EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100769/17

Held in Glasgow on 9, 10, 11, and 12 October 2017 (Final Hearing); and 17 November 2017 & 14 March 2018 (Members' Meetings)

Employment Judge: **Ian McPherson**
Members: **Ken Thomson**
Vernon Alexander

Ms Patricia Wallace — **Claimant**
In Person

The Student Loans Company Limited — **Respondents**
Represented by:
Mrs Mel Sangster - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:-

(1) The claimant's complaint of unlawful direct age discrimination by the respondents, contrary to **Section 13 of the Equality Act 2010**, is not well-founded, and accordingly, it having failed, that part of the claim against the respondents is dismissed by the Tribunal;

(2) The Tribunal finds and declares that the claimant was dismissed by the respondents on grounds of capability, as the principal reason for dismissal, and as she was unfairly dismissed by the respondents for that reason, the claimant's complaint of unfair dismissal by the respondents, contrary to

Section 98 of the Employment Rights Act 1996, is well-founded, and it succeeds;

(3) In respect of that unfair dismissal, the Tribunal finds that the claimant did not cause or contribute to her dismissal, and so it is not appropriate that her compensation for unfair dismissal should be reduced for that reason, in terms of **Sections 122(2) and / or 123(6) of the Employment Rights Act 1996** ;

(4) Similarly, the Tribunal finds that the claimant did not fail to mitigate her losses, in terms of **Section 123(4) of the Employment Rights Act 1996**, so it is not appropriate that her compensation for unfair dismissal should be reduced for that reason;

(5) Further, the Tribunal does not accept the respondents' argument that, even if a fair procedure had been followed by the respondents, it was inevitable that the claimant would have been dismissed fairly from the respondents' employment at a later date, so it is not appropriate that her compensation for unfair dismissal should be reduced for that reason;

(6) Accordingly, in respect of that unfair dismissal, the Tribunal awards the claimant compensation for unfair dismissal, that being her preferred remedy in the event of success before the Tribunal, and the Tribunal **orders** the respondents to pay to the claimant a monetary award in the sum of **SEVENTEEN THOUSAND AND NINETY POUNDS, NINETY TWO PENCE (£17,090.92);**

(7) In terms of the **Employment Protection (Recoupment of Benefits) Regulations 1996,** the claimant having been in receipt of State benefits after her dismissal by the respondents, the recoupment provisions apply to this monetary award ; and

(8) The prescribed element is **£7,496.21**, and relates to the period from 27 March 2017 to 12 October 2017, and the monetary award exceeds the prescribed element by **£9,594.71.**

REASONS

Introduction

1. This case called before the full Tribunal on Monday, 9 October 2017, for a Final Hearing, set for 4 days for its full disposal, including remedy if appropriate, as per Notice of Final Hearing issued to both parties' representatives by the Tribunal under cover of a letter dated 24 July 2017.

Claim and Response

2. Following ACAS Early Conciliation between 28 March and 13 April 2017, the claimant presented her ET1 claim form to the Employment Tribunal on 10 May 2017. She complained that she had been unfairly dismissed by the respondents, and that she had also been discriminated against by them on the grounds of age.

3. In the event that her claim was to be successful, the claimant indicated that she sought an award of compensation from the Tribunal, as also a recommendation. No further information was provided by her, either as regards the amount of financial compensation she was seeking, nor as regards the terms of the recommendation she was seeking from the Tribunal.

4. Her claim was accepted by the Tribunal on 15 May 2017, and Notice of Claim served on the respondents, requiring them to lodge an ET3 response by no later than 12 June 2017. At that stage, the case was also listed for a Case Management Preliminary Hearing to be held by an Employment Judge sitting alone on 13 July 2017.

5. On 12 June 2017, the respondents, acting through their Solicitor, Mr David Stirrat, of Burness Paull LLP, Solicitors, Edinburgh, lodged an ET3 response on their behalf defending the claim. It was denied that the claimant had been unfairly dismissed, as alleged or at all, and explained that she had been dismissed on the basis of her capability, being a fair reason for dismissal, following upon what was stated to be a fair and reasonable process in managing the claimant's unsustainable levels of short term intermittent absence over years of employment.

6. It was further denied that the respondents' decision to dismiss the claimant was discriminatory, or in any way connected to her age, as alleged or at all. As a preliminary issue, the respondents' ET3 response raised the lack of specification of the age discrimination

Initial Consideration and Case Management Preliminary Hearing

7. On receipt of the respondents' ET3 response, the file was referred to Employment Judge Shona Maclean for initial consideration of the claim and response. Employment Judge Maclean, having considered the file, did not dismiss the claim or response on initial consideration, and she ordered that the claim would proceed to the Case Management Preliminary Hearing fixed for 13 July 2017.

