimant replied that he was not going to do so, and asking Adrian Williams to stop harassing him.

5.305 Kevin O'Reilly then wrote on 19 September 2016 to the claimant's wife [2015: 173E] expressing his concern that no payments had apparently been made since the claimant left the respondent's employment at the end of February 2016. He advised that it would be necessary to complete the new forms if that was what the pension scheme required. He offered assistance with the matter.

5.306 In due course (it is unclear precisely when) the claimant did then receive, and has been receiving since, the appropriate benefits under the ill health retirement scheme, in accordance with his membership of the "classic" scheme.

5.307 The claimant adduced additional evidence about chairs from Ergochair Limited, in the form of an e-mail dated 6 September 2016 and attachments at

[SB : 87 -89]. The covering letter from Jodie Turner of that company refers to the benefits of a split seat for a person with a fused hip or knee joint. Attached are diagrams of various forms of adaptations and seat or backrest modifications which the claimant contends , and the respondent has not challenged, would , if provided for the claimant, have been likely to have reduced the pain and discomfort he experienced when sitting at work.

5.308 A member of staff, Dale Townsend, had previously been provided with a laptop, when working remotely. He had no management responsibility, and worked in a different role. The reason the claimant was not permitted use of a laptop was the perception of Sarah Smith and Wendy Wallis that it would not be appropriate because of his role in managing staff.

6.Those, then are the relevant facts as found by the Tribunal. Little or nothing, happily, in these claims turns upon the honesty of any party or witness. There have been issues as to the accuracy of recollections or perceptions, but neither side has really suggested, and the Tribunal does not find, that any witness or party has sought to tell anything other than the truth as they saw it. That said, where the claimant has relied upon alleged verbal complaints or discussions which are not supported by any contemporary documentary evidence , the Tribunal, whilst accepting that the claimant may well have had such feelings or observations in his mind at the relevant time, the Tribunal has not been, generally , satisfied that he actually articulated these matters to his employers at the time in the terms that he now believes he did. Indeed, that evidence is at odds with his statements made at the time that he "suffered in silence". Further, by his own admission, he did have issues with his memory, probably as a side effect of the medication he was taking, and this may have hampered his ability to recollect events clearly. To some extent, whilst not in any way impugning the claimant's honesty, the Tribunal has found that his evidence was not always reliable , in terms of its accuracy, and was often unsupported by the contemporaneous documentation. Further, and this is not a criticism , given Mrs Ward's lay status, and the daunting task that faced her, it is unfortunate that the claimant's witness statement somewhat "peters out" in November 2014, when some of his claims clearly relate to events after that date, well into 2015. His witness statement , however, is silent as to those, and the evidence relating to those claims has had to be gleaned from the documents, the cross examination of the claimant, and of the respondent's witnesses.

7. That said, the Tribunal has also clearly been hampered by the absence of Wendy Wallis to answer crucial questions at various stages in the process. Further, the respondents' witness statements too were not always as full and complete as they should have been, and certain documents in the case were not mentioned or commented upon by them, when they were part of the narrative of the events to which they were deposing (see, for example, Adrian Williams's statement which fails to deal with his efforts on 17 September 2014 to get Jamie Pigott to arrange a further O H Assist assessment, and what he did, or did not do, when advised that he should seek to raise this with O H Assist directly). Wendy Wallis, for example , in para. 24 of her statement makes reference to the claimant complaining about her being threatening towards him in a meeting on 2 October 2014, but gives no evidence of that meeting itself, which clearly occurred. Sarah Smith's statement omits reference to various documents in the Bundle, that are clearly part of the chronology of her dealings with the claimant, and the Tribunal has largely had to construct for itself,

from a badly ordered and repetitive set of documents, the precise sequence of events. Be that as it may, the Tribunal has not found such omissions sinister, or evidence of a deliberate lack of candour, merely further instances of a lack of attention to detail and thoroughness which has made determination of the facts rather harder than it need have been.

The submissions.

8. The parties made submissions. Ms Trotter made written submissions, which she spoke to. It was agreed that she would go first, so as to give Mrs Ward an idea of what was required, and to respond to points made by the respondent whilst, of course, as was explained, being free to add any points of her own on behalf of the claimant. Not being a lawyer, or having any previous experience of tribunals , Mrs Ward was not expected to make legal submissions of the type advanced by Ms Trotter. The Tribunal, of course, has ensured that the claimant is not disadvantaged by this, and has considered any points which could be made on behalf of the claimant that Mrs Ward has not mentioned.

9. Ms Trotter's submissions are set out in writing, so there is no need to rehearse them further here. She spoke to them, and subsequently sent in detailed submissions relating to the s.15 claims only.

10. Mrs Ward, in her oral address, said that the claimant had been employed for over 16 years, and at no point had there been an effective assessment of his disability needs. He had told his employer on several occasions, and until 2013 was unaware that the respondent could put bespoke equipment in place for him. When he took his new role in 2014, he found there was no new chair, it was his previous chair. He was told that this was what O H had recommended. She referred to the claimant seeing Laura Porter, seven days into his return to work , and his concerns that she would be involved in the process of managing him. He was alarmed at her e-mail. When he raised this with Janette Barrett she told him to leave it, with no concern for his well being. The claimant had said he did not want staff, but was given them. He was told no other role existed, so he had to accept it. He felt pressured. He had raised his concerns about his chair with Wendy Wallis, and had asked her for a laptop, but she would not meet his requirements. He asked her for annual leave when he had exhausted his sick pay entitlement. This delayed his sickness absences triggering an occupational health referral. He was only ever given one flexi – credit , in November 2014, from Adrian Williams. On 11 November 2014 this facility was removed from him, and this was the final straw.

11. He was given no support for his physical and mental issues, which he used his leave to manage. He was taking up to 8 Tramadol a day. The respondent knew he was having difficulties in sitting and driving a car, but Sarah Smith insisted that he travelled. He suggested video conferencing. He approached David Clayton in April expressing his concerns about his managers. He was told to drop it, he would not win. He told his managers he did not know how he would cope with more staff, but more were added. He had two absences in 2014, and 2 weeks of PTMG. He asked for early starts, but this was refused. The respondent refused a referral to O H services. Ann Harrison sent him home, and in her e-mail made suggestions, as she had dealt with a similar request before. Evelyn Bird knew about his disability, but said if he adopted the right posture this would help. On his return to work (i.e after

going home) he felt that the atmosphere had changed, and he could now see why, having seen Sarah Smith's e-mail about him playing one manager off against another. She did not believe he had the condition that he had, and saw him suffer. She knew he was suffering, but did not act on Ann Harrison' e-mail. Instead she piled on the pressure and put him under threat of PIPs. He was at an all time low, mentally and physically, he was worn down.

12. Jamie Pigott was described as a "middle man" to absolve himself of responsibility. His reference to the chair being suitable for 98% , rising from 95%, of the population was not a typo. He then says that the claimant will not know what he needs. O H Assist said he would need a further assessment , but he never got one. Jamie Pigott arranged a generic workplace assessment. The claimant was left distraught by Evelyn Bird, it did not matter what he told her, she did not treat him with respect. His grievances were not upheld, and he got no further support from the respondent. Any complaint resulted in barriers being put up, his health deteriorated each day. Whilst waiting for his chair he was then denied SLWP, so he had no choice but to carry on , whilst the respondent watched him suffer. He could not change his own KWOs. The respondent would only act on O H 's advice, it did not matter what the claimant said. The only real purpose of getting the O H advice was to put the respondent in a better position if criticised. The claimant had asked for a representative in meetings, the respondent said one thing to him , and did another. The respondents criticised his performance when they knew he was in pain, they never reduced his load.

13. The claimant sent information to Jamie Pigott, perhaps misspelt, but there was also an inbox where his complaint would go. What had happened to that ? He was questioned over £392 allegedly overpaid to him, and was questioned over his memory issues. He had no choice but to take IHR, his hand was forced. His workstation assessment was generic, for any member of staff.

14. The claimant sent his IHR form off on 5 February 2015. Under the classic scheme he would get a lump sum. He was then notified by MYCSP that there would be no lump sum. The, eventually, MYCSP accepted , and paid it. The respondent was not fighting the claimant's corner in taking away this lump sum. Adrian Williams had alleged that the claimant had missed his 9 month review, when he had not. The claimant had begged and pleaded for the reasonable adjustments he needed to stay in work. He was refused help such as the laptop. Reference has been made in the respondent's submissions to the claimant raising what may be considered "semantics" (closing paragraph of Ms Trotter's submissions) but this is related to the claimant's disability, his feelings of intimidation, even if this was not actually the case.

15. This was followed by a short e-mail to the Tribunal later that day, in which she added two paragraphs which related to reason why the claimant had not previously raised a grievance about these matters, or brought any claim sooner than he did, which was that he feared for his employment.

The claims.

16. At this juncture the Tribunal will set out the claims that it is determining. They are to be found in the Scott Schedule , and are set out in Annex B to this judgment.

The reason that the numbering starts where it does is that there are other, earlier claims, going back to 1997. Annex B sets out the claims as set out in the Scott Schedule. On the final day of the hearing, Ms Trotter went through the Scott Schedule with Mrs Ward in the hearing, and Mrs Ward confirmed that the remaining claims that were pursued were those now set out in Annex B. The claims are mostly put as :

Direct discrimination- s.13 claims

Discrimination arising from disability – s.15 claims

Failure to make reasonable adjustments – s.21 claims

Harassment – s.26 claims

Victimisation – s.27 claims.

17. In the majority of instances, the claims made in the Scott Schedule are put on the basis of all five types of discrimination. In a few instances, particularly in the claims made about Adrian Williams, they are put as harassment and/or victimisation only. In the case of Wendy Wallis, several claims are put on the basis of every type other than harassment. This is not to criticise Mrs Ward, who doubtless and understandably , being unfamiliar with the law and the complexities of disability discrimination in all its forms, took the precaution of framing the claims under as many potential heads of claim as she thought may be applicable. She is doubtless unaware, however, that direct discrimination and harassment claims are mutually exclusive, as are harassment and victimisation claims (the effect of s.212(1) of the Equality Act 2010.

18. Before considering the claims in detail, it is useful to set out the legal basis of each type of claim (the actual provisions of the Equality Act 2010 are set out in the Annex) in broad, hopefully readily understandable, terms.

<u>Direct discrimination- s.13 claims.</u>

Direct discrimination occurs when a person treats another person with a protected characteristic less favourably than he does, or would , treat other persons , who do not have that characteristic, “because of” , in this instance, disability. Such claims therefore require a comparator, i.e a person who does not have the same characteristic . Such a comparator, however, must have the same circumstances, but need not be actual person, it can be a hypothetical comparator. In these claims , the claimant has not identified any actual comparator, i.e. a non – disabled person with the same circumstances as the claimant (probably because such a person would be very hard to find, and probably does not exist) , so the claimant must be taken to be relying upon a hypothetical comparator. That person therefore is someone who, for example, will have had a long period of sickness absence, who needed adjustments to his or her workplace, or other accommodations, but whose reasons for these circumstances applying to them were not disability related.

<u>Discrimination arising from disability – s.15 claims.</u>

These claims are based on the rather easier to establish basis that a person treats another person unfavourably (not less favourably, so no comparator is required) not "because of " their disability, but because of something arising in consequence of it. A classic example is sickness absence, where the sickness absence is caused by ("arises in consequence of") a disability. If an employer then treats that employer unfavourably, because of that "something", the employer will be liable for discrimination under this section, unless the employer can show that the treatment is a proportionate means of achieving a legitimate aim, known as the "justification" defence.

Failure to make reasonable adjustments – s.21 claims.

This type of claim too is unique to the protected characteristic of disability. If any PCP on the part of the employer applied to the disabled employee puts that employee at a substantial (i.e more than trivial) disadvantage in comparison with persons who are not disabled, the employer comes under a duty to make reasonable adjustments , i.e such steps as it is reasonable to take to avoid the disadvantage. Failure to comply with that duty renders the employer liable.

Harassment - s.26 claims.

A person harasses another for the purposes of the Equality Act 2010 if he or she engages in unwanted conduct related to a relevant protected characteristic, which has the purpose , or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This is referred to as the "proscribed environment".

Victimisation - s.27 claims.

This term has a particular meaning in law. Whilst it is often used by lay persons as a synonym for being badly treated, in law under the Equality Act 2010 a person is victimised if, having done a *protected act* the claimant is then , by reason of having done that act, subjected any detriment. The protected act can be either bringing proceedings under the Act, giving evidence or information in connection with such proceedings, doing anything else for the purposes of or in connection with the Act, or making an allegation , expressly or otherwise, that the employer or another person has contravened the Act. This latter from is the most common, and is usually satisfied by the employee raising some form of complaint, or grievance, in which some form of discrimination is complained of.

The Law.

19. The full relevant statutory provisions are set out at Annex A or below.

Discussion and Findings.

20. The starting point has to be the claimant's disabilities, and it is important from the outset to bear in mind that there two relevant disabilities in play. The first, and more obvious, is the claimant's physical disability arising from his fused hip, with the associated severe back pain, and limitation upon his ability to sit for lengthy periods, which had afflicted the claimant all his working life, and was an established disability by the time he commenced his new role in February 2014. The other, less obvious,

disability is his mental impairment in the form of depression. The respondent has conceded that as a disability as well (since the amended response – para. 9, page 153 of the Pleadings Bundle) , but it is not clear from what date that concession applies. This was not raised specifically with Ms Trotter in the course of the hearing, but given the contents of the OH report of 3 January 2014 (pages 1 to 6 of Bundle 2) in which the medical advice is that the claimant's depression was by then likely to be considered a disability, the Tribunal presumes that the concession covers the period from, at the latest, January 2014, which is the period covered by these claims.

