EMPLOYMENT TRIBUNALS

Claimant: Mr P McDerby

Respondent: Manchester Airport PLC

Heard at: Manchester **On:** 8-12 October 2018

Before: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent: Mr C Bourne of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaints of unfair dismissal are not well-founded.

2. No order for costs is made against the claimant.

REASONS

1. Written reasons for the decision on liability were requested at the hearing by the respondent for training purposes. Oral reasons were given for the refusal to order the claimant to pay costs but neither party requested written reasons for that decision. These written reasons, therefore, deal only with the judgment that the complaints of unfair dismissal are not well founded.

Claims and issues

2. The claimant brought a complaint of constructive "ordinary" unfair dismissal, under section 98 of the Employment Rights Act 1996 (ERA) and also as a complaint of constructive unfair dismissal because of making a protected disclosure, under section 103A ERA. The complaints were clarified at a preliminary hearing on 2 February 2018 and recorded in notes made by Employment Judge Franey which were sent to the parties. These complaints did not include a complaint of detrimental treatment, other than dismissal, by reason of making protected disclosures.

Application to amend the claim

3. At this hearing the claimant made an application to amend his claim to include complaints of detriment by reason of making protected disclosures. I refused that application for the following reasons, which were given orally at the time.

4. The application was to add a new cause of action, although the claimant was relying on factual allegations included in the claim form and relied on for the constructive unfair dismissal claim. If allowed, the new complaint would bring with it the potential additional remedy of compensation for injury to feelings.

5. The claimant was already bringing a complaint of protected disclosure unfair dismissal, therefore, if the tribunal found constructive dismissal, it would need to consider a causal link between the matters found to constitute individually or cumulatively a breach of the implied duty of mutual trust and confidence to some extent. However, I considered that additional factual enquiry would be likely to be required if individual matters were pursued as detrimental treatment because of making protected disclosures. Further clarification would be needed from the claimant of what detrimental treatment was said to arise as a result of which protected disclosures. Further witness evidence from witnesses already giving evidence in relation to the unfair dismissal complaints and possibly from new witnesses was likely to be required. This further enquiry was likely to be greater than could be done in such time as would allow the current listing of the final hearing to proceed.

6. Considering the application of time limits, the last detrimental treatment relied on was failing to respond to correspondence of 14 September and 6 November 2017. This detrimental treatment arguable continued until the effective date of termination so the complaint would be in time. Other complaints would be out of time unless part of a series of similar acts with the failure to respond to correspondence or it was not reasonably practicable to present the complaint in time and it was presented within a reasonable time thereafter. If the amendment was allowed, there would, therefore, be a time limit issue in relation to the majority of the detriment complaints.

7. Considering the timing and manner of the application, I considered that the claimant had provided no satisfactory explanation for not seeking to bring the detriment complaints at an earlier stage. There had been a discussion of the complaints and issues at the preliminary hearing; the claimant had been sent a list with an order to notify the tribunal promptly if the list was not accurate; the respondent had written to the claimant on 20 September 2018, including a statement (in response to the claimant's schedule of loss including compensation for injury to feelings), that the claimant was not bringing a complaint of detriment and that this had been clearly addressed at the preliminary hearing.

8. The paramount consideration in deciding whether to allow an amendment is the comparative disadvantage of allowing the amendment against refusing it.

9. I considered that, if I refused the amendment, the claimant would lose the possibility of an award of compensation for injury to feelings if the complaints of detriment were successful. Any financial loss was likely to flow from the unfair dismissal so would not be affected by whether or not the amendment was allowed. However, there were time limit issues with the majority of the detriment complaints

so it was not clear that the tribunal would have jurisdiction to consider all the complaints the claimant wished to pursue.

10. If I allowed the amendment, I considered that the respondent would incur additional time and cost in preparing to meet the amended case. It was likely the final hearing would need to be adjourned and it could be many months before the case could be re-listed. There could be difficulty in getting relevant witnesses to attend. I noted that it was not impossible to call people who had left the respondent's employment but I accepted that this was more difficult and the witnesses may be reluctant to attend. Existing witnesses would have this stressful experience hanging over them for probably months more to come. The case dated back to events in 2015. Memories could become more unreliable over further time. If new witnesses were identified, following clarification of the amended claim, they may be less able to recall relevant events years after those events than had their evidence been taken closer to those events.

11. I found this a difficult balancing exercise. Had the claimant said at the preliminary hearing in February 2018 that he wished to pursue detriment claims, it is very likely he would have been able to pursue them (subject to time limit issues). The claimant had an opportunity then to do so, or to inform the tribunal and the respondent after the note of complaints and issues was sent to him that he wished to pursue detriment complaints. He did not do so. I appreciate the difficulties faced by parties who are not legally represented in identifying their complaints. However, I was satisfied that the claimant had been alerted to the possibility of bringing detriment complaints at the preliminary hearing and in subsequent correspondence. The respondent's solicitor, who was present at the preliminary hearing, confirmed that the possibility of a detriment complaint had been discussed and this is supported by the respondent's letter of 20 September 2018. The claimant could have sought advice and/or done further research himself, and informed the tribunal and the respondent at a much earlier stage that he wanted to pursue detriment complaints as well as unfair dismissal. He did not do so. I concluded, on balance, that the injustice and hardship to the respondent if I allowed the amendment would be greater than the injustice and hardship to the claimant if I refused the application.

Issues to be determined at this hearing

12. Following the refusal of the application to amend the claim, the issues to be determined remained as identified at the preliminary hearing. These are reproduced in the Annex to these reasons.

The Facts

13. The claimant's employment began with the respondent in 2008.

14. The claimant relied on a number of matters as being protected disclosures in the details sent prior to the claim. However, in evidence, he said that no adverse consequences arose as a result of what was said in relation to those matters other than in relation to a conversation with Lyndsay Cross on 3 March 2016. It is not, therefore, necessary for me to make any findings of fact about what was said in relation to the other matters that had been listed as potentially protected disclosures.

15. The only protected disclosure relevant for this claim is that said to be made on 3 March 2016, said to be made verbally to the Security Manager, Lyndsay Cross. The claimant's witness statement does not state what information he gave on this occasion. He wrote in his witness statement only that important security issues were discussed. The claimant has no contemporaneous record of what he said. He gave oral evidence, however, about the context in which a conversation occurred. He said that this was in the context of a conversation he had with another recently joined employee who hated his job and the claimant was telling him about the number of people who left the company and that some left because they did not like it, and that others got themselves sacked deliberately. He said that he told Lyndsay Cross that some people do silly things to get sacked, like stealing. Lyndsay Cross completed a report about this and told the claimant that she was doing this. She wrote:

> "I overheard a comment by Paul saying, 'people don't want to go home and tell their partners how much they hate their job, so they just do stupid things in order to get the sack'. Paul was questioned as to what he meant by 'stupid' and came up with 'stealing'. When asked who had been sacked for stealing Paul was unable to answer. Paul went on to say he 'hates this job with a vengeance'."

I find that Lyndsay Cross heard what she recorded in that note.

16. On 30 June 2016, the claimant was sent home by Lyndsay Cross after arriving for work at 3.00pm. The claimant says he was sent home without explanation and relies on this as part of the alleged breach of the implied duty of mutual trust and confidence. The claimant's evidence in his witness statement was very sparse on detail in relation to this event. He failed in his witness statement to mention the telephone calls he had with Lyndsay Cross before speaking again to Resources. The claimant's oral evidence was inconsistent with itself and with his grievance written the same day in some respects. For example, the claimant added in oral evidence an assertion, never made previously, that he was not asking Lyndsay Cross's permission when he rang up and it was just a courtesy call. On that day, there were emails between Resources and Lyndsay Cross, and between Lyndsay Cross, Simon Webster and Resources. Simon Webster was the Security Duty Manager. The claimant wrote his formal grievance on the same day. This was handwritten; there is no addressee written on the letter. Lyndsay Cross prepared an occurrence report of the incident. The claimant's handwritten grievance is largely consistent with Lyndsay Cross's account recorded in the occurrence report prepared on 1 July 2016, although it omits some relevant details.

17. I make the following findings about this incident, on the basis of the documentation. The claimant knew of the dentist appointment three days before he telephoned Lyndsay Cross. The claimant wanted to "slide" his shift to start at 3.00pm rather than 1.00pm to allow him to attend the appointment. He had tried ringing Resources several times before the day but they were not available and did not get back to him. On the day of the appointment, they told him that he would need to contact the podium directly (where Lyndsay Cross was a manager on duty). I find that, once the rota has been handed over, it is the responsibility of managers on the podium to deal with any changes on the day.

18. The claimant rang Lyndsay Cross on the morning of the appointment. She refused his request after hearing that he had known about the appointment for some days. She said she could not look into sliding the shift because she was busy. The claimant rang the podium a second time, hoping to get someone else who would give a different answer. Lyndsay Cross answered again. The accounts then differ in that Lyndsay Cross said the claimant asked only that he be marked “NABS” (notified absence). The claimant in his grievance said he asked to be marked “notified absent or late”. Lyndsay Cross says the latter request would make no sense. I find that Lyndsay Cross heard a request to mark the claimant “notified absence”, said “fine” and adjusted the roster. The call then ended. Subsequently, the claimant rang Resources again and renewed his request for a shift slide. They told him that it was not their decision on the day. He then misrepresented the position to Resources, telling them that Lyndsay Cross had referred him to Resources to make the decision. Resources then emailed the managers to say that the claimant would be doing a 3.00pm to 9.00pm shift as opposed to 1.00pm to 7.00pm and not to mark him as late. The email correspondence between the Security Duty Manager and Resources followed, in which it was confirmed that the decision on the day is that of the managers on the podium, and Resources referred to the call the claimant had made.