8. Thereafter, on 13 July 2017, the case called before Employment Judge Peter Wallington QC for that Case Management Preliminary Hearing. Employment Judge Wallington's written Note and Orders of the Tribunal, dated 14 July 2017, were sent to both parties' representatives under cover of a letter from the Tribunal on 21 July 2017.

9. Employment Judge Wallington ordered the case to be listed for Final Hearing before a full Tribunal for 4 days, namely 9 to 12 October 2017, in Glasgow, as well as making other Case Management Orders for the good conduct of

the Final Hearing, including Orders for additional information, and the disclosure of documents.

10. In terms of those Case Management Orders made by Employment Judge Wallington further correspondence was received by the Tribunal, on 3 and 10 August 2017, from Andrew Clark, Senior Solicitor, at Burness Paull LLP, Edinburgh and, on 13 August 2017, from the claimant. In particular, on 10 August 2017, the respondents' representative, Mr Clark, served voluntary further particulars of the response to the claimant's age discrimination claim, and attached further particulars in respect of 3 comparators, and a comparator table in respect of the claimant, and two comparators.

11. In reply to the claimant's e-mail of 13 August 2017, Mr Clark replied to the Tribunal, on 14 August 2017, with copy to the claimant, explaining why the respondents did not consider the individual referred to by the claimant to be a relevant comparator in relation to the claimant's age discrimination case.

12. On 24 August 2017, the claimant, in compliance with the Case Management Orders, forwarded her Schedule of Loss, expecting to receive at least **£40,000** compensatory award, plus 4 years' lost income up to retirement age, together with some mitigation documentation and, thereafter, on 14 September 2017, Mr Clark served the respondents' Counter-Schedule of Loss, assessing the claimant's losses, in the event of success with her claim, at a grand total of **£8,541.04**.

Final Hearing before this Tribunal

13. When the Final Hearing called before us, just after 10.15am, on Monday, 9 October 2017, the claimant attended, unrepresented but accompanied, for moral support, and as an observer, by a friend, a Mr S Brown, who the claimant confirmed was not being led as a witness on her behalf.

14. The respondents were represented by Mrs Mel Sangster, Director at Burness Paull LLP, Edinburgh, who had become the respondents' representative in this case, on 15 September 2017, when she advised the Tribunal that Mr David Stirrat had left that firm, and she had now taken over in his place.

15. A Joint Bundle of Documents was provided, with an index of contents, under six tabs, and pages consecutively numbered. The claimant asked and, there being no objection by the respondents, we allowed her to add additional pages 274A/D to update her job search activity history to current date.

16. Later, in the course of this Final Hearing, on day 3, being Wednesday, 11 October 2017, just before the claimant was going to be examined in chief by the Employment Judge, a housekeeping matter was raised with both parties, relating to whether or not there was an updated version of the dismissal letter issued to the claimant by the respondents.

17. After further discussion with the claimant, and Mrs Sangster for the respondents, two versions of the dismissal letter were added to the Joint Bundle, at pages 230A/B, being the updated version, with 27 March 2017 as the effective date of termination, and pages 260C/D, being the original version, dated 14 February 2017, but with 13 March 2017, as the effective date of termination, that original version having already been produced at pages 229 and 230 of the Joint Bundle.

Clarification of Issues

18. The claimant confirmed that she was still proceeding with both aspects of her claim, for unfair dismissal, and for age discrimination, and Mrs Sangster confirmed that the claim was still resisted by the respondents, who sought its dismissal in its entirety.

19. The ET1 claim form was silent on the claimant's employment details, at Section 5, and her earnings and benefit details, at Section 6, and likewise, in

many respects, so too was the ET3 response lodged on behalf of the respondents. In discussion with both the claimant, and Mrs Sangster for the respondents, it was agreed that the claimant's employment with the respondents as an Administrative Assistant had started on 21 March 2011, and ended on 27 March 2017, the effective date of termination following her dismissal on 13 February 2017.

20. While Section 7 of the ET1 claim form (further employment) did not state whether, at the date of presentation of the ET1 to the Tribunal, the claimant had managed to secure any new employment, she advised us that, but for 4 days' agency work, she had not secured any new employment post-termination of her employment with the respondents. As per Section 9.2 of her ET1, the claimant confirmed that she was currently unemployed and receiving Jobseekers' Allowance.

21. Further, the claimant agreed the wages details provided by the respondents in their Counter-Schedule of Loss, namely £292.63 per week gross, and £258.49 per week, net. The respondents' ET3 response had not provided this information to the Tribunal, presumably because the claimant had, herself, not provided any employment details, or earnings and benefit details, when presenting her own ET1 claim form.

22. Having seen the respondents' Counter Schedule, the claimant stated that there was nothing in her Schedule of Loss that she sought to change.