21. The claimant's claims in his Scott Schedule relate specifically to the acts of omissions of certain individuals, in most instances, and in some cases to more general allegations against the respondent as an organisation. As will be seen, however, some of the claims made are against a third party, for which the respondent is not vicariously liable.

22. Further, the claimant has made claims of various types of discrimination in relation to each of the allegations, contending, as he is entitled to , that they amount to one or more of the proscribed types of conduct. We therefore will examine each of the alleged acts or omissions complained of, and then determine, in the light of the facts we have found above, whether any of the claimant's claims are made out, and whether, where the burden of proof falls on the respondent, it has made out a non – discriminatory explanation, or justification of any s.15 or other claims.

23. We also have considered the judgment of HHJ Richardson in ***Carranza v General Dynamics IRLR [2015]*** in relation to the interrelation of s.15 and s.21 claims, where he said this:

"In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, s.15."

Further, in the words of Elias LJ in ***Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216*** (at [27]): *"…it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the disabled employee is disabled".*

24. As will be seen, we consider that the converse is rather the case here, in that many claims framed as s.15 claims we consider are more aptly to be considered as s.21 claims, or, at least elements of them are.

Claims which cannot succeed.

25. There are three claims which cannot succeed on any basis, which can conveniently be disposed of at this stage, as they relate not to acts or omissions of

the respondent, but of O H Assist, a third party, for whom the respondent has no vicarious liability. They are , from the Scott Schedule, nos. 81, 95, and (to the extent that it relates to comments by the CMO of O H Assist) 97.

Time limits.

26. Before proceeding any further, however, the Tribunal must deal with an issue which, though pleaded, has been rather overlooked by the parties. This is understandable, given the plethora of factual and legal issues raised by these claims, and the claimant's lack of legal representation, but as it goes to the Tribunal's jurisdiction, it cannot be overlooked by the Tribunal. Time limit issues were identified in the first preliminary hearing on 24 July 2015)see [Pldgs: 43] , and were considered further at the preliminary hearing on 10 and 11 November 2015, when the claimant's application to amend was considered [Pldgs: 67 – 68] . and are specifically pleaded in the amended response [Pldgs: 194 - 195].

27. The claim form was presented on 12 March 2015. The claimant made a referral to ACAS for early conciliation on 21 January 2015, and a certificate was issued on 21 February 2015. Those dates are hence the relevant dates "A" and "B" for the purposes of the Early Conciliation Regulations. The effect of the Regulations is to extend the time limit for presentation of the claims in certain circumstances, by the operation of the "stop the clock" provisions. By the Tribunal's calculations the earliest date upon which any claim in respect of any act or omission relied upon would be in time would be 22 October 2014.

28. The original response to the claims as originally presented [Pldgs: 19 - 40] did not raise any time limit issues. The first preliminary hearing was held on 24 July 2015 [Pldgs: 41 - 45]. At para. 3.1 of the Notes, the Tribunal identified, as part of the issues, whether there was a continuing act of discrimination, and if not, was part of the claim presented out of time.

29. The claimant sought to amend his claims, and at a further preliminary hearing on 10 and 11 November 2015, was given permission to do so, in a reserved judgment sent to the parties on 14 December 2015. This was a contested application, in which the issue of time limits was raised, the respondent objecting to some of the proposed amendments on the grounds that such claims would be out of time. There was discussion in that reserved judgment of time limit issues, and their relevance to applications to amend. Employment Judge Porter granted permission to amend, but in para. 65 of her judgment said this [Pldgs: 73] :

"65. If I am wrong in my above assessment of the appropriate category of amendment under the ***Selkent*** *principles , if there are any new causes of action, I have considered the out of time point. The original claim raises a continuing course of action [sc. "of"] discriminatory conduct , relating in particular to the failure to make reasonable adjustments throughout the period of employment. The claimant continues in employment. It is just and equitable to allow the claim, as identified in the CMO, and further particularised in the proposed Amended Particulars of Claim to proceed. The respondent is not prejudiced by the identification of any new cause of action. The evidence is intrinsically linked to the other parts of the originally pleaded claim."*

30. The respondent then sought further particulars, which the claimant provided [Pldgs: 95 - 108] albeit only just before the further preliminary hearing held, by Employment Judge Holmes , on 15 February 2016 [Pldgs: 109 - 115]. The claimant was given more time to respond to the request, and to consider and make any further application to amend, and the respondent was given time to file an amended response.

31. The amended response was filed on 18 April 2016 [Pldgs: 150 - 200]. Paras. 182 to 189 specifically raise time limit issues. On 13 June 016, by an Order sent to the parties on 16 June 2016 [Pldgs:208 - 209], Employment Judge Holmes ordered the claimant to provide an enumerated and chronological schedule of his claims, setting out the dates of each act or omission to act relied upon. The respondent was then directed to respond thereto, and to specify which claims were contended to have been presented out of time, and which were said not to be considered to be conduct extending over a period of time for the purposes of s.123(3) of the Equality Act 2010. A letter dealing with time limit issues, was sent to the parties on 16 June 2016 [Pldgs: 212 – 213] in which the claimant was advised as to what would be required if he was to seek an extension of time for any claims found to be out of time. A further preliminary hearing, to determine the time limit issues, and how they should be dealt with, was convened for 26 August 2016.

32. Mrs Ward replied by e-mail of 78 July 2016 in which [Pldgs: 217 – 218] she states the claimant became aware of his rights as a disabled employee in late May 2013, and later repeats that he was unaware until late May 2013 of the extent to which the respondent should have been helping him. Further correspondence ensued about these issues, and indeed, how the claims, as they then stood, should be tried.

33. The preliminary hearing was held on 26 August 2016 by Employment Judge Holmes. The judgment , sent to the parties on 7 September 2016 is at [Pldgs : 248 - 254] . At para. 4 of the Reasons [Pldgs: 249], it is recorded that time limits are in issue, and the view was expressed that Employment Judge Porter had not, in allowing the amendments that she did, thereby determine whether any claims were brought in time, and, if not, whether any time limit should be extended on the just and equitable basis. It was stated that these matters had not been determined, and would ultimately be determined in the final hearing.

34. Neither party has taken issue since that judgment with that view, and it remains the view of the Tribunal. There has been, it is true, some debate in the appellate jurisdictions as to the way in which time limit issues should be dealt with on applications to amend, but the position now is well established (as was the previous orthoxody) that substantive time issues which will depend upon the evidence should not usually be determined on applications to amend, but at the final hearing (see ***Galilee v The Commissioner of Police of the Metropolis UKEAT/02027/16/RN***).

35. Consequently, time limits were , and were for a long time going to be, issues in the final hearing. It is regrettable that neither party has addressed them in their final submissions, and that the claimant has not addressed them in his evidence. The Tribunal, however cannot ignore such matters, as they go to its jurisdiction.

36. From what has already been argued by the claimant in previous hearings, and correspondence, it is clear that he would contend that the Tribunal should hear all his

claims (as currently before it, i.e those dating from January 2014) on the grounds that they amount to conduct extending over a period of time (known by the slightly inaccurate shorthand as "continuing act") , as they extend throughout this period of employment with the respondent, are all acts of disability discrimination, and were in many instances perpetrated by the same persons.

37. The Tribunal has now, of course, found its facts, so the issue for it is not whether such acts or omissions as it has found could constitute such conduct, but whether it actually did.

38. Section 123 of the Equality Act 2010 provides:

123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) [N/A]

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

39. The leading case on this issue is ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***, a Court of Appeal case. In his leading judgment, Mummery LJ set out the relevant considerations. This judgment is referred to by Employment Judge Porter in her consideration of time limits upon the claimant's application to amend [Pldgs: 67 – 68] , and need not be repeated here. The determination of the relevant time from which limitation runs in failure to make reasonable adjustment cases was the issue in ***Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288***. The Court of Appeal held that failure to make reasonable adjustments was an omission , not an act, and hence as such could be deliberate , or inadvertent. In either case para. 3(4) of Sch 3 to the DDA 1995, which is virtually identical to s.123(4) of the Equality Act 2010, applied. So, if an employer has not done anything which is inconsistent with making the reasonable adjustment,

time runs from when he might reasonably have been expected to make the adjustment.

40. In this case, we find that the respondent did not do anything, in relation to the chair, which was inconsistent with providing it, it merely failed to provide it. We have therefore had to assess the date by which time it might reasonably have been expected to have provided it, and , given that the assessment of the claimant's needs by Evelyn Bird took place on 13 August 2014, we consider that three months should have been sufficient for the respondent to have identified and sourced a chair which met the claimant's needs, so that , by the time the claimant had gone off work sick on 11 November 2014, that duty had been breached, and the relevant failure occurred from that date. As the claimant's claims were presented on a date whereby any claim relating to matters after 22 October 2014 would be in time, this reasonable adjustments claim was presented in time, and no extension of time is necessary. To the extent that the claimant makes reasonable adjustments claims which pre –date this claim, i.e before the Evelyn Bird assessment, we do not consider this latest failure to form part of conduct extending over a period of time. It is right that the claimant had issues with his seating prior to August 2014, but he was off work for 2013, and only started in his new role in February 2014. We consider this breaks any chain of conduct prior to the new role starting, and that the point at which the respondent could and should have properly assessed the claimant's needs in this regard did not arise until August 2014.

41. Not all the claimant's claims, however, are of this form of failure to make reasonable adjustments. He makes such claims not only in relation to the non – provision of a suitable chair, but also in respect of the alleged failure of his previous Manager, Janette Barrett to make reasonable adjustments, which can only have arisen before his transfer on 11 February 2014 , and must therefore be out of time, given that his claim was not presented until 12 March 2015. That means allegations nos. 59, 60, and 62 are potentially out of time, as are 61 , relating Laura Porter, and no. 63, that the claimant was "forced" to accept a position in the debt management team, in which the claimant started in February 2014.

42. In relation to the allegations nos. 64, 65, and 66, these relate to Wendy Wallis, and are obviously post February 2014, but pre – date 22 October 2014. Allegation 68 relating to David Clayton concerns an incident which occurred at the latest in April 2014. This claim is out of time, and as it is wholly different in nature from any other, cannot , even if established on the facts, be considered as part of any conduct extending over a period of time.

43. Dealing with the next claims, Allegation 70, the claimant being allocated three new staff members, occurred around August 2014, so this too is a potentially out of time claim.

Allegation 71, relating to Wendy Wallis refusing the claimant's request for specific hours, arose on 15 July 2014, so is another potentially out of time claim.

Allegation 72, which relates to RAST accepting Evelyn Bird's recommendations is also potentially out of time, but, as will be discussed below, this may not matter when the claimant's reasonable adjustments claims are considered.

Allegation 73, in so far as it relates to Ann Harrison's e-mail, which was on 14 August 2014, is potentially out of time, as is any allegation that Wendy Wallis Sarah Smith and/or Adrian Williams failed to make reasonable adjustments, or indeed committed any other form of discrimination against him prior to 22 October 2014. Thus allegations 74, 77, 78 , 80, 83, 84 , 86, and 87 are also potentially out of time as they all allege discriminatory acts of omissions which had been carried out prior to 22 October 2014. All the remaining allegations before the Tribunal (i.e from no. 90 onwards) post-date 22 October 2014, and hence are in time.

44. The question then arises as to whether these earlier claims are to be considered as conduct extending over a period of time, for the purposes of s.123(4) of the Act. In approaching this issue, the Tribunal considers that there are two separate and distinct periods. The first is whilst the claimant remained under the management of Janette Barrett, the second when, from 11 February 2014, he was in his new role, managed by Wendy Wallis, Sarah Smith and Adrian Williams.

45. In relation to this first period, the allegations against Janette Barrett are mainly of failure to implement reasonable adjustments. The reasonable adjustments in question, however, did not relate to provision of a new chair, categorisation of leave as annual leave or sick leave, working with a laptop , responsibility for additional staff or other matters which go on to form the basis of claims made in respect of the second period under the claimant's new management.

46. Further, the identity of the perpetrators is, of course, different. Whilst there is a common thread of alleged failure to make reasonable adjustments, these are different adjustments, in a very different context. The Tribunal considers that it would be stretching the concept of conduct extending over a period of time too far to link the alleged acts of discrimination by Janette Barrett with those alleged against Wendy Wallis, Sarah Smith and Adrian Williams in the second period. Those claims, therefore are out of time.

47. That is not, however, the end of the matter, as the claimant would doubtless seek the extension of time for presentation of these clams under the just and equitable discretion afforded to the Tribunal. In seeking this, he would doubtless rely upon his lack of legal knowledge or representation, his medical conditions, particularly his mental health, and the lack of prejudice to the respondent of allowing these claims to proceed out of time. Further, the Tribunal has considered the additional points made by Mrs Ward in her further submissions made in writing to the Tribunal by e-mail of 12 February 2018 , in which she said that the claimant had been made aware in May 2013 of the "capacity" (by which she probably means "responsibility") of the respondent to supply him with bespoke reasonable adjustments. He had been an employee of the respondent for 16 years, but did not initiate any action as he wanted to remain employed. She went on to say that he did not raise any formal grievance in 2014 as he was afraid taking formal action may cost him his job.