19. When the claimant attended at 3.00pm for duty, Lyndsay Cross told him he was marked “notified absence” on the roster and he should go home. The claimant was adamant that Resources could override Lyndsay Cross’s decision, and told Lyndsay Cross she was being spiteful. The claimant said he was going to raise an official grievance against Lyndsay Cross, which he did on the same day.

20. There is no evidence which links the events of 30 June 2016 with the conversation of the claimant overheard by Lyndsay Cross in March 2016.

21. On 2 August 2016, the claimant was informally warned that he was behind on his CBT time.

22. On 24 August 2016, the claimant had a stage one grievance meeting with David Hollingsworth about his first grievance about being sent home. I take this from the claimant's evidence, there being no notes of the meeting or any other evidence the respondent has been able to produce about the meeting.

23. On 1 September 2016, an audit was showing the claimant remaining behind on CBT time. Marc Van der Lan, by an email to SDMs in Terminal 2, sent a list of ASOs who were under their CBT time that month, saying that those on the list highlighted in red “were non compliant last month and will need to be referred to disciplinary unless they have mitigation for not being compliant, before any disciplinary is performed, can we check that they have had the informal guidance from last month (if they should have)”.

24. On 14 September 2016, Nathan Crane informed Rachel Thomas by email that the claimant had been given an informal warning the previous month about CBT time and had fallen below it again this month so he was referring the claimant for disciplinary action. I accept the evidence of Richard Quinn, who then conducted the disciplinary hearing in the absence of the claimant's line manager, Rachel Thomas, that it is normal procedure to refer someone for a disciplinary hearing when they have been spoken to informally about falling behind on CBT and then are behind again the following month. The claimant accepted in evidence that this referral was

in line with procedure. The claimant was invited, by a letter dated 16 September 2016, to attend a disciplinary hearing on 19 September 2016 concerning CBT time.

25. On or around 17 September 2016 the claimant sent a formal grievance to Colette Roche in HR concerning an alleged deviation from stated procedures in dealing with his grievance submitted on 30 June 2016. This was the claimant's second grievance.

26. The CBT disciplinary hearing took place on 19 September 2016 conducted by Richard Quinn. No disciplinary action was taken after the claimant explained the reasons for absences and not being up-to-date on his CBT time.

27. On 21 September 2016, a further incident occurred involving the claimant and Lyndsay Cross. This was the incident relating to the tie. The essentials about this incident are common ground. Marc Van der Lan noticed the claimant wearing a tie which did not appear to be company issue. He asked Lyndsay Cross to raise this with the claimant and to ask him to change it. Lyndsay Cross then spoke to the claimant about this. The claimant said the tie was a company tie and he had been issued with it in Terminal 1, where he had worked previously. There was a further conversation on the podium, a raised area above a passenger area. Lyndsay Cross provided the claimant with another tie, a clip on one, and asked him to change his tie. The claimant did not ask to go to a private area to change the tie. Lyndsay Cross thought the old tie had also been a clip on tie since she was not aware of any ties which were not clip on ties having been issued, but she accepted in evidence that she may have been mistaken about this. When Mr Patel investigated the matter later, uniform supplies confirmed to him that no no-clip on ties had been issued for at least 14 years, the length of Mr Patel's service and longer than the claimant's length of service. The claimant asked for a receipt for his old tie which Lyndsay Cross refused. The claimant was upset. The accounts diverge as to how the claimant manifested his upset. I prefer Lyndsay Cross's evidence that the claimant raised his voice and find that, if any attention was drawn to the incident, it was because of the way the claimant reacted.

28. On 22 September 2016, Lyndsay Cross emailed to Jason Naylor a note recording that she had found the claimant's behaviour intimidating on this occasion, although she did not wish to make it formal at that time. I accept Lyndsay Cross's evidence, supported by this email, that she did find the claimant's behaviour intimidating on that day.

29. The claimant made a request that CCTV be retained from that day. In the course of these Tribunal proceedings, I was told that the claimant had been notified no CCTV footage still existed. There is no record I have seen of any reply to the claimant's request. I accept Lyndsay Cross's evidence that CCTV footage is visual only with no audio. It would, therefore, have been of limited, if any, assistance.

30. A formal grievance from the claimant about the tie incident is dated 23 September 2016. There is some suggestion that it might have been submitted a few days later. There was no addressee written on the grievance. The grievance letter included the following:

> "I cannot understand why I was forced into the humiliating act of having to remove an article of clothing in clear and full view of my colleagues and passengers. I was clearly put in an uncomfortable position unnecessarily

> when I could have just been handed the tie and told to swap it for this one and then been given time to dress in private.
>
> "Lyndsay Cross's actions in orchestrating events in this way served no purpose other than to humiliate, intimidate or provoke me as I believe it to be retribution for my previous grievance which I submitted on 30 June 2016 and as of yet await a response from the company on that matter.
>
> "I am now forced to admit to myself that L Cross has obviously singled me out for a campaign of systematic bullying, intimidation and humiliation to make it impossible to maintain the respect of my colleagues and perform my duties without distraction."

31. It appears that, until his departure from the respondent's employment on 2 February 2017, Steve McLaughlin in HR was supporting managers in dealing with the claimant's grievances and/or dealing with some matters himself. It appears that documentation may have gone missing. We may have an incomplete picture, therefore, of what happened before 2 February 2017 when Tania Gonzalez took over from Steve McLaughlin.

32. Around 28 September 2016, the claimant had an informal meeting with Steve McLaughlin of HR about his grievance submitted to Colette Roche. This is taken from evidence from the claimant. There was a reference made to grievances about being sent home and the tie incident. The claimant says that Mr McLaughlin said he had no knowledge of the grievance about the tie incident.

33. On 6 October 2016, there was a capability meeting with Helen Kenny about periods of absence. The claimant sent a letter dated 5 October 2016 to Helen Kenny. In this, he referred to his grievances, saying that it was over three months since he had submitted his first formal grievance and he had still not received a written acknowledgement of its existence let alone a resolution. He wrote:

> "This prolonged and inexplicable delay is making me feel in a state of limbo, suffering the mental and physical effects of this extremely anxious and stressful period of ongoing unresolved issues. Since birth I have never suffered from migraines or any form of headaches and so can assume they are directly associated with the anxiety and stress pressures placed upon me by these ongoing unresolved events at work."

He wrote:

> "It would therefore be of obvious benefit for me to request and hopefully have the company finally attend to its duty of care and acknowledge, investigate and resolve the three separate written formal grievances I have submitted on 30 June 2016, 19 September 2016, 23 September 2016 respectively."

34. The claimant was not given any warning as a result of his capability meeting.

35. On 7 October 2016, Mr McLaughlin wrote to the claimant inviting the claimant to a meeting on 11 October 2016 to discuss points in the claimant's letter of 5 October 2016 and to get a clear understanding of the claimant's grievance. A meeting took

place on 11 October 2016 between the claimant, Mr McLaughlin and Jason Naylor. I was not shown any notes of this meeting.

36. The claimant was on sick leave in a period 24-31 October 2016, the reason for absence being given as migraine.

37. On 1 November 2016, the claimant had a return to work meeting with Nathan Crane. Nathan Crane said to Mr Patel in the subsequent investigation that he had asked the claimant if he wanted a colleague with him but the claimant had refused, and he had also offered a trade union representative but commented that trade union representation is not really normal practice in a return to work interview. This account does not diverge in essentials from the claimant's recollection, which is that he was told he did not need trade union representation because it was a straightforward return to work interview.

38. The claimant said, in the interview, that he had been suffering from headaches and anxiety, that these were work related and that he had been referred to Occupational Health. Mr Crane noted that the claimant had been ill for a period in respect of which the claimant had requested holiday and had been waiting approval. Mr Crane said he would refer the claimant to disciplinary proceedings and also to a capability hearing because of his absences. The claimant alleges that he was tricked out of having union or colleague representation at this meeting.

39. On 21 November 2016, Rachel Thomas sought advice by email from Steve McLaughlin about whether the periods of absence discussed in the capability meeting with Helen Kenny could be discussed in the capability hearing she wanted to conduct. Mr McLaughlin advised that, if he had hit a trigger point, they should discuss why and make a decision. He expressed the view that the claimant “has no grievance in my opinion and his reasons for raising such is nothing more than causing trouble to the company”. The claimant became aware of this email through making a subject access request to the respondent whilst he was still in employment.