23. At the start of the Final Hearing, on the matter of preferred remedy, in the event of success with her claim, the Employment Judge asked the claimant to clarify her position, as in her ET1 claim form, at Section 9.1, where she had indicated compensation only, she had also ticked the box for a "***recommendation"*** in a discrimination complaint.

24. Mrs Sangster apologised that, due to oversight, the respondents had not noted that point, about the claimant seeking a recommendation in her ET!

claim form, and she stated that they, like the Tribunal, needed to know if the claimant was seeking any recommendation from the Tribunal, in the event of success and, if so, in what terms.

25. In reply, the claimant clarified that she was seeking compensation only, as per her Schedule of Loss, and she further confirmed that she was not seeking to be re-instated, or re-engaged by the respondents.

26. When the claimant explained that she was not sure what a recommendation might be, the Employment Judge informed her of the terms of **Section 124 of the Equality Act 2010**, and a copy of that statutory provision was provided to her from ***Butterworths' Employment Law Handbook***, and to Mrs Sangster for the respondents, for their consideration.

27. The Employment Judge signposted the claimant to helpful guidance available on the Equality and Human Rights Commission website, and the Citizens Advice Bureau Scotland website, about valuing a claim, and preparing a Schedule of Loss for an unfair dismissal claim, and how to calculate compensation for injury to feelings in a discrimination claim.

28. After an adjournment of half an hour, from 10.47 to 11.17am, the claimant advised the Tribunal that she did not think that a recommendation by the Tribunal was relevant, and she would not be seeking any recommendation in the event of success with her claim.

29. When, after that adjournment, the Employment Judge then asked the claimant to clarify the compensatory award being sought by her, at page 266 of the Joint Bundle, where she had referred to "***employer's failure to follow their own procedures",*** the Employment Judge noted that there was no specification provided of these alleged failures, and no such allegations on the face of the ET1 claim form.

30. Under reference to the Employment Appeal Tribunal's Judgment in **Chandhok v Tirkey [2015] IRLR 195**, the Employment Judge referred to how

the then President of the EAT, Mr Justice Underhill, had referred to the need for the essentials of any claim to be in the ET1, and not elsewhere.

31. The claimant replied detailing that she relied on three specific failures by the respondents, which she then identified, as follows:-

    (1) She was supposed to get, within five days, notice of when her appeal might be heard, and she had to contact the respondents after eight days to ask, and to enquire about a reference to Occupational Health.

    (2) She alleged that the respondents did not follow their own procedures within the timelines shown in their own procedures; and

    (3) While the Appeals Officer wanted the claimant to attend Occupational Health, the claimant was only told that verbally, and, at Stage 3, she was not given five full days' notice of the date of her hearing.

32. Further, when asked about her use of the words "***stress***", and "***wrong"***, at page 266 of the Joint Bundle, being her Schedule of Loss, and whether or not she was claiming for injury to feelings, where the respondents' Counter-Schedule had assessed such non-financial loss at £0, the claimant stated that there was injury to her feelings, including stress, but her global figure of £40,000, in her Schedule of Loss, included injured feelings.

33. A further adjournment, of around three quarters of an hour, from 11.42am to 12.32pm, was allowed to the claimant, so she could consider the ***Vento*** guidelines, as per the Court of Appeal's judgment in **Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102**, as referred to in the Citizens Advice Bureau guidance on valuing a claim.

34. Copies of the relevant pages, downloaded by the Judge from the CAB website, were provided to the claimant, by the clerk to the Tribunal, and copy for Mrs Sangster, so that the claimant could consider her position during the adjournment allowed to her by the Tribunal.

35. The Judge asked the claimant to confirm, by reference to that guidance, what sums she sought from the respondents, by way of any award for injury to feelings, and compensation for discrimination, as also compensation for unfair dismissal.

36. The claimant stated that she had medical evidence, in her GP, Dr Ross's letter of 7 August 2017, in the Joint Bundle at page 37, but she did not intend to call him as a witness, and she would give her own evidence about her injured feelings.

37. Following the adjournment, during which the claimant clarified that she was seeking low band injury to feelings, in terms of ***Vento,*** which she quantified at about **£1,000**, Mrs Sangster noted the claimant's clarification, and stated that there was no need for any further clarification from the claimant.

38. The claimant did not indicate any changes to the amounts otherwise shown in her Schedule of Loss previously intimated to the respondents, and copied to the Tribunal.

Evidence to be led by the Parties

39. Discussion then focussed on witnesses to be heard at this Final Hearing. From the Case Management Preliminary Hearing before Employment Judge Wallington QC, it was noted that the likely witnesses were the claimant, estimated at 1 day, and no further witnesses for the claimant, and two witnesses from the respondents, identified as a Jenifer Kane, Dismissing Officer, estimated at 1 day, and a Pauline de Pellette, Appeal Hearer,

estimated at 1 day, with the fourth day of the Final Hearing being assigned for closing submissions from both parties.