48. The test for extension of time on this basis has been long established, and is set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** .This discretion, of course, is the same as conferred by several discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link***

2003 [IRLR] 434 ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted. In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

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 co-operated with any requests for information;

The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;and

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

Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be an error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

49. Applying those factors here, the length of the delay here is significant. Given the three month time limit, the claims being presented over 12 months after the events complained of were over 9 months out of time. That is a long time, thrice the prescribed time limit. Turning to the reasons for the delay, the claimant has not advanced any in his evidence, though these matters are touched upon in Mrs ward's further submissions.. The Tribunal has surmised what he could and probably would say, but it has not actually heard any evidence on this point. In terms of the delay, and the reasons for it, it is to be noted that whilst quite vocal , and prepared to raise grievances about matters in 2013, the claimant raised no grievance about any issues during Janette Barrett's management of him at all. By October 2014 he was in serious dispute with his then managers, but nowhere in any written communication from him in 2014 or 2015 is there any reference to any of the issues he now seeks to raise in relation to Janette Barrett. Whilst Mrs Ward submits that the claimant did not take action, or grieve, because he feared he may lose his job. That is, with respect, hard to accept. The claimant had grieved extensively during the course of his employment, with no reprisals, before early 2014. He commenced these proceedings whilst still employed by the respondent. Whilst taking into account his mental health, given what he was saying about his condition being a disability from October 2014, his failure to take action sooner than he did remains inadequately explained.

50. The third consideration is not relevant, the claimant does not say he sought any information from the respondent. The fourth and fifth factors are relevant factors, in that it seems (see [Pldgs:58 – 59 – referred to in Employment Judge Porter's preliminary hearing on 10 and 11 November 2015) the claimant sought legal advice in November 2014, although apparently from an unsatisfactory , non – employment, solicitor. He did not, however, then even raise these issues as grievances, leaving it until March 2015 to make any complaint about them. He clearly knew of the facts giving rise to the claims, but did not act promptly, and he took only one step, it seems to seek some legal advice. Whilst he may not have been in receipt of any pay at that time, he was still employed.

51. The second consideration remains to be considered, and it is right that the respondent called Janette Barrett, and was able to respond to these claims. Perhaps paradoxically, the effect upon the cogency of the evidence has been more for the claimant, than it has for the respondent, as he has had to recall matters from memory. Thus , whilst a trial of these claims has been possible, there has been some effect on the cogency of the evidence, and that will have been the case as at the date the claims were issued.

52. In summary, however, the length of , and lack of good reasons for , the delay weigh heavily with the Tribunal. That there was not a hint of any complaint about these matters until over a year after they occurred, reinforces the Tribunal's misgivings about granting the extension of time sought. Whilst there may be little or no prejudice to the respondent, ***Robertson v. Bexley Community Centre*** makes it clear that this does not tip the scales in the claimant's favour. The Tribunal also takes into account the impact of the loss of these claims upon the claimant's case as a whole. Whilst , if successful, they would sound in an award for injury to feelings, they were short lived, and have no financial losses which could be said to flow from them if proved.

53. This affects the claims relating to Janette Barrett, Laura Porter and David Clayton. The allegations relating to the latter two are , at the time the claims were presented, already stale. They have even less connection with the subsequent claims about the claimant's managers in his new role than the allegations which relate to Janette Barrett do. In the case of David Clayton , as was demonstrated, there was clearly an effect upon the cogency of the evidence, as he and the claimant both had to recall a brief , undocumented and unreferenced conversation .

54. For all these reasons , the Tribunal considers it does not have jurisdiction to hear these claims, and does not extend the time for their presentation . They (being allegations nos. 59, 60, 61, 62, 63, and 68) are dismissed.

55. By way of alternative, however, the Tribunal would not, on the facts , have found any of these claims made out on the evidence before it, for reasons that will largely become apparent from further discussion of the claims below.

Summary of Findings.

56. It is perhaps convenient if we now summarise how we have made our findings in relation to the remaining claims by reference to the types of claim made. We will then set out all the claims , and our findings in relation to each of them. There are 36 allegations from the Scott Schedule which are pursued, many of which allege five

types of discrimination , direct (s.13), discrimination "arising from" (s.15) ,failure to make reasonable adjustments (s.21), harassment (s.26) and victimisation (s.27). Other allegations involve fewer claims, but these are the five types of discrimination alleged. We will, after considering claims which cannot succeed, and time limit issues, set out our findings in broad terms in relation to each of them, and then set out the specific findings against each allegation. This will mean that many allegations are considered under different heads of claim, but we consider that this is a more coherent approach than examining each allegation and considering each strand of discrimination alleged in it. The claimant has generally pleaded these claims in the order of the section numbers, but for reasons that will be apparent, we will deal firstly with the direct discrimination and victimisation claims.

The Direct Discrimination claims (s.13).

57. The claimant makes claims of direct discrimination in each of the remaining allegations in his Scott Schedule , save for nos. 84, 96, 98 and 99. He therefore alleges that the acts or omissions of Wendy Wallis, Jamie Pigott, Sarah Smith, and Adrian Williams (though only allegation 85 is couched as direct discrimination in his case) were direct discrimination.

58. Direct discrimination is summarised above, and s.13 is set out below. The claimant, unsurprisingly, has not relied upon an actual comparator, as there is no non – disabled person he can refer to whose circumstances were the same as the claimant's. He must therefore rely upon a hypothetical comparator, so the Tribunal must be satisfied that his treatment was less favourable than that which would have been afforded to a non – disabled comparator. In terms of the burden of proof, the claimant must initially a prima facie case of less favourable treatment, and if he does so, the burden passes to the respondent to show that the treatment was not "because of" any disability.

59. In each instance of alleged direct discrimination, we find that the claimant has not satisfied the Tribunal that the alleged discriminators treated him less favourably that they would have treated a non – disabled comparator. That hypothetical non – disabled comparator, of course, must have circumstances which are not materially different from those of the claimant. In other words, this person must have been absent from work for a year , for non – disability related reasons, have been re-deployed into a new department, given the same responsibilities and so on. He or she must have had the same absences, and needed for time off work, or to go home, or need for a special chair, for non – disability related reasons. We find that in all the dealings that the persons against whom the claimant makes direct discrimination claims had with him, they treated him just the same as they would have treated a non – disabled comparator in the same circumstances. That is, we should say, in relation to those persons for whom the respondent is potentially liable. There are claims, as has been seen, where the respondent is not be liable for the alleged discrimination in any event.

60. In the alternative, if we were wrong, and the claimant had proved facts from which we could, absent an explanation, have inferred that the reason for the claimant's treatment was his disability, or either of them, we would have had no hesitation in finding that we were satisfied by the respondent's witnesses, even allowing for the absence of Wendy Wallis, but including her, that they did not treat

the claimant the way they did because of any disability that he had. In short, we are satisfied that, whilst they may on occasion have been less than competent, somewhat unimaginative, rather bureaucratic and rather bound by procedures, we are satisfied that they acted from perfectly proper motives, and did what they considered they were required to in order to try to assist the claimant. The degree to which they succeeded may be questionable, and will be examined under other heads of claim, but we find that none of them acted as they did because the claimant was disabled. They would all, we are quite satisfied, have treated a non – disabled person in the same circumstances in precisely the same, and perhaps less than satisfactory, way. All the direct disability claims are accordingly dismissed.

The victimisation claims (s.27).

(a)The protected acts.

61. As explained above, this term has a particular meaning in law. In order to establish such claims the claimant must first establish the doing of a protected act , or acts. Thereafter, he must establish some unfavourable treatment by the respondent. If he does so the burden then shifts to the respondent to show that the treatment was not because of the protected act.

62. In relation to the former, the claimant , we are satisfied, has shown that he did a protected act , indeed, the respondent has not argued to the contrary. The victimisation claims, however, are made in every one of the 39 allegations made. In the Scott Schedule, the protected acts ("P.A") relied upon are repeatedly referred to as:

"P.A = grievances raised in May 2013 , June 2013, and Sept 2013, and any appeals necessary in those grievances."

63. The Tribunal cannot see any grievance of May 2013, but notes that at [2013: 101 – 106] there is a grievance complaint form , dated 6 June 2013. That relates to the claimant being dissatisfied with a "must improve" rating for his end or year review, which he received at the end of May 2013. That grievance therefore relates to his previous period of employment in the year 2012 to 2013, when he was managed by Laura Porter.

64. The next grievance, dated 17 September 2013 , is at pages [2013: 142/153]. This relates to allegations that Laura Porter had been gossiping about the claimant with Rachel Thorpe, who in turn had passed on to Mrs Ward, as she was to become, comments that Laura Porter had made about the claimant.

65. By this time Janett Barrett was the claimant's manager, having taken over in mid - 2013. None of the grievances , however, relate to her, but to the period of the claimant's previous assignment to Laura Porter's department.

66. The acts of victimisation that the claimant contends he was subjected to, however, begin in January 2014, and permeate all his claims up to 2015. It is an important element of victimisation claims, however, that the alleged victimiser was aware of the protected act (see: ***Chief Constable of Cumbria v McGlennon [2002] ICR 1156***, ***South London Healthcare NHS Trust v Al – Rubeyi UKEAT/0269/09***).

67. The claimant started his new employment in February 2014, with Wendy Wallis, and then Sarah Smith, and ultimately Adrian Williams as his managers. The victimisation claims, however, are made not only against them, but Janette Barrett, Laura Porter, David Clayton, and Jamie Pigott.

68. Starting with the victimisation claims against Janette Barrett (leaving aside the time limit issue) , it is correct that she was aware of the claimant's grievance relating to Rachel Thorpe and Laura Porter, as she was involved in dealing with it. The victimisation claims relating to her, however, nos. 59, 60, and 62 cannot succeed, given that the one grievance of which Janette Barrett was aware made no reference to any disability discrimination issues, and cannot therefore be a protected act.

69. Next (and again, unnecessarily, but for completeness) is the claim relating to Laura Porter, against whom the claimant brings one claim of victimisation only. She clearly did know of the claimant's previous grievances, as she was the subject of them. The only act alleged against her, however, is an e-mail , which was erroneously sent to the claimant, in which she enquired of her manager whether the claimant was coming back to work. That was, however, we find, and the claimant agreed, an error, and not intentional. We do not find it unfavourable treatment or a detriment, it was no more than an enquiry of her manager which the claimant got to see. Even if it was, we are satisfied that it was not <u>because of</u> the protected act the claimant had done in raising a grievance about her, because the terms of the grievances as we have seen them do not, in fact, raise any disability issues. His first grievance was about his rating, and his basic complaint is that he was found to have been underperforming, which he disputed. Whilst he makes mention of his absence from January 2013, he nowhere makes any complaint that his rating was the result of any disability discrimination. His second grievance relates to the alleged gossiping between Laura Porter and Rachel Thorpe. Again, whilst this apparently related to whether he was leaving the department (or DWP, it is not clear), it is impossible to construe this grievance either as in any way raising disability discrimination complaints. Hence, neither grievance, in our view was a protected act, nor do we find that Laura Porter, or indeed, anyone else who did know of them , believed that they were.

70. Similarly, dealing next with the claim relating to David Clayton, no. 68 in the Scott Schedule , he, the Tribunal finds, was aware not so much that the claimant had previously done any protected act, but , at most that he might in future do so, in that he knew that he wished to raise a grievance. To that extent, he might fall within s.27(1)(b), as a person who believed that the claimant may do a protected act. To find so, however, the Tribunal would have to be satisfied that he believed that the claimant may do a protected act within the meaning of the Equality Act, i.e that he may complain of, grieve about, something related to a protected characteristic under the Act. An awareness that the claimant may want to raise a grievance is not enough, there has to be a belief that the claimant may raise a complaint relating to, in this instance, one of his disabilities.

71. The only evidence about this in the claimant's witness statement is para. 24 (the first, for there are two) , where he says that he spoke with Dave Clayton "about what had happened to me the previous year and my ongoing issues." Nothing more specific than that is said, and this is way short of establishing that he led David Clayton to believe that he was going to grieve about matters relating to his disability.

David Clayton's evidence was clear, and we accepted it. He did not know the claimant was going to refer to any disability issues. That is enough to dispose of the victimisation claim relating to him, but if we were wrong about what David Clayton knew or believed, we are quite satisfied that his advice to the claimant , which he agrees was to discourage taking the matter further, was in any way shape or from influenced by his knowledge or belief of any potential disability related grievance. It was general advice , which he would have given to anyone seeking to raise a grievance about any decision which had gone against them , born of his own personal experience.

72. That leaves the (in time) victimisation claims against claimant's managers from February 2014, Wendy Wallis, Sarah Smith, and Adrian Williams. In relation to the timescale, the preceding protected acts, the grievances of May and June 2013 did not relate to them, and, the Tribunal finds, Wendy Wallis, Sarah Smith and Adrian Williams had no knowledge of them. Indeed, Wendy Wallis and Sarah Smith studiously avoided going back into the claimant's personnel history, and issues with previous colleagues, as they wanted him to start with a "clean sheet", and to leave behind any "baggage" from his previous department. There is no evidence they, or Adrian Williams were aware of the claimant's previous grievances, or what the contents of those grievances were. Even if they were, as is clear from the analysis of the content of those grievances, it would be impossible to find that they were, or were believed to have been, protected acts.

73. It follows therefore that the Tribunal cannot find that the claimant did any protected act until October 2014, when , in the e-mail chain of 6 to 8 October 2014 the claimant expressly referred to his disability. The Tribunal has scrutinised the evidence, and finds that the first time the claimant made reference to any potential breach of the Equality Act 2010, as it was then, (not that he has to be so specific) was 8 October 2014, when the claimant said in his e-mail response that his condition was a disability.

74. Then, it is also true to say, he sent an e-mail to Sarah Smith [2014:234 to 236] in which he expressly complained of disability discrimination. Until 8 October 2014 there was no protected act, of which any of these three persons were aware, so there can have been no victimisation. That means that no allegation prior to allegation 86, can be sustained as a victimisation complaint, as there is no preceding protected act, nor could it be said that the alleged victimisers believed that the claimant had done, or was likely to do, any protected act.