40. The claimant was referred to Occupational Health and an assessment took place on 22 November 2016. The Occupational Health adviser confirmed, from what the claimant had advised him, that migraines were not an underlying medical condition, however he perceived that he had started to suffer from symptoms of migraines following perceived issues at work. The claimant reported no history of migraines prior to his perception of problems in the workplace. The adviser noted that the claimant said he had put in three grievances since June and no action had been taken to address any of the concerns he had raised. The claimant did not make any reference to meetings which had been held. The adviser recorded that the claimant was unclear what he hoped to achieve as an outcome of the grievances and described negative perceptions of the business as he perceived the issues he had raised had not been addressed. The adviser wrote:

> “The barriers to progress in this case appear to be related to employee workplace concerns rather than a primary medical problem. If Paul’s concerns can be addressed through collaborative dialogue, then the prognosis for resolution would be improved. I recommend that you speak Paul about his concerns.”

41. On 23 November 2016, the claimant was issued with an invitation to a formal final capability meeting. He was also provided with a copy of the capability procedure. The claimant says that this letter, read with the capability policy, indicated that a decision had been taken to terminate his employment with notice. The letter referred to a formal final capability meeting. However, it also included the following:

> "The purpose of this meeting is to discuss three periods of sickness within a six month rolling period. You should be aware that this formal meeting could result in a disciplinary sanction being applied up to and including the termination of your employment, however no final conclusions have been reached and you will be afforded every opportunity to explain your position."

42. The claimant was invited, in the letter, if he had any queries, to contact the writer, who was said to be Rachel Thomas, although the letter was signed in her absence, or, alternatively, HR. Contact numbers were given.

43. I accept the evidence of Rachel Thomas that she had asked Mr McLaughlin for a template for an invitation to a capability meeting and then asked someone to send it in her absence while she was on rest days. She did not see the letter before the claimant showed it to her in the meeting.

44. There is no evidence which suggests to me that this form of letter was sent other than by mistake. It should have been an invitation to a stage one capability meeting. To the extent that the claimant holds the belief that the letter was sent in this form deliberately to cause him stress, I find that this belief is unsupported by any evidence presented to the Tribunal.

45. The respondent's capability procedure provides that a formal review will be triggered if somebody is absent either on three or more occasions in a rolling six month period or eight working days in a rolling 12 month period. There is a table in the capability procedure about the various stages of the process. The trigger for stage one is three or more occasions in a roiling six month period or eight days in a rolling 12 month period. The outcome of stage one could be one of the following: informal guidance/no further formal action, recommended improvement plan/no formal action, formal outcome/first stage warning which will commence from the date of the last absence and remain on the colleague's HR file for six months with an improvement plan. Stage two and stage three are also included in the table. The outcome of stage three, the final stage, is stated to be action up to and including dismissal.

46. In section 4.3 of the capability procedure it is written:

> "If, after exploring all options, it is clear that no further adjustments/assistance/alternatives can reasonably be provided, a final meeting will be arranged, the decision will be taken to terminate your employment and you will be dismissed with notice. It will be confirmed in writing, giving reasons for the decision and confirming the date of termination of employment."

47. It is apparent from the claimant's letter dated 28 November 2016, that he handed in at the capability meeting, that the claimant thought that it was incorrect that he

should be having a formal final capability meeting. However, the claimant did not query this prior to the meeting.

48. On 24 November 2016, the claimant was invited to a grievance outcome meeting on 30 November 2016 with Steve McLaughlin.

49. On 28 November 2016, the claimant wrote a letter of grievance addressed to Security Team Managers, complaining that his grievances raised on 13 June, 17 September and 23 September had been ignored and unacknowledged, although it is apparent that the claimant had met with Steve McLaughlin about the grievances and should have received the letter inviting him to the outcome meeting on 30 November by this point.

50. The letter of 28 November 2016 also raised a number of new grievances. The claimant raised a new grievance about the disciplinary hearing about CBT compliance, although that disciplinary hearing had been in September and no action had been taken as a result of it. The claimant raised a new grievance about being, as he described it, “tricked out of my rights of representation” at the return to work meeting on 1 November 2016. The claimant raised a new grievance about being summoned to a “formal final capability meeting” without having had stage one and stage two reviews. The claimant did not suggest, in this written grievance, that he had understood the letter as meaning he would be dismissed at the capability meeting. He gave this letter to Rachel Thomas in the capability meeting on 29 November 2016.

51. The claimant has produced a further letter dated 28 November addressed to Security Team Managers complaining about being summoned to a formal final capability meeting. However, the only copy of this in the bundle appears in the claimant's timeline. The claimant says he submitted this together with the other letter of 28 November at the meeting on 29 November. Rachel Thomas did not recall seeing this second letter. Since the matters addressed in this letter are also contained in the other letter of 28 November 2016, I consider it possible that this was the draft and the claimant is mistaken in his recollection of handing in two letters. It is not, however, necessary for me to make a finding as to whether this letter was handed in as well since it adds nothing further of substance.

52. The capability meeting with Rachel Thomas occurred on 29 November 2016. The claimant raised the matter of the letter inviting him to the meeting and was informed that this was a mistake and that this was a stage one capability meeting. In evidence, the claimant said that Rachel Thomas had been lovely about this. Rachel Thomas produced a revised letter which she gave to the claimant. The claimant, who was accompanied by a trade union representative at this meeting, did not say that he was not prepared to carry on with the stage one meeting because of the mistake with the letter. At the end of the meeting, Rachel Thomas said that she was giving the claimant a stage one warning, and this was subsequently confirmed in writing. The warning was to remain on the claimant's personal file for six months from 24 October 2016. The claimant was advised of his right of appeal. The claimant gave Rachel Thomas the letter of 28 November for the following day’s meeting. As previously noted, I do not find it necessary to make a finding as to whether the second letter was handed in as well. The claimant was placed on the capability register as a result of being given the warning.

53. On 30 November 2016, there was what was supposed to be a grievance hearing outcome stage one meeting with Steve McLaughlin. We have handwritten notes of this meeting which were taken by J Ellis. These notes, it appears, were not passed to Tanya Gonzalez when she took over from Steve McLaughlin or given to Altaf Patel who agreed in February 2017 to conduct an investigation. The claimant was accompanied by a trade union representative. The meeting took from 12.45pm until 2.30pm. As noted previously, the claimant had submitted a number of new grievances the day before in his letter dated 28 November 2016.

54. The notes of the meeting on 30 November record that, in relation to the claimant's complaint about grievances 2 and 3 not being acknowledged, Mr McLaughlin offered a verbal acknowledgement and this was refused by the claimant who said that he wanted a written acknowledgement. In relation to the CBT matter, Mr McLaughlin said that people are spoken to about CBT and he would say that that was not a grievance. The claimant alleged that he had been frivolously referred to a disciplinary. Mr McLaughlin said they would speak to Nathan Crane to investigate. Mr McLaughlin said it was company policy and the claimant was not treated any differently. That was what they did with every other employee. He asked questions about the allegation that the claimant was tricked out of representation at the return to work meeting with Nathan Crane. Mr McLaughlin said they would interview Nathan Crane.

55. In relation to the final formal capability meeting letter, the claimant confirmed that Rachel Thomas had apologised. The claimant said that did not answer the question he had asked about how it happened. Mr McLaughlin said an error had been made and apologised on behalf of the company and said he would speak to the Terminal Manager but there was nothing more he could do. He offered the claimant counselling. He asked the claimant what more he wanted. The claimant said he did not accept Mr McLaughlin's apology. Mr McLaughlin again asked the claimant what he wanted the company to do. The claimant replied, "Do you not accept repercussions to my health? If your wife had been threatened with dismissal would you be happy with a simple 'sorry', asking me to accept a simple 'sorry'?". The meeting then adjourned with Mr McLaughlin saying that they needed to speak to Nathan Crane and Rachel Thomas.

56. It appears that the grievance outcome meeting was never reconvened or any outcome letter issued by Steve McLaughlin. The respondent's witnesses, who did not include Mr McLaughlin, were unable to provide any explanation for this.

57. On 5 December 2016, the claimant wrote an appeal against the placement on the capability register which he addressed to Security Team Managers, although the outcome letter had said that it should be sent to Steve McLaughlin. The claimant says that he handed this letter to a manager to hand to Marc Van der Lan. In the investigation, Marc Van der Lan told Mr Patel that he did not recall receiving the appeal and that it would be normal practice for the appeal to be heard by an SDM. In this letter, the claimant wrote that the letter sent to summon him to the meeting was titled "final formal capability meeting" which he wrote was "also known as the 'dreaded 4.3' a dismissal meeting where the decision to terminate an employee has already been made". Rachel Thomas gave evidence that she had never heard of anyone referring to a "4.3" meeting. The claimant wrote in the letter that he was told at the meeting that the letter was sent by mistake. He wrote:

> "I was so relieved to still have a job I was not able to produce a coherent defence of my position regarding my capability to meet my duties as it seemed unimportant in relation to the threatened action I was anticipating re impending dismissal.
>
> I also failed to notice the obvious accusation that I was not ill at all during my time off sick as implied by the questions regarding my alleged attempt to book holidays at some three months earlier, although no evidence was available for me to see to back up the accusation made by the company and I totally forgot to produce my own evidence of my medical condition at that meeting."