75. Thereafter, of course, it is possible that the treatment the claimant received, which the Tribunal will consider as unfavourable in the ways in which the claimant alleges, was because he had done such protected acts. Clearly, in issuing the Tribunal claim as he did on 21 March 2015, the claimant also did another protected act.

(b)Causation.

76. The question then is did any of the persons who treated the claimant that way do so because he had done this , or any subsequent, protected act ?

77. In terms of the persons involved in the allegations from no. 86 onwards, they are everyone who had dealings with the claimant –Wendy Wallis, Sarah Smith,

Adrian Williams, and Jamie Pigott. Once the protected act has been established, which we accept the claimant has done from 8 October 2014 , the onus is upon the respondents to show that their treatment of the claimant was not because of his having done any protected act.

78. We are quite satisfied that the respondents have discharged this burden. The essence of victimisation claims is that the treatment complained of is some form of retaliation for the employee having done a protected act. This involves an examination of the motives and reasons why any alleged victimiser acted as they did. Sometimes a Tribunal can discern a change in treatment, some worsening of treatment, after the claimant has done a protected act, from which it can be inferred that the reason for the treatment was the doing of a protected act.

79. In this case, however, we cannot see any such change in treatment. The claimant was being treated much as he was before he did any protected act. That may have been unsatisfactory treatment in his eyes, and possibly may constitute some other form or forms of discrimination, but that does not mean that it was victimisation. Victimisation is (usually, but it does not have to be) a conscious act – the perpetrator treats the employee the way that he does because of his complaint or other protected act. In essence, the Tribunal is therefore required to examine the mindset of the alleged perpetrator, and ask if it has been influenced by the doing of any protected act. Having heard from Sarah Smith , Jamie Pigott, and Adrian Williams, and having seen what Wendy Wallis wrote at the time, and her written evidence to the Tribunal, the Tribunal accepts that , however “negligent” or otherwise discriminatory their conduct towards the claimant was, none of the alleged victimisers were influenced at all by any protected act the claimant had done.

80. In the case of Jamie Pigott, the Tribunal is quite satisfied that he was not even aware of the protected acts that the claimant did indeed do, namely in his e-mail traffic with Wendy Wallis Sarah Smith and Adrian Williams from 8 October 2014. Jamie Pigott was not a party to , or made aware of, this traffic, and hence could not have victimised the claimant for anything that he had said in this exchange.

81. Further, and for the avoidance of doubt, the Tribunal is quite satisfied on the facts that the allegation that Jamie Pigott deliberately failed to pass on the claimant’s further complaint about O H Assist to that organisation, and deleted it , allegation 91, is not made out. The claimant’s original e-mail of November 2014 did not reach Jamie Pigott, and he did nothing deliberately to thwart the claimant’s attempts to complain to O H Assist. All victimisation claims against him are dismissed.

82. Finally, in terms of the remaining allegations of victimisation , made against Wendy Wallis , Sarah Smith and Adrian Williams which post – date allegation 86 , they are: nos. 87, 89, 90, 93, 94, 95 , 96, 97, 98 , and 99. Allegation 87 , a complaint that the claimant was not permitted representation in meetings which he had requested, is expressly put as a failure to make reasonable adjustments, but is also framed as a victimisation claim. Firstly, factually, we do not find this claim is made out. The evidence shows that the claimant accepted the decision that he could not have union representation, and was content that Adrian Williams attended future meeting as a precaution. This was therefore not unfavourable treatment or a detriment. Secondly, in any event, even if it was, it was not, we are satisfied, because the claimant had done any protected act. It was expressly on the advice of

CS HR , who advised that the managers should follow the respondent's policies and procedures.

83. Allegation 89 relates the Adrian Williams' discussion with the claimant on 11 November 2014 to the effect that he could not utilise annual leave when he was in fact too ill to come to work, such absences being sickness absence and required to be recorded as such. Leaving aside the reasonable adjustment element of this claim, and accepting for these purposes that this was unfavourable treatment (though this is arguable) , the Tribunal cannot find that this treatment was in any way related to the claimant having done any protected act. It was done in a telephone call, on the spur of the moment, and was a reflection of Adrian Williams' understanding of how such absences should be dealt with , regardless of any previous practice of Wendy Wallis of allowing the claimant to take annual leave when in fact he was absent through ill – health. This victimisation claim fails.

84. Allegation 90 is simply that Sarah Smith failed to reply to the claimant's e-mail of 12 November 2014, alleged to be , amongst other things, an act of victimisation. The simple response to this is that Sarah Smith was away at the time, and Adrian Williams replied instead. Assuming this was unfavourable treatment, again it has nothing to do with the claimant doing any protected act, it has this simple, and non – victimising , explanation. This claim too is dismissed.

85. Turning to allegation no. 93, this related to Wendy Wallis only, in the original Scott Schedule, but has been amended to relate also to Adrian Williams. Either way, it is an allegation that the respondent , in seeking medical advice from its O H providers as to the effect of medication upon the claimant's memory, and his ability to perform his work (see the O H referral on 19 November 2014 at [2014 : 240 – 241], was victimising him for his protected acts. The Tribunal does not so find. The issues were raised because the claimant himself had made reference to the effect of his medication on his memory, and the Tribunal does not consider that it was unfavourable treatment to seek medical advice upon these issues. Indeed, the ensuing report did advise that the claimant's memory was likely to be affected by his medication, and other factors. This, if anything, would be favourable to him in any assessment of his performance, as it would tend to show that any failings were due to his disabilities. This victimisation claims falls, therefore at that hurdle, and even if it did not, we are quite satisfied that this referral was not in any way influenced by the claimant's recent protected acts.

86. The next, and most serious allegations of victimisation, are levelled against Adrian Williams, at no. 94. It is alleged that Adrian Williams did not submit the claimant's IHR form until after 1 April 2015, in an attempt to change the applicable pension scheme upon which the claimant was be retired. This , of course, is a reference to the change in pension schemes across the respondent's workforce which took place on 1 April 2015, and which made that a critical date. The claimant, had his medical retirement been granted on the basis of the new scheme from 1 April 2015, would have been worse off. An analysis of the facts, however, shows that Adrian Williams did submit the application before that date, but there were then issues with the claimant's signature, and the process was not then completed until after the crucial date of 1April 2015.

87. The Tribunal is quite satisfied that Adrian Williams made the initial submission in advance of 1 April 2015. In any event, the Tribunal cannot ascribe to Adrian Williams any malice or desire to punish the claimant for his protected acts. The terms upon which the claimant would be afforded ill health retirement were, as it were, no skin off Adrian Williams' nose, and we are quite satisfied that he had no desire or intention of disadvantaging the claimant, still less for the reason that he had done any protected act.

88. The Tribunal notes that it then transpired that when the ill health retirement was granted, and was meant to have been paid, there was then a delay, and issues were then raised as to which was the pension scheme that applied to the claimant, and what payments he should then receive. This is yet another unfortunate event that befell the claimant, who, particularly given his mental health issues, understandably suspected conspiracy and underhandedness, to his detriment. In the end , all was well, and the correct position was restored .The claimant's suspicion that all this was the result of deliberate victimisation on the part of Adrian Williams, or perhaps others, is understandable, but, we are satisfied, as we hope the claimant may now be, unfounded.

89. The next victimisation allegation, no.95 relates to the alleged refusal of the respondent to communicate with the claimant's wife, on or about 8 June 2015. This has been dismissed, as it relates to O H Assist, for whom the respondent is not vicariously liable.

90. Allegation 96 is in two parts and relates to Adrian Williams. The first is that he "lied", and falsely claimed that the claimant had refused a 9 month attendance review. A perusal of the relevant e-mail exchanges between 27 July and 10 September 2015 shows, however, that Adrian Williams made no such allegation. The claimant appears to believe that he had, but there is no evidence that he in fact did so. This claim fails on its facts.

91. The second part of this allegation relates to the comment made by Adrian Williams in the claimant's end of year report [SB : 74H] that the claimant had done little to challenge his rating. The Tribunal accepts that this is unfavourable treatment, but is quite satisfied that it has no connection whatsoever with the claimant's protected acts. This claim fails.

92. Allegation 98 relates to Adrian Williams and Sarah Smith. They were both involved in the claimant's end of year report provided to the claimant on 15 July 2015 by e-mail [2015:134]. The relevant entry was signed by Adrian Williams, and countersigned by Sarah Smith at pages [SB:74G – 74H], where the claimant's performance was assessed as "must improve". The Tribunal accepts that this was unfavourable treatment, so the issue becomes whether that was because of his having done any protected act. The Tribunal considers that it was not, neither Sarah Smith nor Adrian Williams were so motivated. It may have been unfair, or less than thorough, but that does not make it an act of victimisation. Further, the Tribunal takes the point made on behalf of the respondent that it was Adrian Williams who then considered the claimant's grievance about this rating, and subsequently allowed his appeal against it [2015 : 161A – F].

93. The next allegation is no.99 and relates to the claimant pursuing his bonus. The period in question appears to be between 2 October 2015 when the claimant's appeal against his end of year report was allowed, and 20 January 2016 when the claimant raised the issue with Adrian Williams. There was no evidence about this issue, and it was not put to Adrian Williams. The implication is that Adrian Williams did not progress the claimant's bonus payment, until he was chased by the claimant for it. There is no mention of this in the claimant's witness statement. The claim fails on its facts. Again, the Tribunal can see how this could be unfavourable treatment, but , even if proved, would accept that it was not motivated by any protected act on the part of the claimant.

94. Whilst there is a further allegation of victimisation made in allegation 101, that is something of a general sweeping – up allegation which encompasses all five types of discrimination claims made, and will be addressed in due course. To the extent that it refers to the date of 26 February 2016 , it presumably is a contention that the claimant's termination of his employment on that date on ill health retirement was somehow another act of victimisation. We cannot agree. We do not consider that the ill health retirement of the claimant, even if "forced", as the claimant would contend it was, was unfavourable treatment to which he was subjected because he had done any protected acts. Rather, if anything, it was a consequence of the respondent's failure to make reasonable adjustments. This victimisation claim too fails.

95. In summary, therefore, we find that none of the direct discrimination or victimisation claims succeed.

The failure to make reasonable adjustments (s.21) and discrimination arising from disability claims (s.15).

96. There are twenty five s.21 claims, and twenty nine s. 15 claims. In twenty five of the allegations before the Tribunal both are pleaded. Only allegation nos. 61, 78, 84, 94, 96, 98, and 99 do not include such claims, and only allegations 68, 89 , 90, and 91 plead a s.15 claim, but not s.21 claims. As discussed above, s.15 and s.21 often overlap, and in this case we consider that the proper focus should be upon the reasonable adjustments claims , which may also , if established, amount to s.15 claims.

The failure to make reasonable adjustments claims:

(i)The chair.

97. The claimant has framed many of the allegations as failure to make reasonable adjustments . Each has been considered, but, with all due respect to the claimant and Mrs Ward, we consider that many of them could be wrapped up into one single, and simple , claim of one failure to make reasonable adjustments, in that the respondent failed to make the reasonable adjustment of providing the claimant with a suitable workplace chair. Many separate individual allegations of failure to make reasonable adjustments have been made covering aspects such as the Evelyn Bird assessment and subsequent advice, the RAST reliance upon it, the management reliance upon it, repetition of inaccurate advice , the provision and delivery of an unsuitable chair, and then the failure to carry out a further assessment before the claimant went off sick.

98. It seems to us that these are all really facets of an overarching and single complaint of failure to provide the claimant with a suitable chair. The individual allegations were merely steps in the process, they were the reasons why, and the manner in which, the respondent failed , but the essential failure is to provide a suitable chair. Put that way , it is less important, and possibly a diversion, to try to analyse the individual claims which the claimant has advanced in the Scott Schedule, when his basic complaint is that the respondent failed to provide a suitable chair, and thereby failed to make a reasonable adjustment.

99. In considering whether an employer has failed to make reasonable adjustments a number of points need to be made. Firstly, in order to amount to a reasonable adjustment, the adjustment need not completely eradicate the disadvantage to which the claimant's disability puts him (***Noor v Foreign and Commonwealth Office [2011] ICR 695***) nor need it be shown that the adjustment definitely would have that effect, it is sufficient if there is a prospect , not necessarily a good or real one, of that occurring (***Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075*** , following ***Romec v Rudham [2007] All E R (D) 206 (Jul)***) . That is an important factor , as it seems to be one that certain persons dealing with the claimant's case appear to be unaware of , as reference has been made to the fact that a particular type of chair would not "cure" the claimant's hip/spine condition. It did not need to, it is sufficient if it had some prospect of preventing the PCP or physical feature in question from placing the disabled person at a substantial disadvantage.

100. Thus, if provision of a particular chair would have had some prospect of enabling the claimant to stay seated at work, and work in more comfort, so that , even if still at some disadvantage, that was reduced to a less substantial one, it would have been a reasonable adjustment to provide it.

101. The respondent has not argued that no such chair could have been provided, and the claimant has identified , in the documents, one type of chair, and has referred to two other chairs at work that he tried, which the respondent had provided for colleagues, and which it could easily have investigated further. Once the situation had reached something of an impasse at the end of 2014, the respondent has argued that it did not fail to make reasonable adjustments in relation to the provision of a suitable chair, because the claimant would not attend work for the purposes of a further O H assessment which might have (nay, the respondent argues , in Ms Trotter's closing submissions under allegation 101, was likely to have) led to him getting one.

102. The Tribunal has considered further the relevance of the claimant's failure to attend a further assessment. The respondent sets great store by this in its defence to these claims. This requires the Tribunal to consider what relevance the conduct of an employee can have in determining the issue of the reasonable adjustments. The first observation to make is that the Equality Act does not impose liability for unreasonable failure to make reasonable adjustments, it imposes it simply for failure to make such adjustments. In other words, the focus is upon the reasonableness of the adjustment, not of the failure to make it. The claimant's co-operation or lack of it therefore can only go to the issue of the reasonableness of the adjustment.

103. The relevance of the conduct on the part of the employee has been considered in a number of cases, such as ***Cosgrove v Caesar and Howie [2001] IRLR 653*** and ***Dominique v Toll Global Forwarding Ltd UKEAT/0308/13/LA*** . In ***The Home Office v Kuranchie UKEAT/0202/16/BA*** the EAT upheld a decision that the employer's duty to make reasonable adjustments went beyond those suggested by the employee . (The parties are aware of this case, as it is referred to by Mrs Ward in an application to strike out the response) . It has long been the case that the duty to make reasonable adjustments rests and remains upon the employer, and cannot be shifted onto the employee. Failure to co-operate in terms of assisting an employer to identify what adjustments would be likely to assist the employee can be relevant , as ***Dominique*** demonstrates, but it has no application in this context, where the claimant had identified that what he needed was a suitable chair. The precise specification for, or sourcing of, such a chair was something that we do not consider was his duty to provide.

104. It seems to us that the respondent is really arguing that it did not know whether a particular type of chair, or if so, what type of chair, would resolve, at least in part, the claimant's difficulties. In other words, it is an argument that it did not know, and could not reasonably be expected to know, without the claimant's assistance in a further assessment, exactly what was needed. There are two problems with such a contention. Firstly, the defence afforded to an employer under para. 20 of Part 3 of Schedule 8 to the Equality Act 2010 is of disapplication of the duty to make reasonable adjustments in a case where the employer did not know, and could not reasonably be expected to have known, of, firstly, the disability, and secondly the likelihood of the disadvantage in question. Neither of those apply here. This provision does not apply where the employer did not know, and could not reasonably be expected to know, precisely what reasonable adjustment to make.

105. Secondly, even if this were a relevant consideration, on the facts we would reject it. As has been stated, it is not an answer to a claim of failure to make reasonable adjustments that an employer did not know what reasonable adjustments to make, unless it can also show that it could not reasonably be expected to know, after due enquiry.

106. We do not agree that a further assessment by O H Assist was necessary. Whilst Ms Trotter in her submission contends that a further assessment "would have been likely to have resulted in the equipment that the claimant needed", we are far from sure it would, as was the claimant. An assessment by a suitable specialist with the requisite skill and knowledge would have. As observed, a further assessment would have obtained no more data than that which had already been obtained. Its purpose, it seems to us, was not just to gather the necessary data (which was already available), but to persuade O H Assist of the need for a bespoke chair at all.

107. Thus we would not , in any event, find that the claimant's failure to participate of a further O H Assist assessment was a factor that the respondent can rely upon. The duty to make the adjustments lay upon the respondent, the claimant had already provided data , and medical information upon which, with appropriate enquiry and advice , a suitable chair could and should have been sourced. This line of defence is of no avail to the respondent. The claimant had even identified one, possibly two chairs, in use by colleagues, which appeared to be suitable. The failure of the respondent, or its service providers, to examine such chairs, and assess the

claimant as he sat in one is another example of the missed opportunities and, frankly, bungled attempts to understand , and then provide for, his physical needs in this case.

108. In summary, we find that allegations 72,73,79, 82, 85, 97, and 101 are all evidence of, and integral components of, an overarching, and quite simple claim of failure to make the reasonable adjustment of providing the claimant with a suitable workplace chair, for which we find the respondent indeed is liable, having so failed from , at the latest, 11 November 2014, by which time, having started the process of trying to assess his needs in August 2014, it would have been reasonable for it to have provided the claimant with one.

109. It will be noted that we have omitted allegation 83 from this finding. This is because we do not find it factually made out. Sarah Smith did not refuse to fund a further assessment for the claimant, she agreed to one. There may have been some slight delay in this, but we do not consider that to be germane. In any event the assessment was not the adjustment, providing a suitable chair was.

110. In terms of the reasonable adjustments claims, it is hard not to have some sympathy for Wendy Wallis, who, from mid August 2014 was clearly trying her utmost to get the claimant what he needed. The breakdown in the process, it seems to the Tribunal came in the actions or failures of RAST and OH Assist. The former, of course, is part of the respondent, the latter is not, but the respondent has to accept the consequences of the acts or omissions of those third parties to whom it outsources the means to satisfy its obligations under the Equality Act.

111. The claimant was , from mid – August, or early September at the latest, making it clear that what Evelyn Bird had recommended , and RAST had sourced, was unlikely to meet his requirements, despite Wendy Wallis's specific enquiry to Jamie Pigott of 21 August 2014, which she had to reiterate in her further e-mail of 2 September 2014, as to whether a custom built chair would be sourced if, as was becoming apparent, the adaptations to the claimant's existing chair were not suitable. There was no response until 4 September 2014, when Jamie Pigott effectively said that the claimant would have to wait and see if the recommendations improved the claimant's problem. Neither RAST or OH Assist would arrange another referral until the recommendations had been trialled.

112. This led to the claimant having to try the chair, which he did for a day, and which proved , as expected, unsuccessful. Whilst Jamie Pigott sought to submit the claimant's complaint without the final sentence seeking a re – referral, Wendy Wallis stood firm , and asked him to submit the complaint as it was, which he then did.

113. With respect to the two organisations involved, this was "the tail wagging the dog". Whilst the claimant, and more importantly Wendy Wallis, his line manager, was saying that the August 2014 assessment was not going to solve the problem, and a further assessment for a custom built chair was needed , O H Assist apparently dictated that no further assessment would be carried out until the recommendations of Evelyn Bird had been trialled, notwithstanding the claimant's strong disagreement with them, with which RAST , rather supinely it has to be observed, concurred . At the end of the day, O H Assist were a third party service provider. If their client, DWP/RAST wanted a further assessment, provided it would be paid for, that was,

the Tribunal would consider, the client's prerogative. Jamie Pigott, however, accepted the O H Assist position without further challenge, and told the claimant and Wendy Wallis that the Evelyn Bird recommendations had to be trialled first.

114. It is also worth observing that the claimant, in his contribution to the e-mail chain of 7 and 8 October 2014 [2014 : 194] identified not one , but two chairs , that he had tried , and which he had found suitable. It is , to say the least, unfortunate that no-one on behalf of the respondent took the initiative of examining or investigating these chairs any further, and putting to RAST (or anyone else) that this was, or may lead to, a viable solution. Instead , the claimant's case was back in the vicious cycle of RAST referrals and O H Assist assessments, and the continued failure to take what was, or should have been, a relatively simple management decision to provide the claimant with a chair of the type that he had identified as being the reasonable adjustment that could have kept him in work.

115. The respondent has vacillated over the issue of whether the provision of a further chair would have been a reasonable adjustment. This is doubtless because of the less than satisfactory quality of the advice it was receiving from O H Assist. As late as September 2015, Angela Dunlop of O H Assist was doubting that the provision of such a chair would in fact make any difference to the claimant , and was upholding , in effect, the opinion of Evelyn Bird, expressed in 2014, about which the claimant had been complaining ever since. Even then, the best she offered was the possibility of an occupational therapist's report , but she was also suggesting that other aspects needed to be considered. If, however, this was a reference to the claimant's second disability, his mental condition, it was not an express one, and she offered (from the only extract of this letter available to us) no actual advice as to how the claimant's mental health issues should be addressed.

116. In the final analysis , however, the respondent has not challenged that there was such a chair that was attainable, which would in fact have alleviated the claimant's back pain symptoms at work, or have been likely to . It would have been open to the respondent to take the opposite position, and argue that there was no physical adjustment that could have been made that would have been likely to make a difference (for example, Kevin O'Reilly postulated such a possibility in his letter of 10 September 2015 [2015:161L]) , but it did not. The claimant, albeit late in the day, adduced further documentary evidence of the type of chair that would have been likely to help him manage his back condition at work, and, of course, much earlier than that had identified not one , but two , chairs of colleagues at work which he had tried, and which he considered offered him better support than what he was provided with, or was going to be provided with, by the respondent.

117. A further missed opportunity arose on 1 December 2014, when, as he had long requested, the claimant was finally to receive a further workplace assessment, from someone other than Evelyn Bird. There is no suggestion that, despite his fears that such an assessment may well have led to the same recommendation, the claimant would not have participated in such an assessment, but Adrian Williams cancelled it, on the basis that the claimant had submitted a further sick note, and was still off work and therefore, as he put it in his e-mail to James Pigott, "not available" for the assessment. He did not, however, raise this with the claimant , and merely assumed that , because he was off work, he could not undergo the assessment. He later tried to get the assessment carried out whilst the claimant was

off work, but by then the claimant was unwilling to participate at all, suffering as he was with the mental aspects of his disabilities.

118. A key feature in the resolution of these claims is the fact that the claimant has not one , but two, disabilities. The first is physical, his back condition, and the second is mental, his depression and anxiety. It is this second feature which has been rather overlooked in some of the respondent's dealings with the claimant. We note, for example, that initially Wendy Wallis and Sarah Smith did not acquaint themselves with the claimant's medical history before he started his new post in early 2104, expressly declining to examine the contents of the file of information that was provided to them. This was on the perfectly understandable and laudable basis that they did not want to dwell on, or go into, issues in the claimant's employment history which were in the past, and were, at first blush, irrelevant to his new position , and the new start he was making. The problem with that is that his managers did not acquaint themselves adequately with his mental disability, and concentrated on the purely physical side of his issues.

119. The further relevance , we consider , of the mental disability is in the degree to which it could be argued that the respondent did not fail, from late 2014 onwards to make reasonable adjustments in relation to provision of a suitable chair, because the claimant refused , unreasonably, to participate in a further workplace assessment. Whilst we have discounted the respondent's argument based on this alleged failure of co-operation on the part of the claimant, we would go further , and hold that does not excuse the respondent from liability for failure to make a reasonable adjustment for three further reasons. Firstly, the assessment was not the reasonable adjustment, provision of a suitable chair was. It was the respondent who imposed the condition of requiring a further workplace assessment before it would provide such a chair, not the claimant. Secondly, the claimant had, in any event, identified two chairs , used by other employees (used by Paul and Ann) as potentially suitable, which could have been examined and the same type provided for him to at least trial, or use. His measurements had been obtained in previous assessments, so it is difficult to see why it was so difficult to provide him with a suitable chair.

120. Thirdly, even if a further assessment was a reasonable pre – requisite to provision of a suitable chair, we do not consider that the claimant's stance in 2015 of refusal to undergo a further assessment was unreasonable, particularly given his second disability, his mental state. The reasonableness of such a refusal, if judged purely objectively, may have been open to question, although after months of trying to get a further assessment after the ill – fated Evelyn Bird assessment any non – disabled employee may well not have been regarded as acting reasonably in saying enough was enough. The claimant's views, however, were of course affected by his mental state, itself a product of his second disability. It is to be remembered that the workplace assessment that so nearly took place on 1 December 2014 was cancelled by Adrian Williams, simply because the claimant was off work sick. Jamie Pigott too appears to have regarded the claimant's sickness absence as a barrier to the workplace assessment being carried out [2015 : 1].

121. As at December 2014 there was thus a classic "Catch – 22". The claimant was unable to return to work until he was assured that a suitable chair would be provided for him upon his return. The respondent would not, however, provide such

a chair , or such assurance, until he had undergone a further workplace assessment, which could not take place until he returned to work. That position changed by the time of the meeting on 6 January 2015, when Adrian Williams did then suggest that the claimant could come in to work just for such an assessment , if he felt up to it. The claimant , who was on anti – depressants at the time , at that point refused to take up this offer, as he felt , as indeed we find, that the respondent had already failed to supply him with a suitable chair, and there was no certainty that a further assessment would result in one being provided.

122. Thus , in relation to what we consider has long been the central claim that the claimant makes, failure to make the reasonable adjustment of providing him with a suitable workplace chair, we find the claimant succeeds.

Other reasonable adjustments claims (and where appropriate, s.15 claims):

123. In terms of other, less significant claims of failures to make reasonable adjustments, and where there are also s. 15 claims, the Tribunal finds as follows:

Allegation 64:

Wendy Wallis failed to put the Claimant on sick leave between 2 February 2014 – 3 July 2014.

In terms of reasonable adjustments, this is the converse of a complaint that the claimant later makes about not being permitted to use annual leave instead of sick leave. It was, on his own case, at the time, a reasonable adjustment he wanted, and was happy with. We cannot therefore find that this was a failure to make reasonable adjustments, it was the opposite. Further, it was not Wendy Wallis who controlled this, it was the claimant. He was free to classify his absences, and the reasons for them, as he wished. It may have been financially beneficial for him to use annual leave this way, and that may have been condoned, but the claim , at most , seems to us to be that this was a reasonable adjustment , which was later withdrawn. At the time the claimant was quite happy with it. This s.21 claim therefore is dismissed.