58. On 16 December 2016, the claimant sent an email to Lawrence Chapple-Gill, Regional Co-ordinating Officer of Unite, summarising his six grievances. Lawrence Chapple-Gill forwarded it to Andrew Ashton the same day. At some point prior to 2 February 2017, it was given by the claimant's trade union to Steve McLaughlin. The email is not marked to indicate that it is private and confidential. However, I accept that the claimant sent the email to his trade union not expecting or authorising the trade union to copy it to the respondent. The claimant wrote in this email that, by then, he had had two investigative meetings, three informal un-minuted meetings and one minuted meeting in the presence of or more. He wrote:

> "So Lawrence, you can see the state of play/battlefield – I know how I see it…I can't go on popping zopiclone like harlem hooker but I can't force my shop steward friends to risk annoying a very unpredictable and often vicious HR department to get on and deal with something that has developed into an obviously very malicious campaign."

59. The claimant has made an allegation that the respondent used a third party organisation covertly to gather personal, private and medical information about the claimant. I find that the trade union passed the email to the respondent. There is no evidence to support an allegation that the respondent requested or encouraged the trade union covertly to gather personal, private and medical information about the claimant and to pass it to the respondent

60. On 2 February 2017, Steve McLaughlin left the respondent. On the same day, Tanya Gonzalez joined the respondent, taking over from Steve McLaughlin. As part of what appears to be a very brief and rushed handover, Mr McLaughlin gave Ms Gonzalez the trade union email, telling her this was the claimant's grievance, saying some points had been dealt with and others had not. When she looked into matters, she could find no evidence that there had been any written outcome to any of the grievances. The only other paperwork Ms Gonzalez was given or found in relation to the claimant's grievances was the grievance to Colette Roche. Ms Gonzalez was told by Steve McLaughlin that Altaf Patel had agreed to conduct an investigation into the claimant's grievances.

61. At some time, on or shortly before 2 February 2017, Altaf Patel responded to a request for a manager to investigate grievances. Mr McLaughlin had wanted a Security Duty Manager from Terminal 1 or Terminal 3, rather than Terminal 2 where the claimant worked. Out of four or five who could have dealt with a new grievance, others being new, Mr Patel had the least workload and so volunteered for this. It appeared in cross examination by the claimant, that the claimant was suggesting that Mr Patel was not suitable to hear his grievances because he and the claimant

had worked together in the past. This had not previously been alleged and the claimant had given no evidence about this. From this line of cross examination, however, it seemed the claimant was suggesting they had been on friendly terms and, therefore, there did not appear to be any basis for arguing that Mr Patel was likely to be biased against him.

62. On 22 February 2017, there were emails exchanged between Ms Gonzalez and Mr Patel trying to arrange a meeting about the claimant's grievance.

63. On 24 March 2017, Rachel Thomas sent an email to Ms Gonzalez about the claimant having appealed the first stage warning for capability and having told her that he had not heard anything. She wrote that she had been advised that the appeal had been passed to Steve McLaughlin before he left.

64. On 24 March 2017, Ms Gonzalez sent Mr Patel the claimant's grievance, which I understand refers to the letter to the trade union. Ms Gonzalez wrote that Julie had spoken to the claimant the previously week and it seemed that the claimant wanted to proceed. She proposed having a preliminary informal meeting with the claimant as soon as possible to understand his outstanding grievance and what he would like the outcome to be. She wrote that they could then meet informally to discuss his grievance in detail and initiate an investigation.

65. On 26 March 2017, Ms Gonzalez replied to Rachel Thomas saying she had not been aware of an appeal against a warning but she asked Julie to arrange an informal meeting between the claimant and Mr Patel as she was aware of an outstanding grievance and suggested that this could be picked up with that.

66. On 13 April 2017, there was a grievance clarification meeting with the claimant, Mr Patel and Ms Gonzalez. I have not been shown any notes of this meeting. The respondent had a copy of the email that the claimant had sent to his trade union. Ms Gonzalez and the claimant are recorded in the minutes of the meeting of 26 June as stating, in the meeting of 26 June, their recollections of what happened in relation to this document at the meeting on 13 April. Although the claimant said on 26 June he had been very upset by them having the document, which was never intended to be seen by the respondent and contained personal, private and confidential information, he did not say that he had expressed this to the respondent on 13 April. However, he said at the 26 June meeting that he had demanded on 13 April that he be given "the copy".

67. I find Ms Gonzalez's evidence, supported by what she is recorded as stating in the minutes of the meeting of 26 June, to be more reliable than the claimant's evidence. If there had been a demand for "the copy" as opposed to "a copy" of the document, and the claimant had expressed that the respondent should not have the document, I consider it more likely than not that Ms Gonzalez would have looked into the provenance of the document before 26 June and she would not have given her account as recorded in the minutes of 26 June. I find the claimant asked for, and was given, a copy of his email to the trade union to which Mr Patel was referring. I find that, if he was upset at the time by the respondent having this, the claimant did not express this to the respondent and did not say at this time that he objected to the respondent having that document.

68. The claimant asked, in the meeting on 13 April, if they had his seventh grievance. He then, having been given some paper by Mr Patel, wrote out that grievance in the meeting. This was a grievance against denial of an appeal against his capability decision, having had no formal acknowledgement of the appeal despite it having been submitted over three months previously.

69. I accept Mr Patel's evidence that he found the claimant quite obstructive in this meeting. The claimant kept going off on a tangent, would not answer questions and asked irrelevant questions e.g. why there was no union representative present. At this tribunal hearing, the claimant demonstrated similar behaviour of not answering the questions asked and going off on tangents, although I make no finding that the claimant was seeking to be deliberatively obstructive at this tribunal hearing. The claimant wanted to adjourn the meeting to have a union representative. Mr Patel located two union representatives who were available but the claimant refused them. The meeting ended with the claimant saying that he needed to speak to his trade union representative.

70. Sometime after the meeting, the claimant objected to his trade union that they had forwarded his email to the respondent. After the trade union rejected his complaint, the claimant referred this matter to the Information Commissioner.

71. On 14 April 2017, the claimant was required by letter to attend a disciplinary hearing on 25 April in relation to the CBT matter. The letter has not been produced in the bundle. An email from Rachel Thomas to SDMs refers to the claimant having had two separate incidents leading to disciplinaries: one about CBT time and the other for being late on a terminal move. It appears that the disciplinaries did not proceed, perhaps because the claimant was off sick until his resignation.

72. The claimant began a period of sickness absence on 24 April 2017 and did not return to work before his resignation in December 2017. The claimant produced the first of a series of fit notes which gave his reason for absence as stress at work.

73. On 9 May 2017, a letter required the claimant to attend an absence review meeting on 18 May. Julie Ellis called the claimant on 17 May to confirm his attendance. The claimant said he did not think he had to attend since he was away with stress. Julie Ellis asked if they could do a home visit. The claimant refused. He said the issue was the seven grievances which had not been resolved.

74. By a letter dated 22 May 2017, the claimant was invited to an informal absence review meeting on another date. He was offered an alternative of completing a questionnaire if the claimant did not feel able to meet with them. The claimant chose to complete the sickness review questionnaire rather than attending the review meeting. He referred, under the heading of what events had led to his absence, to having submitted seven grievances, all of which he wrote were still unresolved, causing him considerable stress and anxiety. Under the heading about what steps the business could take to aid him in his recovery and expedite a return to work, he wrote that they should acknowledge formally in writing each of the grievances, investigate fully and submit to him in writing results of each investigation, and, after he had seen the reports, work with him to resolve each issue.

75. By a letter dated 7 June 2017, Julie Ellis, a Security Team Manager in Terminal 2, acknowledged the questionnaire and invited the claimant to a grievance

clarification meeting on 26 June to be chaired by Altaf Patel. Julie Ellis asked the claimant to accept the letter as formal acknowledgement of his seven point grievance. She referred to the meeting with Mr Patel and Ms Gonzalez on 13 April, held with the aim of clarifying his grievances. Julie Ellis wrote that the meeting would be for the claimant to have the opportunity to elaborate on the details of his complaints. The claimant was informed that he could have a trade union representative or work colleague with him if he wished.

76. On 12 June 2017, the Information Commissioner issued a decision that Unite, the claimant's trade union, had breached the Data Protection Act in passing on the claimant's email to the respondent.

77. The formal grievance clarification meeting took place on 26 June 2017. We have notes of this meeting. The meeting took place from 11.15am to 12.50pm. The claimant was accompanied by his trade union representative, Barbara Bull. The claimant has taken issue with the minutes of this meeting without identifying the parts he does not agree with. I find that the minutes correctly summarised points of relevance discussed in the meeting whilst no doubt not being a verbatim account of all that was said. Mr Patel referred to the email to the trade union. I find that he had not been informed, prior to this meeting, that the claimant objected to the respondent having this document. During the course of the meeting, the claimant asked how Mr Patel had obtained the letter he was reading from as it had been obtained covertly. Ms Gonzalez informed the claimant that she had obtained the document from Mr McLaughlin as part of the handover between them, with Mr McLaughlin telling her this was the claimant's grievance. Ms Gonzalez referred to showing the claimant the document in the meeting on 13 April and the claimant having indicated that the points numbered were his grievance numbers 1-6. The claimant said he had a different recollection. He had noticed they had the document which was never meant to be seen by anyone from the respondent, was very upset and demanded to be given "the copy".

78. Mr Patel went through the claimant's grievances, reading from the email to the trade union in respect of each point. He asked the claimant to supply details of each grievance then asked the claimant in respect of each one how they could resolve it.