124. As a s.15 claim, the Tribunal does not find that the claimant has established the factual basis for this claim of unfavourable treatment. The claimant took 6 days of annual leave between February and 4 July 2014. He has not been able to establish when, during this period, he should have been given sick leave, and when he was allowed, or required to take days when he was unable to work by reason of either of his disabilities as annual leave, rather than sick leave. Further, it is hard to see how this was unfavourable treatment. If it occurred, it had the effect of the claimant receiving payment for such absences when he otherwise would not do so, given his exhaustion of his entitlement to sick pay. Alternatively, any such treatment, is justified for the reason advanced by the respondent as a proportionate means of achieving the legitimate aim of maintaining the claimant's financial position. This claim as a s.15 claim is also dismissed.

125. Allegation 65:

Wendy Wallis forced the claimant to record deficits on his time sheet:

The Tribunal does not find that the claimant has established the factual basis for this claim of unfavourable treatment. This claim is dismissed as either a s.21 or s.15 claim.

126. Allegation 66:

Wendy Wallis unreasonably refused the claimant's February 2014 request for the reasonable adjustments of a) a laptop and b) sporadic home working.

The Tribunal does not find that the claimant has established the factual basis for these claims of unfavourable treatment or failure to make reasonable adjustments. Whilst there is evidence of such requests being made later, the Tribunal is not satisfied that any such request was made by the claimant in February 2014. These claims are dismissed. The Tribunal, however, does find that the respondent failed to make the reasonable adjustment of allowing the claimant the use of a laptop from October 2014, when he explained how he was proposing only to use one when he had to go home early, and was not proposing to become home based. Neither Wendy Wallis nor Sarah Smith took this up, and Sarah Smith in questioning before the Tribunal conceded that there was no good reason why the claimant could not have been provided with a laptop for these occasions. These claims succeed as s.21 and s.15 claims, as the respondent cannot justify this treatment as a proportionate means of achieving the legitimate aim of namely ensuring full efficacy of the claimant's role, which was one requiring significant face to face work with direct reports on a daily basis. Once his request was properly understood, there was no reason why allowing him use of such a laptop for the limited purpose of allowing him to complete work, if he had to go home early, could not have been arranged.

127. Allegation 70:

The claimant was informed by email that he was being allocated 3 new staff members, despite having indicated he couldn't cope with any more line management responsibility.

Firstly, we find that the claimant was aware of the potential arrival of these additional employees well before this e-mail . He had been consulted on the changes that would lead to additional staff being recruited or deployed. In terms of the s.21 claim, it is presumably argued on behalf of the claimant that it would have been a reasonable adjustment not to give him these additional members of staff, but, absent any prior indication that he could not, by reason of either of his disabilities, cope with them, we cannot see how this can be a reasonable adjustments claim, and it is dismissed.

128. Further, this alleged treatment , if such it be, cannot be unfavourable treatment by reason of something arising in consequence of either of the claimant's disabilities. He was not allocated these members of staff because of anything arising in consequence of either of his disabilities. His ability, or inability, to deal with them may do, but the allocation of them cannot. This claim again confuses the effect upon the claimant of something done or not done with the reason for it being done . The effect upon the claimant may be felt particularly because of his physical , or indeed his mental, disability, but the treatment was not "by reason" of anything arising in consequence of either disability. This s. 15 claim is dismissed.

129. Allegation 71:

Wendy Wallis unreasonably refused to allow the claimant to take his part time hours between 9 -1, as opposed to 10 – 2, as a reasonable adjustment.

This is framed as a reasonable adjustment claim, and a s.15 claim. The evidence was that the claimant made this request, but did not frame it as a request for a reasonable adjustment, which does not preclude it from being one. It is a defence under para. 20 of Part 3 of Schedule 8 to the Equality Act 2010 for the respondent to show that it did not know, and could not reasonably be expected to know that the claimant's disability put him at the disadvantage which the adjustment was required to abate. The claimant's e-mail simply says that he is up anyway from 6.30 , doing stretches, because he does not sleep well, so asks if he can come in earlier, as he is up. He does not suggest that his current hours were in any way disadvantaging him, or that this in any other way would reduce any disadvantage that his back condition was causing him. The Tribunal does not consider this was a reasonable adjustment, and the respondent did not fail to make it.

130. As we do not find this was unfavourable treatment which arose from his disability of back pain, the first limb of s.15 is not satisfied. If it was, however, the respondent argues justification , in that this was a proportionate means of achieving the legitimate aim of maximising the efficiency of the claimant's team whilst he was on part – time managed working. The claimant's acceptance of Wendy Wallis's decision at the time reinforces the Tribunal's finding that such justification would be established. This claim is dismissed.

131. Allegation 74:

Wendy Wallis and Sarah Smith were particularly hostile towards the claimant.

In terms of the s.21 claim, it is hard to see what PCP is being relied upon but it is presumably the requirement to meet certain levels of performance, and if the claimant is actually saying that any deficiencies in his performance were the result of his disabilities, that would then put him at a disadvantage. It may then be a failure to make reasonable adjustments to maintain those performance requirements, but the evidence shows that either the claimant was not claiming any deficiencies in his performance were in fact disability related, or was saying, and agreeing that they could be, and would be , rectified.

132. This allegation is rather vague, and undated. It appears, however, to relate to the period around 14 August 2014. This is a very general allegation, and it is difficult to identify what acts of Wendy Wallis or Sarah Smith are being complained of. If it is any criticisms of the claimant's performance , or of any alleged failures on his part, raised by either of them, however unfair the claimant may have felt these were, we do not understand any of them to have arisen as a consequence of either of his disabilities. The first limb of s.15 is thus not engaged, and this claim is dismissed.

133. Allegation 77:

The claimant completed a request for part time hours, which was refused.

It is again unclear to what period of time this allegation relates. If there was such a request, we accept that it may have been a reasonable adjustment, and refusal of it would be something arising in consequence of the claimant's disability in relation to his spine, which would then require justification. It is clear that later on in the process it was being suggested by the respondent that the claimant may have to consider accepting part time hours, but with a concomitant reduction in pay. This was discussed in a meeting on 21 October 2014. If by this claim the claimant is suggesting that he requested such a reduction and it was refused, we do not so find. There is no documentary evidence the claimant can rely upon to support such a contention, and this claim, as either a s.21 or a s15 claim, is dismissed.

134. Allegation 80:

Wendy Wallis gave the claimant responsibility for seven more tasks.

Even assuming the facts in the claimant's favour (and we are not satisfied that there were in fact seven additional tasks, in fact, if any) , we cannot see how any PCP has been identified which put the claimant at any particular disadvantage, nor that this is unfavourable treatment because of something arising in consequence of either disability. As with other examples of these claims, it confuses effect of the treatment with whether the treatment was "because of" something arising in consequence of the disability. These claims are dismissed.

135. Allegation 86:

Wendy Wallis unreasonably refused the claimant's request for Special Leave With Pay whilst he was waiting for the Meridian Chair.

This is factually correct, and not disputed. The occasion is in October 2014 , when the claimant specifically asked for this leave. Wendy Wallis sought advice from CCAS [2014: 176] who advised that this was a matter for local management, but rather inclined against it. The rationale for doing so was that the claimant could get into work, adjustments had been made, and he could manage with his existing chair, so this leave was not warranted.

136. It is appreciated that paid leave in itself may not amount to a reasonable adjustment, but this is not merely a financial issue. The claimant did not want to take annual leave, and did not want to take sick leave, for which he would not be paid. He was , in fact, not sick, so would not truly be off work sick, he would be off work because a suitable chair , which was meant to be arriving, was not delivered. He was struggling to cope at work with his existing chair, a fact acknowledged by the respondent ordering him a new chair. When even that did not materialise , the claimant asked for this special leave. It was the leave that was the adjustment, the fact of it being paid was incidental, but was the means by which the claimant would not suffer the disadvantage of either being unpaid if he took sick leave (though not sick) or of using up his annual leave when he did not wish to and was only doing so because his new chair had not arrived.

137. Although CCAS gave the advice, it was left to local management to make the decision. The clear "steer" was that this would be exceptional, and Wendy Wallis and

Sarah Smith decided not to allow the claimant this leave. We consider it would have been a reasonable adjustment to have done so. The justification advanced by CCAS, we consider , missed the point, probably because of the secondhand and incomplete nature of the information provided to it. The claimant had issues with his existing chair, a new chair had been ordered which was meant to have addressed those issues, but the claimant was expected to continue to "soldier on" when it failed to materialise. Allowing him leave, without financial detriment , at this point would have been the least that the respondent could and should have done, particularly bearing in mind, as the respondent clearly failed to, that the claimant had not only a physical disability, but also a mental one. The respondent clearly failed to address the potential effect upon the claimant's mental health of making him stay at work when the promised new chair did not then arrive. This claim succeeds, both as a reasonable adjustments claim, and potentially as a section 15 claim.

138. The section is engaged, which therefore requires the respondent to justify the treatment if it is to avoid liability. The justification pleaded is as follows:

"No disadvantage conceded. If found, PMOALA in that RAST following expert advice was part of process attempting to ensure MOS received adjustments as quickly and proportionately as possible".

The Tribunal cannot see how this was a proportionate means of achieving the alleged legitimate aim of the claimant receiving his adjustments as "quickly and proportionately as possible". Quite how keeping the claimant in work would hasten the process is unclear. If anything , the opposite was probably the case – if the claimant was off work, the respondent may have made getting his chair a more pressing priority. This type of leave had been granted previously, and was likely to be of short duration, i.e. until the claimant's chair actually arrived, although this may have been longer if a bespoke chair was required. In any event, there was a blanket refusal, for poor reasons, and we find the justification defence to this claim is not made out. This claim succeeds as a s.15 claim as well.

139. Allegation 87:

The claimant asked for representation at meetings after 8 October 2014 as a reasonable adjustment because he felt bullied and harassed.

We find that , whilst Wendy Wallis too thought the presence of another person, a manager, would be beneficial, the claimant did ask for representation in future meetings, which is why Wendy Wallis raised the issue with CCAS, whose advice (without, it appears, any knowledge or appreciation of the claimant's mental health) was in accordance with the standard policies and procedures. When , however, she relayed this to the claimant, and suggested Adrian Williams attended future meetings, the claimant was perfectly happy with that, and never sought to change this.

140. The claimant has not established that any PCP, such as not being entitled to be accompanied at meetings of this nature, which put him at a particular disadvantage because of his disability. He may have felt bullied, but this perception is not necessarily because of his disability. He did not allege he could not function in any such meetings, and did agree to Adrian Williams attending. There was no failure

to make a reasonable adjustment in this regard, and this was not unfavourable treatment falling within the first limb of s.15, which is not engaged. These claims are dismissed.

141. Allegation 93:

Adrian Williams asked about the claimant's memory issues in an attempt to undermine him.

To the extent that this allegation is advanced as a s.21 and/or s.15 claim, whilst no PCP has been identified, it would presumably be that of the respondent referring the claimant's memory issues to occupational health, which put the claimant at a disadvantage, and the s.15 claim is advanced on the basis that because the claimant's memory issues arose from the pain relieving medication he took for his disability, this referral was treatment falling within s.15.

142. We find, firstly, that the reasonable adjustment claim founders on the disadvantage point – even if the PCP is established, the Tribunal fails to see how it would have been a reasonable adjustment not to seek that information, and how the claimant could be disadvantaged simply by the referral. Further, if the first part of s.15 is satisfied, we consider that the respondent can and has justified the treatment as a proportionate means of achieving the legitimate aim of ascertaining the effects of the claimant's medication upon his memory and ability to carry out his role, he having himself suggested that his medication was having an effect upon his memory These claims fail as s.21 and s.15 claims..

The remaining s.15 claims.

143. There are some remaining claims, not dismissed as out of time, which have been advanced without a corresponding s.21 claim. They are nos. 89 , 90, and 91. The direct and victimisation claims have been dealt with, and the Tribunal will now deal with these separate claims.

144. The respondents , through Ms Trotter's further submissions specifically addressing the s.15 claims, do not concede that the first limb of the section is made out in any of the claims made ("no disadvantage conceded" as it is put, presumably another way of denying any unfavourable treatment because of anything arising from either of the claimant's disabilities) , but in the alternative, argue justification , the justification varying according to the claim made.

145. Allegation 89:

Classification of absence was changed from sick leave to annual leave.

This has been put as a s.13, s.15 , s. 26 and s.27 claim . It has been a hard allegation to comprehend, and is the converse of another claim to the opposite effect. The claimant is presumably referring to the period before 9 October 2014. That day Wendy Wallis first told the claimant that he must take sick leave if he was sick, and could not utilise annual leave when he was actually unfit for work. Thus, it must be the period before this to which the claimant is referring, when, he contends , he was allowed, or indeed, required to take annual leave if he was unfit for work. The

allegation at no. 89 in the Scott Schedule is dated 11 November 2014, and is hence a reference to the conversation between the claimant and Adrian Williams, who told the claimant that he could not use annual leave when he was in fact off work sick.

146. There is a factual dispute about the arrangement that the claimant alleges he had with Wendy Wallis. The claimant's annual leave record shows only 6 days leave in this period. He was, however, certainly under the impression that Wendy Wallis was agreeable to this course of action, because he says so in his e-mail of 9 October 2014 [2014:202].

147. Taking the claimant's case at its highest, and assuming he is right, we cannot see how this claim can succeed as a s.15 claim. This is because we cannot see it as unfavourable treatment, it was actually more favourable treatment for the claimant because it insulated the claimant from the financial effects of having to take sick leave. Hence his other complaint when this was removed. It is appreciated that a consequence of this may well have been that the referral to occupational health was delayed , but in overall terms we cannot see it as unfavourable treatment, especially as the claimant clearly appreciated this accommodation by Wendy Wallis. Equally, we cannot see the removal, if such it was, of such an arrangement by Adrian Williams as unfavourable treatment, as there are clearly plus and minor points , as the claimant's claims show. If it was, however, we consider that the respondent would succeed in justifying the treatment by Adrian Williams as a proportionate means of achieving the legitimate aim of ensuring that the reasons for all absences are correctly recorded, and, as the claimant has himself said ensuring that annual leave is used to provide rest and recuperation, and not to disguise absences for sickness reasons. This claim is dismissed.

148. Allegation 90:

The claimant emailed Sarah Smith with a number of issues on 12 November 2014; she did not reply.

It is hard to see how this is put as a s.15 claim. Whilst the claimant's e-mail might be viewed as something arising in consequence of his disability, because of its subject matter, it is his treatment that has to so arise. This is far more comprehensible as a s.26 or s.27 claim, which it is also pleaded as. As the Tribunal cannot see how the treatment , i.e. the lack of a reply from Sarah Smith could engage the first limb of s.15, the claim cannot succeed. In any event, the claimant did get a reply, from Adrian Williams. That change of correspondent can hardly be regarded as unfavourable treatment. This claim is dismissed.

149. Allegation 91:

Jamie Pigott deleted the claimant's complaint rather than forwarding it.

Again it is hard to see how this is put as a s.15 claim. Whilst the claimant's complaint might be viewed as something arising in consequence of his disability, because of its subject matter, it is his treatment that has to so arise. This claim too is far more comprehensible as a s.26 or s.27 claim, which it is also pleaded as. The Tribunal has found that Jamie Pigott did not receive the claimant's complaint, and did not deliberately delete it. This claim is dismissed.

The harassment claims.

150. Whilst the claimant has made these claims in many instances, he has not done so in every claim against each person named, and it is this necessary to set out those claims where he has made such claims, and our findings in relation to each one. Again, harassment has been summarised above, and s.26 is set out below. These claims are made in every allegation in the Scott schedule ,save nos. 64, 65, 66, 71 and 85. In some cases they are made solely with s.27 claims , which we have dismissed. In many cases , however, our findings have been that these are largely alternative ways of putting what are really failure to make reasonable adjustment claims, or are other ways of framing what were also alleged to be direct discrimination or victimisation claims . In relation to the former, they feature many of the same features, and often relate to the chair issue, or other instances of refusals to accede to requests that the claimant made. It has to be observed that whilst there is no statutory prohibition upon claims being made that are both failure to make reasonable adjustments and harassment, the requirement for harassment to take the form of "conduct" makes it difficult to make what are often complaints of failure to act fit into the harassment regime, which is doubtless why they are rarely both found to be made out on the same facts.

151. In determining whether these allegations do amount to harassment (for the facts are not greatly disputed) we have reminded ourselves of the words of s.26, which are quite strong – in that the environment created must be "intimidating, hostile, degrading , humiliating or offensive" , or which had the purpose or effect of violating the claimant's dignity . These are, as has been remarked in caselaw, strong terms, and having been satisfied that none of the alleged perpetrators had the purpose of creating such an environment for the claimant, we have had to consider in each instance whether the conduct (and again, there must be some) complained of can be said to have been likely to have had the effect of creating such an environment. Mere disagreement, or even disappointment and frustration , at a course of conduct , or a failure to act, with which the claimant disagreed , we consider is not enough.

152. In all instances, however, that is all we could find. Whilst doubtless disappointing, and frustrating, and perhaps on occasion leading to the claimant being in pain , we find that the conduct , if such it be, complained of falls short of the statutory definition of harassment, or lacks the requisite relationship to either of the claimant's disabilities, and all these harassment claims are dismissed. In particular, our findings (in relation to the in time claims) are these:

153. Allegation 70:

The claimant was informed by email that he was being allocated 3 new staff members, despite having indicated he could not cope with any more line management responsibility.

Firstly we do not accept that the claimant had given any such indication, nor that any difficulties he may have had were related to his disability – he had not previously managed staff. Even if this was potentially harassment, we find that this was not done with the purpose of creating the proscribed environment for the claimant, nor was it likely that it would have that effect. The claimant was aware this would be

happening from an early stage, having been privy to the changes which were going to lead to it. Viewed objectively , it could not be said to have been likely to create the environment of the claimant complains, nor can we see how it is "related to either of the claimant's disabilities.

154. Allegation 71:

Wendy Wallis unreasonably refused to allow the claimant to take his part time hours between 9 -1, as opposed to 10 – 2, as a reasonable adjustment.

Whilst this has not been pleaded as an act of harassment , we firstly find that it was not "unwanted conduct", the claimant reacting very quickly to it with a smiley face. Further, we find that it was not done with the purpose of creating the proscribed environment for the claimant, nor was it likely that it would have that effect.

155. Allegation 72:

RAST were unreasonable in accepting Evelyn Bird's recommendations, as opposed to the claimant's. RAST said the claimant did not need bespoke equipment.

We cannot see how this can be harassment. It is not "conduct" towards the claimant. It may be something with which the claimant disagreed, and he may well have been right, but the "unreasonable acceptance" of another person's opinion cannot amount to unwanted conduct with the proscribed effect of which the claimant complains.

156. Allegation 73:

Ann Harrison emailed Wendy Wallis and Sarah Smith making suggestions for reasonable adjustments in respect of the claimant. No action was taken.

Whilst this is evidence, again it is not conduct towards the claimant. This is an allegation of failure to make reasonable adjustments on the part of Wendy Wallis and/or Sarah Smith, not one of harassment. If anything it is a failure to act, not conduct. It cannot be harassment of the claimant.

157. Allegation 74:

Wendy Wallis and Sarah Smith were particularly hostile towards the claimant.

This unparticularised allegation has been considered above, and in the Scott Schedule is dated around 14 August 2014. Whilst noting that the claimant felt under pressure, and later claims that he was being badly treated at this time, the contemporaneous documents show a different picture, at least up until October 2014 when the claimant does indeed begin to be more vociferous about his treatment. The Tribunal can see no "hostility" at this time, however, and certainly no conduct on the part of these two managers which could be objectively regarded as being likely to create the proscribed environment for the claimant.

158. Allegation 77:

The claimant completed a request for part time hours, which was refused.

As set out above, we are not satisfied on the facts that any such request was made. In the alternative, this again is an allegation of failure to make reasonable adjustments, not of harassment. It was not done with the purpose of creating the proscribed environment for the claimant, nor was it likely that it would have that effect.

159. Allegation 78:

Sarah Smith told Wendy Wallis that the claimant had completed a task wrongly, when he had not, in an effort to maliciously mislead Wendy Wallis.

Whilst we can accept that this could potentially amount to harassment (although mere communication to Wendy Wallis alone would not suffice, it would have to be her communication with the claimant) , we accept that whatever was done was not done with the purpose of creating the proscribed environment for the claimant, nor was it likely that it would have that effect. Further, we fail to see, once motive is discounted, how it related to either of the claimant's disabilities.

160. Allegation 79:

Jamie Pigott maintained the Meridian chair would be suitable for C because suitable for 95% of the population.

Jamie Pigott may well have been right, and that was the advice he had been given. We are satisfied that this was not conduct which had the purpose of creating the proscribed environment for the claimant, nor was it likely that it would have that effect.

161. Allegation 80:

Wendy Wallis gave the claimant responsibility for seven more tasks.

On analysis, this was not in fact the case, but in any event we find that it did not have the purpose of creating the proscribed environment for the claimant, nor was it likely that it would have that effect.

162. Allegation 82:

Jamie Pigott refuses to listen to the claimant saying that the chair should be suitable for the claimant as it is for 98% of the population.

As with Allegation 79, we find that this was not done with the purpose of creating the proscribed environment for the claimant, nor was it likely to do so.

163. Allegation 83:

Sarah Smith refused to fund a further assessment for the claimant.

This is not an allegation of harassment, but a factual allegation which goes to the other claims of failure to make reasonable adjustments.

164. Allegation 84:

Wendy Wallis maliciously suggested the claimant had failed to carry out mid - year reviews , and threatened him with a PIP.

We do not consider that this was conduct “related to” either of the claimant’s disabilities. Nor do we consider that it was done with the purpose of creating the proscribed environment for the claimant. It was legitimate management issue.

165. Allegation 85:

Wendy Wallis, Sarah Smith and Adrian Williams ignore what the claimant is saying and accept Jamie Pigott’s view that the claimant will need to trial the chair for a month.

Again, this is not an allegation of harassment, but a factual allegation which goes to the other claims of failure to make reasonable adjustments.

166. Allegation 86:

Wendy Wallis unreasonably refused the claimant’s request for Special Leave With Pay (SLWP) whilst he was waiting for the Meridian Chair.

This claim has been examined in the context of other claims, and upheld. The Tribunal, however, does not consider that this was done by Wendy Wallis , who was acting on advice, with the purpose of creating the proscribed environment , nor do we consider that the conduct could be objectively considered as likely to do so.

167. Allegation 87:

The claimant asked for representation at meetings after 8 October 2014 as a reasonable adjustment because he felt bullied and harassed.

Again, this has been considered in the context of other claims. The Tribunal finds that this conduct too did not have the purpose, or likely effect of creating the proscribed environment. Further, the claimant agreed to it, and hence this conduct could not be considered “unwanted”.

168. Allegation 89:

Classification of absence was changed from sick leave to annual leave.

This is a reference to the conversation between the claimant and Adrian Williams, in which he stated his view as to the correct way to record the claimant’s absences. Whilst accepting that this did “relate to” the claimant’s disability, this is not , we consider, conduct which was carried out with the purpose, or indeed the likely effect , of creating the proscribed environment. The imparting of unwelcome or disappointing information is not of itself sufficient to constitute the likely creation of the proscribed environment.

169. Allegation 90:

The claimant emailed Sarah Smith with a number of issues on 12 November 2014; she did not reply.

Sarah Smith did not reply, but Adrian Williams did. This was not done with the purpose of creating the proscribed environment, nor was it likely that it would do so.

170. Allegation 91:

Jamie Pigott deleted the claimant's complaint rather than forward it.

The Tribunal's findings are that he did not do so. There is, therefore no conduct on his part which could amount to harassment.

171. Allegation 93:

Adrian Williams asked about the claimant's memory issues in an attempt to undermine him.

Whilst the Tribunal finds that this was conduct which related to the claimant's disability , creation of the proscribed environment not its purpose, nor was this conduct likely to have this effect.

172. Allegation 94:

Adrian Williams did not submit claimant's IHR form until after 1 April 2015, in an attempt to change the pension scheme on which the claimant was retired.

Whilst the Tribunal finds that this was conduct which related to the claimant's disability , creation of the proscribed environment not its purpose, nor was this conduct likely to have this effect.

173. Allegation 96:

Adrian Williams a) stated that the claimant had missed his 9 month review and b) insinuated the claimant had done little to challenge his box marking.

The Tribunal cannot see any basis for the contention that this was "related to" either of the claimant's disabilities. The claimant appears to allege that every action or comment made by the respondent with which he disagreed, or was inaccurate, was a form of harassment. Unfavourable, or even untrue, comments are not enough to sustain claims of harassment under the Equality Act . The mere fact that the person about whom they are made has a disability does not make them "related to" his disability. This claim falls at that hurdle. If it did not, the Tribunal would find that this was not his purpose, nor was this conduct likely to have this effect.

174. Allegation 97:

The respondent maintained that the claimant's chair was suitable. CMO of OH Assist commented that no chair would cure the claimant's condition.

To the extent that this is an allegation of harassment made against the respondent , we find that this was not done with the purpose or likely effect of creating the proscribed environment.

175. Allegation 98:

Adrian Williams and Sarah Smith maliciously marked the claimant down in his end of year report.

We find that this was not conduct which related to either of the claimant's disabilities, nor was it done with the purpose of creating the proscribed environment. We accept that it could be considered to have been likely to do so, but we find that it was not related to the claimant's disability.

176. Allegation 99:

The claimant contacts Adrian Williams to ask where his end of year bonus was.

This claim , as put, does not actually allege anything, but the implication is that the respondent, in the person of Adrian Williams, had delayed or failed to progress a bonus payment due to the claimant. The Tribunal finds that there is no evidence before it of this allegation, which, other than a form of victimisation, which the Tribunal has rejected, is difficult to see as being in any way related to the claimant's disability . The Tribunal does not find that Adrian Williams deliberately took or failed to take any action in connection with the bonus payment. This claim is dismissed as a harassment claim.

177. Allegation 101:

The claimant was forced to take IHR because the respondent had refused to allow him bespoke chair, and left him to suffer without any reasonable adjustments.

The Tribunal considers that this is not a separate claim, as such, but is rather a statement of the consequences of the discrimination to which the claimant was subjected. It amounts to an allegation that the respondent harassed the claimant by failing to make reasonable adjustments. It is therefore a matter for remedy, not liability.

General observations.

178. It is the unanimous view of the Tribunal that the nub of these claims has always been the chair issue. The Tribunal is quite satisfied that no one person bears any particular responsibility for the failures that undoubtedly occurred, and no one of the respondent's staff acted maliciously, though it is easy to see why the claimant, after the series of misfortunes that befell him, through the prism of his mental health issues , did not see things that way.

179. Rather , it seems to us that there has been a systems failure here, well – intentioned managers have not been given the quality of service and assistance to make the adjustments that we could see they were more than willing to make. There

was an over emphasis on procedure, and a lack of overall control and direction in the management of what was, ultimately, an almost unique physical disability. They still had, of course, their management responsibilities, and the claimant could not expect them simply to exempt him from being managed appropriately, and much of what he perceived as discrimination related issues we cannot recognise as such, though we do not doubt the genuineness of his perceptions.

Remedy and other claims.