79. In relation to the grievance about being sent home, the only details the claimant provided were that he had been on the smart roster as a 15:00 start on 13 June and when he attended he was sent home. The claimant did not give the details about this original rota or about the calls to Ms Cross and Resources. Mr Patel asked how they could resolve this. The claimant said he wanted a full and frank explanation. The claimant said he had had meetings about the incident with Dave H (SDM), Steve McLaughlin and SDM Jason Naylor.

80. In relation to the second grievance, the one to Colette Roche about nothing having happened about the first grievance, the claimant said as a resolution that he wanted the respondent to explain the deviation from the complaint guidelines which were part of his employment contract, and whether Ms Roche was made aware of the grievance. Mr Patel asked in what way it deviated from the procedures. The claimant said first he had not got the paperwork with him and then that the deviation was timeframe, acknowledgement of receipt of the grievance, and "I have not received minutes of the meetings".

81. In relation to the third grievance, the tie incident, the claimant said Lyndsay Cross was unhappy with the tie he was wearing, which he had been wearing for years. She provided him with a second-hand tie and made him stand on a raised podium and put the new tie on in front of staff and passengers. He said it was a company issue tie. In resolution of this grievance the claimant said he would like an explanation.

82. In relation to the fourth grievance, the referral to disciplinary for being behind on CBT time, the claimant answered questions from Mr Patel. The claimant said he was referred for disciplinary by Nathan Crane, incorrectly referred to as Cross, despite having offered an explanation of sickness absence.

83. In relation to the fifth grievance, being tricked out of representation at the meeting with Nathan Crane on his return to work, the claimant said Nathan Crane had told him it was a return to work and no representation was necessary. The claimant said he could not deny that he had tried to book leave for the period he was off as he had tried to book several periods of holiday. The claimant said he could not remember what dates he tried to book leave for. The claimant said the return to work part of the meeting lasted two minutes then he was accused of not being ill at all because it allegedly coincided with the holiday dates he had tried to book. He said he was told he would be referred for disciplinary action. Mr Patel asked if he was referred and the claimant said “no”. When asked by Mr Patel how they could resolve this, the claimant said, “I would like to know if Nathan Cross’ close relationship with Lyndsay Cross has any influence over these dealings with me as they often share a house”. Mr Patel then clarified with the claimant that he meant Nathan Crane rather than Cross.

84. In relation to the sixth grievance, the invitation to a formal final capability meeting, the claimant said Rachel Thomas had apologised and he had accepted the apology, but he demanded to know how it had happened. How could somebody who was absent due to anxiety and stress be sent a dismissal letter a few weeks before Christmas? When asked by Mr Patel how they could resolve this, the claimant said, “by a full and frank explanation”.

85. In relation to the seventh grievance, denial of the right of appeal against the capability warning, the claimant said he appealed and it never happened so he was denied the right to appeal.

86. Mr Patel asked the claimant if there were any documents he would like to provide. The claimant said, “not at this stage, no”. The claimant asked Mr Patel, “does the company have access to my seven formal grievances?”. Mr Patel said, “yes”. I accept Mr Patel’s evidence that he understood by this question that he was being asked whether he had details of the seven grievances, and his reply was in accordance with that understanding. Whilst the claimant may have meant the original separate grievance documents, it was not clear from the question posed that this was what the claimant meant.

87. In his evidence and in his letter of 14 September 2017, the claimant asserted that he had stated at the meeting on 26 June that the individual grievance letters contained all the necessary facts for the grievance to progress properly, and was informed that these documents were not present at the meeting, that he offered his copies of these grievance documents but this offer was declined. I find that this

exchange did not take place at the meeting on 26 June. I prefer the evidence of the minutes of the meeting to this account. Although Ms Boyle confirmed that Mr Patel and Ms Gonzalez did not have copies of the grievance documents in the meetings, she did not give any evidence about this exchange which the claimant wrote took place. I do not find the claimant's evidence on this point to be reliable. During the course of this case, on many occasions, the claimant has reflected back inaccurately to a witness what he says the witness said only a short time previously. I make no finding on whether the claimant did this knowingly, but it causes me to question the reliability of his recollection unless supported by other evidence. The claimant has not referred to any notes he or his trade union representative made at the meeting on 26 June. His letter of 14 September was written almost three months later. Whether or not the claimant had come to believe that the exchange he purports to record took place, I do not consider that his evidence or the account in the letter of 14 September is a reliable account. I prefer the evidence of the minutes which, although not sent out until December 2017, I find were typed up from contemporaneous notes made during the course of the meeting.

88. The claimant asked Mr Patel how long the process would take. Mr Patel suggested four weeks. The claimant gave Mr Patel his mobile phone number so Mr Patel could contact him. The claimant said he was off ill because of this. He referred to his first grievance saying he would be distracted. He said this had had an adverse effect on his health. He questioned why an outcome had taken so long. I accept that this was all the information Mr Patel had about the claimant's medical position apart from having been told by another manager that the claimant considered addressing his grievances would help him to return to work.

89. The claimant was told that the minutes of the meeting would be sent to him. Minutes were prepared by the notetaker and then given to Mr Patel who had the responsibility for passing them to the claimant. They were not sent to the claimant until the outcome in December 2017. I accept Mr Patel's evidence that he intended to send them to the claimant with the outcome at a time when he thought he would be able to provide an outcome within four weeks. Mr Patel accepted, with hindsight, that he should have sent them to the claimant when he realised the outcome would take longer. I accept at the time that, based on the information the claimant had provided, Mr Patel thought it was feasible to provide an outcome within 4 weeks. I accept Mr Patel's evidence that, when he started to investigate, he realised that he was going to need to interview more people than seemed apparent from details provided by the claimant on 26 June. In particular, the claimant had not given the full picture relating to the incident of being sent home. Mr Patel needed to interview not just Lyndsay Cross but Scheduling. I accept his evidence to the effect that he had underestimated how soon he would be able to complete his investigation given the different shift patterns of himself and those he needed to interview.

90. I find Mr Patel conducted a conscientious investigation into the complaints as explained by the claimant, and further investigation which arose because of the interviews he conducted. I find that Mr Patel conducted the investigation as quickly as his duties and his and other people's shift patterns allowed. Mr Patel's job is very reactive. He can plan to work on something but then be required to deal with other things which arise. I accept his evidence that he came in on several days off to conduct interviews and on one of these he was unable to conduct the scheduled interview with Lyndsay Cross because she was called away on urgent duties.

91. Mr Patel considered whether to try to deal with one grievance at a time but decided it was likely to be quicker to deal with everything together so that he could speak to relevant people in relation to all the grievances as and when he could. He did not consider that handing over to another SDM was likely to have achieved a quicker outcome. He felt that another manager would have to duplicate some work since Mr Patel had conducted the interviews with the claimant and they would have other work priorities.

92. The notes in Mr Patel's day book are a record of some, but not all, of the interviews he conducted. I accept that he made rough notes which were transcribed into a Word document which evolved into the outcome letter. The rough notes were shredded. I accept that the outcome letter dated 14 December 2017 gives a true reflection of the scope of Mr Patel's enquiries.

93. On 13 July 2017, Ms Gonzalez sent an email to Mr Patel asking how he was getting on with his investigations. She sent a further email on 27 July asking for an update. Mr Patel replied on 27 July, apologising for the delay, saying that this was his first shift in, he was "on nights from tonight and still had some people to speak to" and had rung the claimant to update the claimant but had received no answer, but he was planning to ring again. Ms Gonzalez replied, stressing that the most important thing was to keep the claimant updated. Mr Patel replied that he would keep calling the claimant until he answered and, if not, would send a message via his SDMs to contact him, and he would keep notes of the times he had contacted the claimant. I accept that Mr Patel made a number of attempts to contact the claimant using the contact telephone number provided by the claimant to give him an update that he was still investigating. The calls were not picked up by the claimant and did not go through to voicemail so Mr Patel could not leave a message. If the claimant saw that he had missed calls, the claimant did not return these. Mr Patel could not recall whether he did send a message via the Security Team Managers.

94. On 14 September 2017, the claimant wrote to Ms Gonzalez. I accept Ms Gonzalez did not receive this letter until after she had sent her letter of 15 September. She did not feel it necessary to respond to the claimant's letter because of the letter she had just sent. Ms Gonzalez gave evidence that, in hindsight, she regrets that she had not replied directly to the claimant's letter.

95. In his letter, the claimant complained about the use of the email to the trade union. As previously noted, he asserted that he had stated at the meeting on 26 June that the individual grievances letters contained all the necessary facts for the grievance to progress properly. He was informed these documents were not present at the meeting, and that he offered his copies of these grievance documents but the offer was declined. For reasons previously given I find this exchange did not take place at the meeting on 26 June.

96. The claimant complained that, although he had been told to expect an outcome within about four weeks, it was now ten weeks and he had not received a response to his questions or even a copy of the minutes. The claimant asserted that there had been a total lack of progress made or action taken in a year since his first grievance. The claimant referred to the respondent being aware of the toll on his health. The claimant referred to having submitted a subject access request to the respondent and referred to the email between Mr McLaughlin and Rachel Thomas of 22

November 2016 to which I referred earlier in these reasons. The claimant asserted that the respondent was failing in its contractual obligations and statutory duty of care. He wrote:

> "If I do not receive a credible response to the points raised in this communication I will be forced to conclude that, in the absence of any explanation from MAG, the company's blatant failings are nothing more than the pursuit of a deliberate, cynical campaign of inaction with no intention whatsoever to pursue the correct procedures, just one of vague undocumented promises, counting on the disgruntled employee to eventually just give up, give in, resign in disgust or so, eventually, they can be conveniently dismissed on unrelated grounds."