180. The claimant having succeeded in some of his claims, is entitled to a remedy. Before moving onto that topic, however, there remain the other claims which the claimant included in his original claim, or have been added by amendment, and which have been dismissed. As previously explained, there are time limit issues in relation to those claims, and this has led to some of them failing on that basis. The claimant now needs to address the remaining claims, and take a view upon them. Given the Tribunal's findings in relation to any claims which pre – date 22 October 2014, where the Tribunal has only considered those claims where there is the common thread of the claimant being managed in his new role, the claimant will appreciate that the Tribunal's findings on these claims make it extremely unlikely that the clamant will be able to establish that any prior alleged acts of discrimination , pre – dating January 2014 could be considered part of conduct extending over a period of time for the purposes of s.123(3) of the Equality Act 2010, and they are thus likely to be found to be out of time. The prospects of the "just and equitable" extension being granted in respect of claims which are even older than those the Tribunal has already rejected , it will also be appreciated, are also very slim.

181. The Tribunal is not ruling upon these matters, of course, as they are not currently before it. If the claimant now wishes to withdraw them, that will probably (the Tribunal cannot rule out any applications that may be made) be the end of the matter, and no further hearing , save for remedy, will be necessary. If, however, the claimant does seek to pursue these claims, it is likely that a preliminary hearing will be convened to consider whether the remaining historic claims should proceed to a final hearing.

182. Turning to remedy, that is not likely to be a straightforward matter. There will be two elements to remedy, one will be an award for injury to the claimant's feelings arising from the discrimination that has been found. The other will be financial compensation for such financial losses as flow from the discrimination found. Whilst the Tribunal has made three findings of failure to make reasonable adjustments, only one is likely to be found to have led to any financial loss, the chair issue, which , the Tribunal presumes the claimant's case will be, led to his leaving his employment. The finding in relation to the laptop has no immediate financial consequences, and the failure to provide Special Leave With Pay again is presumably not something that led to any financial loss, as the claimant did not, the Tribunal understands it, take the leave, and was not paid , he simply did not take it. There are thus, it would appear, no immediate financial claims arising from this claim.

183. All financial claims therefore are likely to arise from the failure to make reasonable adjustments in relation to the claimant's chair. That is likely to involve two periods. The first is that whilst the claimant remained employed, but was off work sick. To the extent that this is found to be a consequence of the failure to make

reasonable adjustments, the claimant is, on the face of it, entitled to recover his loss of earning (he was presumably on half or no pay throughout this period) whilst his employment continued.

184. Thereafter, if the Tribunal finds that the loss of his employment was a consequence of the discrimination that it has found, the claimant will be entitled to seek loss of earnings from the date of the termination of his employment. The question then is likely to be : for how long should the Tribunal award such compensation? In practical terms that is going to involve an assessment of what the position would have been had the respondent not failed in its duty to make reasonable adjustments in relation to the claimant's chair. The Tribunal's decision is based upon a finding that the provision of such a chair would have had a prospect of avoiding the disadvantage that the claimant suffered, and therefore had some prospect of keeping him in work.

185. There are likely to be several elements to assessing the appropriate compensation for financial losses the claimant has suffered. Firstly, if the Tribunal is satisfied that the claimant's absence from work from November 2014 to the date of his retirement, during which he was not paid , was caused by the respondent's failure to make reasonable adjustments, he would, prima facie , be entitled to recover that loss of earnings. It is noted that the respondent (in Mr O'Reilly's letter of 10 September 2015) has suggested, based on the undisclosed medical opinion of Angela Dunlop, that this absence was the result of his disability, and not any failure to make reasonable adjustments, citing the progressive nature of arthrodesis as a relevant factor. If that were so, clearly there would be an issue as to whether this loss is recoverable. It has to be recalled, however, that the claimant has two, not just one , disabilities, and if the Tribunal was satisfied this his absence was caused by , in the broadest sense, the failure to make reasonable adjustments as it impacted upon him at the time, this loss would appear to be recoverable. That, however, is not a finding, merely an indication of a potential issue relating to remedy.

186. The second , and major, issue is what the position would have been for the claimant's long term employment had the reasonable adjustments been made. At present the Tribunal lacks clear medical evidence which addresses this issue. The report of Sunil Pai [2015 : 130 – 132] is perhaps the best medical evidence currently available, but this, of course, was not commissioned to address this issue. The report does make reference to degenerative changes being noted at L5/S1 level. Further, the tenor of the medical evidence has been that the claimant's hip and back condition is a progressive one, which will, sadly, get worse. The respondent, we note in its counter schedule of loss, argues that the claimant's employment would have ended anyway, and no further compensation should be payable.

187. Both sides, therefore need, separately, or perhaps jointly, to obtain expert medical evidence upon the likely prognosis for the claimant's employment had a suitable chair been obtained for him in November 2014. If the claimant's case is to be that he would have remained in employment until his retirement age, he will need medical evidence to show this. The basis of his ill health retirement, however, is that this would not have been the case. Conversely , if the respondent's case is indeed to be that his employment would, on a balance of probabilities , have ended in any event, even with reasonable adjustments, within a specified period, it too needs evidence to establish this.

188. In order to assess the losses the claimant has suffered, the Tribunal will need to determine the period in respect of which to award the losses claimed, and, subject to the parties' arguments, will, of course, decide how the receipt of the ill health retirement benefits should affect any award to be made. Clearly the claimant will have to give credit for early receipt of his pension, but this is also likely to involve issues relating to long term pension loss. Further the claimant will need to address mitigation. If he is medically fit for some employment , he would be expected to find such employment within a reasonable time. If, however, he is unfit for any employment, the position will be different, but this may impact upon the period for which the Tribunal should award loss of earnings, if his employment with the respondent, in any capacity , would have ended.

189. The claimant has prepared a Schedule of Loss [Pldgs: 298 – 300] , which sets out the position as at 24 April 2017. It clearly needs updating. Further, the Tribunal can assist the claimant and Mrs Ward by pointing out how the Tribunal will, and will not, approach the assessment of compensation.

190. Firstly, whilst on the first page the claimant refers to 18 years of "severe injury to psychological health" this cannot form the basis for the Tribunal's award. As it is hoped will be clear from the foregoing, the Tribunal will award losses going forward from the dates of the discrimination it has found, and will not be assessing any compensation for any alleged psychological injury allegedly sustained in the preceding 18 years.

191. To the extent that the claimant will be claiming future loss of earnings, which has been put at 22 years, the discussion above will hopefully assist in identifying what the likely issues will be.

192. There is also an entry for "costs", where the claimant has sought an award based on 40 hours per month for research, preparation and documentation at £50 per hour, a sum of £24,000 to the date of the Schedule.

193. The claimant is reminded that the Employment Tribunal is a costs – free jurisdiction. Entitlement to costs of any type only arises when the Tribunal finds that any of the pre-conditions in rule 76 are satisfied – unreasonable conduct being the most usual. The mere bringing of and defending of a claim is not in itself sufficient to trigger an award of costs, nor is the fact of winning or losing. The claimant has won some claims, but lost others. Before the Tribunal could consider making an award of costs in favour of either party the Tribunal would have to be satisfied that in the conduct of the claim or the defence to it there had been unreasonable conduct.

194. Further, as the claimant has not been legally represented there can be no award of "costs", only (if the conditions are satisfied) a preparation time order, where the Tribunal can award a party's preparation , but not hearing, time, capped at the rate , currently, of £38 per hour.

195. Finally, there is mention in the Schedule of "aggravated" damages. These can be awarded, and there is reference to the "poor conduct" of the respondent. The claimant needs to be aware , however, that the circumstances in which aggravated damages can be awarded are limited, and quite narrowly defined. It is, of course, open to the claimant to seek such an award, but the grounds for doing so have to be

made out, and mere “poor conduct” would not, on the face of it, suffice to merit such an award.

196. A counter – schedule has been filed [Pldgs : 313 – 314] , and this will need revision in the light of any updated schedule from the claimant.

197. It is hoped that these observations are helpful. Whilst the claimant and his wife have thus far been unrepresented, this may be a point at which, with the benefit of knowing that they have succeeded, and an award is going to be made, they now seek legal advice, and possibly representation by an employment solicitor or direct public access barrister , to assist them in formulating a further Schedule of Loss, setting out further the remedy they will claim, marshalling the evidence and advancing the (potentially quite complex) arguments that will need to be deployed. Further, such representation may also assist in negotiating with the respondent, so that no remedy hearing is in fact needed.

198. To further assist, and save costs, it is unlikely that any lawyer instructed on behalf of the claimant would need to read or consider the existing Bundles , or all of the evidence (e.g that of Janette Barrett or David Clayton relating to claims which did not succeed) or much of the correspondence that preceded the hearing. This judgment (and large parts of it too could probably be “skim – read”) would be the starting point, and thereafter any competent employment lawyer should fairly quickly be able to identify the likely issues on remedy, assemble the necessary evidence, and prepare for a remedy hearing.

199. To that end, and to allow reflection, and formulation and preparation for the remedy stage , the Tribunal has allowed the parties some time for this purpose, and has made the case management orders above for the purposes of remedy. It may, of course, be necessary for a further preliminary hearing to be held to give further directions as to remedy, but it is hoped that these initial case management orders will assist the parties.

200. Finally, the Employment Judge wishes to express his personal gratitude to the parties for the tremendous patience they have shown in awaiting the promulgation of this judgment, the tardiness of which he very much regrets, and hopes has not added too much to the stress and anxiety of all affected parties.

Employment Judge Holmes

Dated: 29 October 2018

RESERVED JUDGMENT SENT TO THE PARTIES ON
2 November 2018
For the Tribunal Office

ANNEX A

THE RELEVANT STATUTORY PROVISIONS

Equality Act 2010

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) [N/a]

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) to (7) [N/a]

(8) This section is subject to sections 17(6) and 18(7).

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) – (13) [N/a]

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) – (3) [N/a]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

disability;

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

ANNEX B

THE CLAIMS
(Allegation numbers are from the Scott Schedule)

Allegation 59:

C returned to work on 13 Jan 2014; R did not undertake adjustments advised by OH

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 60:

Janette Barrett advised the Claimant not to complete a WSA until he had moved to a permanent role.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 61:

Laura Porter accidentally emailed the Claimant, instead of Gerry Reardon with whom the Claimant was working.

Claims: s.26 & s.27

Allegation 62:

Janette Barrett left the Claimant to work unsupported and alone, despite an OH recommendation for regular meetings.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 63:

C. was forced to accept a role in the debt management team.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 64:

Wendy Wallis failed to put the Claimant on sick leave between 2 February 2014 – 3 July 2014.

Claims: s.13, s.15, s.21, & s.27

Allegation 68:

David Clayton held a workshop and at the end of the same told the Claimant: “Drop it, you can’t and won’t win”.

Claims: s.13, s.15, s.21, & s.27

Allegation 72:

RAST were unreasonable in accepting Evelyn Bird's recommendations, as opposed to C's. RAST said the Claimant did not need bespoke equipment.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 73:

Ann Harrison emailed Wendy Wallis and Sarah Smith making suggestions for reasonable adjustments in respect of C. No action was taken.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 77:

C completed a request for part time hours, which was refused.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 78:

Sarah Smith told Wendy Wallis that C had completed a task wrongly, when he had not, in an effort to maliciously mislead Wendy Wallis.

Claims: s.26 & s.27

Allegation 79:

Jamie Pigott maintained the Meridian chair would be suitable for C because suitable for 95% of the population.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 80:

Wendy Wallis gave C responsibility for seven more tasks.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 81:

Christopher Nethercott did not uphold Cs complaint about Evelyn Bird:

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 82:

Jamie Pigott refuses to listen to the Claimant saying that the chair should be suitable for C, as it is for 98% of the population.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 83:

Sarah Smith refused to fund a further assessment for C.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 85:

Wendy Wallis, Sarah Smith and Adrian Williams ignore what the Claimant is saying and accept Jamie Pigott's view that the Claimant will need to trial the chair for a month.

Claims: s.13, s.15, s.21, & s.27

Allegation 86:

Wendy Wallis unreasonably refused C's request for Special Leave With Pay (hereinafter SLWP) whilst he was waiting for the Meridian Chair.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 89:

Classification of absence was changed from sick leave to annual leave.

Claims: s.13, s.15, s.26 & s.27

Allegation 90:

C emailed Sarah Smith with a number of issues on 12 November 2014; she did not reply.

Claims: s.13, s.15, s.26 & s.27

Allegation 91:

Jamie Pigott deleted C's complaint rather than forward it.

Claims: s.13, s.15, s.26 & s.27

Allegation 93:

Adrian Williams asked about the claimant's memory issues in an attempt to undermine him.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 94:

Adrian Williams did not submit C's IHR form until after 1 April 2015, in an attempt to change the pension scheme on which C was retired.

Claims: s.26 & s.27

Allegation 95:

The DWP refused to communicate with C's wife.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 96:

Adrian Williams a) stated that C had missed his 9 month review and b) insinuated C had done little to challenge his box marking.

Claims: s.26 & s.27

Allegation 97:

R maintained C's chair was suitable. CMO of OH Assist commented that no chair would cure C's condition.

Claims: s.13, s.15, s.21, s.26 & s.27

Allegation 98:

Adrian Williams and Sarah Smith maliciously marked the Claimant down in his EOY report.

Claims: s.26 & s.27

Allegation 99:

C contacts AW to ask where his EOY bonus was.

Claims: s.26 & s.27

Allegation 101:

C forced to take IHR because R had refused to allow him bespoke chair, and left him to suffer without any reasonable adjustments.

Claims: s.13, s.15, s.21, s.26 & s.27