97. On 15 September 2017, Ms Gonzales wrote to the claimant. As previously noted, she had not received the claimant's letter at the time she wrote this. She wrote to update him on the progress of the grievance investigation. She wrote:

> "Due to operational demands and colleague availability Altaf Patel SDM has yet to complete his investigations and reach a conclusion on your seven grievances. I have asked that he focuses on completing this process and I am confident that you will shortly receive an outcome. I apologise for the delay and thank you for your understanding and patience. Please do not hesitate to contact Altaf via email [she gave email address] should you have any questions in respect of his progress. I also take this opportunity to remind you of the airport's EAP (Employment Assistance Programme), details of which have already been provided and are enclosed."

98. The claimant says he did not receive the letter until 25 September. It is not necessary for me to make a finding as to whether that was the case.

99. On 19 December 2017, the Information Commissioner sent a letter to the claimant. The Commissioner wrote in this:

> "It appears likely that Manchester Airport Group has not complied with the Data Protection Act 1998. This is because it continued to hold and process personal data contained in your email to Unite the Union. I appreciate that MAG had not solicited this information and that it was not initially aware that Unite the Union had forwarded the email to MAG without your knowledge or consent. However, MAG continued to refer to it even after you had explained the situation and asked it not to. In my opinion this was unfair to you and not within your reasonable expectation. In my opinion, it was clear from the wording of the email that you did not intend it to be sent to your employer."

100. The Commissioner recorded that the respondent had said they had deleted copies of the email.

101. On 20 September 2017, the claimant approached ACAS. An ACAS early conciliation certificate was issued the same day. I infer from this that ACAS is unlikely to have sought to contact the respondent before issuing the certificate. The claimant has given evidence that he was advised that ACAS would not get involved until he resigned and would not get involved with the grievance whilst he was still employed. Whatever was said to the claimant, I find that, by seeking an early

conciliation certificate, the claimant was, at the least, seriously considering leaving the respondent and bringing a complaint to the Tribunal by 20 September. I feel unable to infer, from the information available to me, that it was the claimant's settled intention by this date to resign.

102. By the end of October 2017, Mr Patel had completed his investigation in rough, and all that remained was to write the outcome letter. A few days after this, an incident at work led to Mr Patel's unexpected absence. He was required to be absent for seven days during an initial investigation. The matter impacted on his state of mind to an extent that he did not feel he was fit for duty. He referred himself for counselling. In the event, he was absent for a further three weeks for the counselling process. He was in touch with his manager throughout but neither were aware at the start of Mr Patel's absence that it would be of that length. Mr Patel was taking it week by week. When Mr Patel declared himself fit for work, he had a number of rest days on his roster. He went back into work on 4 December.

103. On 6 November 2017, the claimant had a long-term sickness review meeting with the Security Manager, Sue Bowers. The claimant says a further copy of his letter of 14 September was given to Susan Bowers during this meeting, together with a further letter dated 6 November. I accept Ms Gonzalez's evidence that she was not shown the letter dated 6 November. The only copy in the bundle appears in the claimant's timeline created in January 2018 for the purposes of these proceedings. I have not heard evidence from Sue Bowers. The claimant quoted the letter in his claim form submitted on 2 December 2017. I consider it unlikely that the claimant would have done so had he not given the letter to Sue Bowers. I find, on the balance of probabilities, that the claimant did hand the letter dated 6 November 2017 to Sue Bowers. The letter of 6 November repeated some of the matters in the letter of 14 September. It referred to his grievances; it referred to the document obtained by the SAR request; it made an allegation that the respondent had "continued to gather private personal information about myself from a third party organisation", although by this date the claimant was aware that the Information Commissioner had reported that the respondent had been given the email by the trade union. The claimant wrote that he was still suffering from the anxiety and depression caused by the stresses of his formally submitted grievances still not being investigated and addressed.

104. The claimant has produced a letter dated 1 December 2017, which is a resignation letter. I find, if this was sent, that it was not received by the respondent. The telephone conversation on 4 December and the respondent's letter of 15 December, and the emails of 28 December 2017 and Ms Gonzalez's letter of 3 January 2018, are consistent with the respondent not being aware, until receipt of the claim form, that the claimant had resigned. There is no copy of the letter in the bundle and the claimant reproduces the letter he says he sent in his witness statement.

105. The claimant presented his claim to the Employment Tribunal on 2 December 2017. He referred to his letters of 14 September and 6 November, reproducing them in full, but he did not refer to his resignation letter of 1 December. The claimant indicated on the claim form that he was seeking reinstatement or re-engagement if successful.

106. On 4 December 2017, there was a conversation between the claimant and Susan Bowers about obtaining another sick note for December. I find there was no mention of resignation in the conversation.

107. Mr Patel returned to work on 4 December 2017. He made the grievance outcome letter his priority and produced a draft for proof reading around 12 December. He did not find out about the claimant's resignation until he asked HR to check the outcome letter and was told that the claimant may have resigned and that HR were dealing with it. Mr Patel sent his outcome letter on 14 December 2017, together with a copy of the minutes from the meeting on 26 June. In the letter, he apologised for the length of time it had taken him to respond to the claimant's grievances. He wrote that the delays were caused by operational demands, difficulties in coordinating calendars in a shift work environment and latterly by Mr Patel's unexpected absence from the business. Since that letter postdates the claimant's resignation, there is no need to deal with it in detail at this stage. The six page letter indicates a careful enquiry and consideration by Mr Patel of the grievances brought by the claimant.

108. On 15 December 2017, Susan Bowers wrote to the claimant referring to his claim form, saying they had not been aware of his resignation and asking him to confirm his position. She referred to their conversation on 4 December when the claimant had confirmed he was obtaining a sick note that afternoon. She wrote, "If we do not hear from you by Friday 22 December 2017 we will take it that you have resigned from the company with effect from 1 December 2017".

109. The claimant wrote to the respondent on 18 December 2017 saying he disagreed that the minutes of the meeting of 26 June were an accurate record but did not say in what respect he considered them to be incorrect.

110. On 3 January 2018, Ms Gonzalez wrote to the claimant. She wrote that they had received his Employment Tribunal claim form which stated that his employment ended on 1 December, though they had not received anything directly from the claimant stating he had resigned. She referred to him stating in his claim form that, ideally, he would like to return to work. She wrote:

> "If you have resigned but have since changed your mind, we will be happy for your employment to continue and to pay you as normal as if you had not resigned in the first place. This will also allow you to appeal the outcome of the grievances you received recently. We would also request that you send us a fit note to cover your sickness period from 30 November 2017."

111. Ms Gonzalez asked the claimant to confirm his situation by 10 January 2018. There was no response to this letter.

Submissions

112. Mr Bourne, for the respondent, produced written submissions and made additional oral submissions. The claimant made oral submissions. I do not seek to reproduce all the submissions but summarise some of the main points.

113. Mr Bourne submitted that the claimant did not disclose anything to Lyndsay Cross which might amount to a protected disclosure. He submitted there was no evidence linking the acts which followed with what Lyndsay Cross heard.

114. Mr Bourne submitted that the claimant did not resign in response to the continued delay in dealing with his grievances because, immediately before he contacted ACAS he was told the investigation was continuing.

115. Mr Bourne submitted that the respondent could not provide a proper explanation why nothing was done until Ms Gonzalez took up her post but then things moved forward in a concerted way. The respondent had reasonable grounds for behaving as they did. If there was an earlier breach, the claimant waived the right to complain about this because he consented to the start of a new investigation.

116. Mr Bourne submitted that the claimant could not have lost trust and confidence in the respondent because he sought reinstatement or re-engagement in his claim form.

117. The claimant made oral submissions which were, in effect, a repetition of evidence or, in some respects, an attempt to give new evidence. I informed the claimant I could not take account of new information given in the course of submissions.

The Law

118. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has a right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. An employee will be entitled to terminate a contract of employment without notice if a respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

119. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. In *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666* it was said that the Tribunal must look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

120. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident, even though the last straw is not by itself a breach of contract. The last straw does not have to constitute unreasonable or blameworthy conduct but it must contribute, however slightly, to the breach of the implied term of trust and confidence. In *Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978* the Court of Appeal has reasserted the orthodox approach to affirmation of the contract and the last straw doctrine, that is that an employee who is the victim of a continuing

cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation. The Court of Appeal set out the questions the Tribunal must ask itself in a case where an employee claims to have been constructively dismissed:

(1) What is the most recent act on the part of the employer which the employee says caused or triggered his resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the *Malik* term?

(5) Did the employee resign in response to that breach?

121. There is an implied term in a contract of employment that an employer would reasonably and promptly afford a reasonable opportunity to its employees to obtain redress on any grievance they may have (*WA Goold (Pearmak) Limited v McConnell 1995 IRLR 516 EAT*).

122. The law in relation to protected disclosures is contained in the Employment Rights Act 1996. Section 103A of the Employment Rights Act 1996 provides that "an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason, or if more than one, the principal reason for the dismissal, is that the employee made a protected disclosure".

123. Protected disclosures are as set out in section 43 of this Act. A protected disclosure is a qualifying disclosure made in one of the prescribed ways, one of which is to the employer. A qualifying disclosure is defined in section 43B as "any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following…". The list that follows includes that a criminal offence has been committed, is being committed or is likely to be committed.

124. I have also been referred to the case of *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436* in which the Court of Appeal considered *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38* about what constitutes a protected disclosure, and cautioned against taking an approach that a statement is either information or an allegation, and saying that the language of the statute must be considered. At paragraph 35, the Court of Appeal said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

Conclusions

125. I consider, first, whether the claimant was constructively dismissed. The claimant relies on the matters set out in the list of complaints and issues identified at the preliminary hearing as being individually or cumulatively a breach of the implied term of mutual trust and confidence. The first of these is sending the claimant home without explanation in June 2016. On the basis of the facts which I have found, it appears to me that Lyndsay Cross was entirely justified in sending the claimant home on that day. Contrary to the claimant's assertion, it was not without explanation. Lyndsay Cross told the claimant that he was “notified as absent”. The claimant was fully aware of the circumstances, having requested Lyndsay Cross herself to mark him as “notified as absent” after she had refused to slide his shift. I conclude that the claimant arranged for Resources to change his shifts on the rota by deception, wrongly informing them that Lyndsay Cross had referred him to them for a decision when they told him that the decision on the day was that of the managers on the podium. The claimant knew that Lyndsay Cross had refused his request to slide his shift. He was going behind this refusal to try to arrange matters to his satisfaction. I conclude that this matter cannot be something which can properly be either individually or cumulatively with other matters a breach of the implied term of mutual trust and confidence.

126. The second matter relied on is failing to deal properly with the claimant's grievance about the matter of 30 June 2016. I will deal with this matter together with the complaints about the failures to deal properly with the claimant's grievance of 17 September 2016, the grievance of 26 September 2016, the grievance submitted on 29 November 2016, the claimant's grievance of 13 April 2017 and the failure to progress the claimant's grievances after June 2017. Before I deal with these I will deal with the other individual matters relied upon.

127. The claimant complains that he was embarrassed and humiliated by being made to change his tie in front of his colleagues and members of the public on 21 September 2016. I conclude, based on the facts I have found, that Lyndsay Cross was entitled to require the claimant to change his tie for a clip-on tie which was current company issue. I do not conclude that the way in which this matter was carried out was such that it could, either individually or cumulatively, form a breach of the implied term of mutual trust and confidence. Changing a tie is a simple matter. This could have been achieved with a minimum of fuss with no attention being drawn to the claimant. Alternatively, if the claimant felt embarrassed about changing his tie in public he could have asked to change it in a private area. He did not do so. If any attention was drawn to the claimant this was because of his disproportionate reaction to the request.

128. The claimant complains of being referred for disciplinary action in September 2016 regarding insufficient computer training. I have accepted Richard Quinn’s evidence that it would be normal practice to refer an employee who was behind on CBT time for the second month in a row to a disciplinary hearing where the employee had been spoken to the previous month. The email from Marc Van der Lan is somewhat ambiguous and could be read as suggesting there was some discretion in considering whether a person in that position should be referred for disciplinary action. However, even if this was the case, and the evidence of Mr

Quinn suggests this is not normally the case, I conclude that there is nothing improper or unusual in referring a person in the claimant's position to a disciplinary hearing. The claimant had the opportunity at that disciplinary hearing to explain the circumstances and no disciplinary action was taken. I conclude that there is no breach of the implied duty of mutual trust and confidence by this action and that it cannot contribute to a breach of the implied duty of mutual trust and confidence when taken together with other matters.

129. The claimant complains that he was tricked out of having union or colleague representation at a meeting in November 2016. This refers to the return to work meeting with Nathan Crane. There is no right to be accompanied by a trade union representative to a return to work meeting. I do not consider that by raising the matter of having requested leave for the period for which he was then absent, this converted the return to work meeting into any form of disciplinary meeting to which the right to representation would attach. I have heard no evidence which suggests that it would be usual to have union representation at such a return to work meeting. I conclude that Nathan Crane did not “trick” the claimant out of having representation at that meeting by telling him either that trade union representation was not really normal practice in a return to work interview or, as the claimant says, that he did not need trade union representation because it was a straightforward return to work interview. I conclude that this matter cannot, individually or cumulatively with other matters, form part of a breach of the implied duty of mutual trust and confidence.

130. The claimant complains about being issued with an invitation to a capability meeting with a pamphlet indicating that the decision had already been taken to terminate his employment with notice. This relates to the letter sent to the claimant intended to invite him to a stage one capability meeting. I found that, in error, the letter had referred to a final formal meeting. The remainder of the letter did not suggest that a decision had been made to terminate the claimant's employment. The claimant says he understood by reference to the capability procedure that the meeting he was invited to would be one at which he would inevitably be dismissed. I find it hard to believe that the claimant genuinely had this understanding at the time. I conclude that a reasonable reader of the letter and policy could not have understood this to be a letter saying he was definitely to be dismissed. At worst, they could read it as being an invitation to a meeting at which he could be dismissed. However, knowing the circumstances, a reasonable reader should have realised this letter may have been issued in that form by mistake and sought clarification. I conclude that this matter cannot, individually or cumulatively with other matters, be a breach of the implied duty of mutual trust and confidence.

131. The claimant complains about being placed on the capability register. This arises from the claimant's absences. I conclude that it was in accordance with the respondent’s absence procedure that the claimant was given a warning and placed on the capability register. This matter cannot therefore, individually or cumulatively with other matters, form a breach of the implied duty of mutual trust and confidence.

132. The claimant alleges that the respondent used a third party organisation to covertly gather personal, private and medical information about the claimant. This refers to the respondent having a copy of a letter the claimant wrote to his trade union. It is clear from the decision of the Information Commissioner that there is no evidence that the respondent solicited the trade union to gather such information

about the claimant for the respondent. The respondent was given the letter by the trade union and, until the claimant objected to this in the meeting on 26 June, the respondent had no reason to believe that it should not have been given this letter. It would not be unusual for a trade union to act as a conduit of information from a member. I conclude that this is not a matter that, individually or cumulatively with other matters, can constitute a breach of the implied duty of mutual trust and confidence.

133. The claimant relies on failing to respond to correspondence dated 14 September and 6 November 2017 seeking progress in relation to the grievances. Although this is closely linked with the complaints about failure to progress grievances, I will address it separately. I found that the respondent did not reply to the claimant's letter of 14 September because this was received after Ms Gonzalez had sent her letter dated 15 September 2017 to the claimant advising him that the matter was still being investigated. The claimant was invited to contact Mr Patel by email if he had any questions about progress, but there is no evidence that he did so. I have found, on the balance of probabilities, that the claimant handed the letter of 6 November to Sue Bowers but that this was not then given to Tanya Gonzalez. Failure to respond to the letter of 14 September 2017 cannot by itself or with other matters form part of a breach of the implied duty of mutual trust and confidence. The failure to respond to the letter of 6 November 2017 is unexplained. I do not consider that a failure to respond to this one letter could by itself constitute a breach of the implied duty of mutual trust and confidence. I will consider whether, if there are other matters which could be relied on as being cumulatively a breach of the implied duty, a failure to reply to this letter could form part of that.

134. I turn then to the allegations about failing to progress the claimant's grievances and failing to deal properly with the claimant's appeal about going on the capability register. On the face of it, there is an extraordinarily long period between the presentation of the first grievance on 30 June 2016 and the outcome letter of 14 December 2017. A delay of this nature could potentially constitute a breach of the implied duty of mutual trust and confidence. As a matter of case law, and the ACAS Code of Practice of Discipline and Grievance, an employee can expect that an outcome should be given to a grievance without unreasonable delay. The respondent's own grievance procedure emphasises that it is important that any serious concerns are resolved as quickly as possible to reduce worry and stress to all concerned. The respondent's procedure also indicates, perhaps optimistically given the shift nature of their work, that a grievance will be acknowledged and a meeting held where possible within five working days of receipt of the grievance to discuss and hopefully resolve the concern. It also states that the written response to the grievance will be provided usually within a maximum of five working days of the meeting. The procedure does include the caveat that, at any stage where a manager needs to conduct an investigation, there will be a delay in reaching and communicating a decision, although any delay will be kept to a minimum. There are no fixed periods, therefore, within which meetings must be held and an outcome provided. However, there must not be unreasonable delay. If there is unreasonable delay, this could constitute a breach of the implied duty of mutual trust and confidence.

135. There is a lack of full information about what was done in relation to the claimant's grievances whilst Steve McLaughlin was the HR Manager. There is

evidence in the claimant's evidence, and some documents, that there were a number of meetings held. In particular, notes have been produced of a meeting with Steve McLaughlin on 30 November 2016. It appears that this was intended as an outcome hearing for the grievances of the claimant prior to those added by letter of 28 November 2016. However, because of the new grievances, most of the meeting was spent discussing the new matters which the claimant wished to raise. It appears that it was intended to reconvene the meeting. However, this never took place before Mr McLaughlin's departure on 2 February 2017. There is no evident reason why the respondent could not have provided a written outcome to the grievances prior to those of 28 November whilst Mr McLaughlin was in post. It appears from the handover he provided to Ms Gonzalez that he thought some of the grievances had been disposed of. However, Ms Gonzalez could find no evidence of any outcome letters. In relation to the handling of the grievances prior to Ms Gonzalez taking up her post, I conclude that the failure to provide written outcomes could constitute a breach of the implied duty of mutual trust and confidence. However, the claimant did not resign at that stage in response to the breach. Whether he can rely on failures in that period for his complaint of constructive unfair dismissal, therefore, turns on whether there are later matters which can constitute part of the breach of the implied term. I, therefore, turn to the handling of the claimant's grievances after 2 February 2017.

136. It appears that, by the week before 24 March 2017, Julie Ellis had spoken to the claimant about his grievances and confirmed that he wished to proceed with these. Ms Gonzalez and Mr Patel arranged the clarification meeting with the claimant on 13 April. They sought to understand in this meeting what had been resolved and which grievances still needed to be addressed. The claimant was not as forthcoming as Mr Patel had expected from his previous experience of dealing with grievances. The meeting was adjourned so that a further meeting could be arranged at which the claimant could be accompanied by a trade union representative. The respondent was not, therefore, in a position to begin the investigation until after a further meeting when more details of the complaints could be provided.

137. The claimant began his period of sickness absence on 24 April 2017 which continued until his resignation. The meeting was not rearranged until Mr Patel was informed that the claimant thought that dealing with his grievances would assist his return to work. The further meeting was therefore arranged for 26 June.

138. At the meeting on 26 June 2017, the claimant was asked for full details of his complaints. He had been advised in the invitation to the meeting that he should be in a position to provide these details. The claimant was not as forthcoming as Mr Patel expected. When Mr Patel began to investigate, he found that the claimant had not, for example, told him the full story about the incident when the claimant was sent home. The additional enquiries required and difficulties in arranging meetings, given the shift working environment, meant the investigation took longer than originally anticipated. Mr Patel sought to contact the claimant by telephone to notify him and Ms Gonzalez wrote to him on 14 September. The claimant was given an invitation in that letter to email Mr Patel with any enquiries but did not do so. Unexpected absence from the business caused a delay in Mr Patel producing a written outcome, which did not go to the claimant until 14 December 2017, after the claimant's resignation. Mr Patel produced the outcome swiftly after his return to work.

139. Whilst there was a lengthy delay in receiving an outcome, all communications to the claimant were consistent with the investigation being ongoing. It was unfortunate that the claimant was unaware of Mr Patel's absence from the business in October and November, but Mr Patel and his managers did not know at the start of the absence that it would be for such a lengthy period. Handing over to another manager at that stage would have been likely to cause even more delay in reaching an outcome.

140. The test for a breach of the implied duty is whether the respondent, without reasonable or proper cause, conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. Whilst it was very unfortunate that there was such a delay in reaching an outcome to the claimant's grievances and appeal against the capability warning, I conclude that, in relation to addressing the claimant's grievances from February 2017 onwards, there was reasonable or proper cause for all the delays, although the claimant was not aware of all of these reasons. I conclude, therefore, that there was no breach of the implied term from February 2017 onwards or conduct which could contribute to such a breach. I conclude that the claimant lost the opportunity to rely on matters earlier than this since he had not resigned at that time and he participated in the investigation begun by Mr Patel. I conclude, therefore, that the claimant has not established that the respondent committed a breach of the implied term of mutual trust and confidence which formed a reason for his resignation.

141. There is an issue about whether the claimant resigned because of the various matters he alleged to constitute a breach of contract. There is particularly a question mark over the claimant's motives, given that he put on his claim form that he wished to be reinstated or re-engaged, which appears inconsistent with a breakdown of trust and confidence. However, it is not necessary for me to decide whether he did resign for these reasons.

142. I conclude that the complaints of unfair dismissal are not well-founded because the claimant was not constructively dismissed. That disposes of both the "ordinary" unfair dismissal claim and the section 103A claim, since, without a dismissal (constructive or otherwise), there can be no successful unfair dismissal complaint of any kind. However, for completeness I address other issues which would have been relevant to the section 103A claim.

143. The only relevant alleged protected disclosure is that to Lyndsay Cross in March 2016, since the claimant in evidence said he was not arguing that any adverse consequences arose because of the other alleged protected disclosures. I have found that Lyndsay Cross heard the claimant say that "people don't want to go home and tell their partners how much they hate their job so they just do stupid things in order to get the sack". In answer to questions from Lyndsay Cross, the claimant then said that people steal in order to get the sack but was unable to provide details of who had been sacked for stealing.

144. In considering whether this was a protected disclosure, I have to decide whether this was a disclosure of information which, in the reasonable belief of the claimant, tended to show one or more of the matters listed in section 40(3)(b)(i) of the Employment Rights Act 1996. I conclude that this was not a disclosure of information tending to show any of the relevant matters. It did not have sufficient

factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). It is an allegation that people commit a criminal offence to get themselves sacked. However, the claimant provided no details in support of the allegation. I conclude that this generalised allegation is not a disclosure of information tending to show that a criminal offence has been committed or is likely to be committed. I conclude that this was not a protected disclosure. Therefore, the s.103A claim would have failed for this reason.

145. If I had concluded that there had been a protected disclosure, I would have concluded that there was no link shown between that disclosure and any of the matters relied upon for the constructive unfair dismissal claim. The claimant has pointed to no evidence which would support such an allegation. There was a considerable time gap between the alleged disclosure and the other matters involving Lyndsay Cross. The fact that Nathan Crane and Lyndsay Cross shared a house at one stage is not sufficient to persuade me of any link between Nathan Crane's actions and the protected disclosure. The acts of both Lyndsay Cross and Nathan Crane were entirely in accordance with company practice and justified in the circumstances. There is nothing other than the claimant's suspicions to link the alleged protected disclosure and the actions of Lyndsay Cross and Nathan Crane. The alleged link is even more tenuous in relation to other matters relied on for the constructive dismissal. Even if I had found that there was a constructive dismissal, I would not, therefore, have found that the reason or principal reason for the constructive dismissal was that the claimant had made a protected disclosure.

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Employment Judge Slater

Date: 5 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 November 2018

FOR THE TRIBUNAL OFFICE

ANNEX
Complaints and Issues

Preliminary issue – protected disclosures

1. Can the claimant show that on one or more occasions to be specified in further particulars he made a protected disclosure under Part IVA Employment Rights Act 1996 in that:

(a) He made a disclosure of information to his employer;

(b) Which he reasonably believed tended to show one or more of the matters set out in Section 43B(1); and

(c) Which he reasonably believed was made in the public interest?

Unfair Dismissal

Dismissal

2. Can the claimant establish that the respondent committed a fundamental breach of the implied term of trust and confidence through one or more of the following matters, either individually or cumulatively?

(a) Sending the claimant home without explanation in June 2016;

(b) Failing to deal properly with the claimant's grievance about that matter of 30 June 2016;

(c) Failing to deal properly with the claimant's grievance of 17 September 2016 about the failure to follow grievance procedures;

(d) Embarrassing and humiliating the claimant by making him change his tie in front of his colleagues and members of the public on 21 September 2016;

(e) Failing to deal properly with the claimant's grievance about that matter submitted on 26 September 2016;

(f) Referring the claimant for disciplinary action in September 2016 regarding insufficient computer training;

(g) Tricking the claimant out of having union/colleague representation at a meeting in November 2016;

(h) On 23 November 2016 issuing the claimant an invitation to a capability meeting with a pamphlet indicating that the decision had already been taken to terminate his employment with notice;

(i) Placing the claimant on the capability register;

(j) Failing to deal with the claimant's grievance submitted on 29 November 2016 about matters (f) – (h);

(k) Failing to deal properly with the claimant's appeal of 5 December 2016 about going on the capability register;

(l) Using a third party organisation to covertly gather personal private and medical information about the claimant;

(m) Failing to deal with the claimant's grievance of 13 April 2017 about his capability register appeal and the use of a third party to gather information;

(n) Failing to progress the claimant's grievances after June 2017 despite a meeting on 26 June 2017 when he was told that this would happen;

(o) Failing to respond to correspondence dated 14 September and 6 November 2017 seeking progress in relation to the grievances.

3. If so, can the claimant show that such a breach of contract formed a reason for his resignation?

4. If so, had the claimant lost the right to resign by delaying or otherwise affirming the contract after any such breach?

Reason

5. If it is established that the claimant was dismissed, what was the reason or principal reason? Was it:

(a) One or more protected disclosures, in which case dismissal is automatically unfair under section 103A; or

(b) Some other reason, which the respondent accepts is unfair as no potentially fair reason has been pleaded in the response form?

Remedy

6. If the claimant was unfairly dismissed, what is the appropriate remedy? Issues likely to arise include:

(a) The basic award for unfair dismissal;

(b) An award for financial losses;

(c) Whether the claimant would have received any pay had he not resigned because he was on nil sick pay at the time;

(d) Whether the claimant would have been fairly dismissed for capability within a short period in any event;

(e) Whether the claimant failed to mitigate his losses by not accepting an offer of reinstatement;

(f) Whether the claimant has made reasonable steps to find other work since leaving employment;

(g) Whether there should be any uplift to compensation to take account of an unreasonable failure by the respondent to act in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.