40. Never having cross-examined a witness before, the claimant, quite understandably, stated that she was not sure how long she would take in asking her questions of the respondents' witnesses. As it appeared that the Final Hearing could still be concluded with evidence over three days, the Tribunal felt that there was no need for it to consider any formal Timetabling Order, under **Rule 45 of the Employment Tribunal Rules of Procedure 2013**. Neither party sought any such Timetabling Order from the Tribunal. In the event, evidence led was heard and concluded over those first 3 days.

41. Given the comparator information provided by the respondents, in reply to Employment Judge Wallington's Case Management Orders, the Employment Judge enquired whether either of the two identified witnesses for the respondents would be speaking to the three comparators.

42. Mrs Sangster advised that that subject matter would be dealt with by the respondents leading a further witness, a Mrs Maria McShane, an HR Adviser with the respondents, who had also been involved in the Stage 3 meeting when the claimant was dismissed by Mrs Kane on 13 February 2017.

43. Further, Mrs Sangster estimated that, with now three witnesses for the respondents, the likely duration of evidence-in-chief was three hours for Mrs Jenifer Kane, two hours for Mrs Maria McShane, and two hours for Ms Pauline de Pellette, and Mrs Sangster further stated that she assumed that the respondents would lead their witnesses first, as unfair dismissal was the main issue, and the first witness for the respondents was in attendance anyway.

44. At this stage, the Employment Judge noted that, with there being both unfair dismissal and age discrimination complaints, the onus of proof was on the respondents, who admitted dismissal, to show the reason for dismissal, and

that it was a fair and reasonable dismissal, but as they denied discrimination, as alleged by the claimant, the onus was on her for that head of complaint. The claimant stated that she was expecting to give her evidence on the first day, and the respondents' witnesses thereafter.

45. Employment Judge Wallington's written Note, from the Case Management Preliminary Hearing held on 13 July 2017, did not address the issue as to which party was to lead evidence first.

46. After discussion with both the claimant, and Mrs Sangster, the Tribunal decided that it would be best to hear from the respondents' witnesses first, for them to be cross-examined by the claimant, and then asked questions by the Tribunal.

47. Further, the Tribunal also decided that when it came to the claimant's evidence, in circumstances where she was self-representing, it would be appropriate for the Employment Judge to elicit her evidence-in-chief, by a series of structured and focused questions, and then let her have the opportunity to add anything else she felt relevant and necessary for a fair Hearing of her case, before she was then cross-examined, in the usual way, by Mrs Sangster, as the respondents' Solicitor, and questioned, if necessary, by the Tribunal panel members.

48. It was agreed by both parties, and by the full Tribunal, that this would be appropriate, and in accordance with the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** to ensure that the case was dealt with justly and fairly, and both parties put, so far as possible, on an equal footing.

Findings in Fact

49. We have not sought to set out every detail of the evidence which we heard nor to resolve every difference between the parties but only those which appear to us to be material. Our material findings, relevant to the issues

before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before us.

50. Mrs Sangster, the respondents' solicitor, very helpfully, in her written closing submissions, at section 2, provided us with suggested findings in fact, from paragraphs 2.1 to 2.20. We have had regard to them, but not considered ourselves bound by them, and our own findings in fact are more extensive in scope and extent, and often more detailed, than in her suggested draft.

51. On the basis of the sworn oral evidence heard from the various witnesses led before us over the course of the Final Hearing, and the various documents included in the Joint Bundle of Documents provided to us, the Tribunal has found the following essential facts established.

Parties

(1) The respondents are a non-profit making, government-owned, organisation with their head office in Glasgow. They were set up in 1989 to provide loans and grants to students in universities and colleges in the UK.

(2) The claimant was employed by the respondents, latterly in the role of Administrative Assistant, at the respondents' offices at Hillington, in the Pre-Assessment department. It was agreed between the parties that her employment with the respondents commenced on 21 March 2011.

(3) A copy of the claimant's contractual documents, being original terms and conditions of employment, signed by her on 11 March 2011, and subsequent letters of variation to her contract, dated between 23 December 2011 and 25 November 2015, were produced to the Tribunal at pages 87 to 103 of the Joint Bundle.

(4) It was agreed between the parties that, as at the effective date of termination of her employment with the respondents, on 27 March 2017, the claimant, then aged 61 years, had six complete years' continuous employment with the respondents.

(5) It was further agreed between the parties that, on the basis of a 37.5 hours per week contract, her gross weekly wages with the respondents, as at that effective date of termination of her employment, were **£292.63**, and her net weekly wages were **£258.49**.

(6) Copy payslips for the claimant, issued by the respondents, from 31 October 2016 to 28 February 2017 were produced to the Tribunal at pages 257 to 259 of the Joint Bundle.

(7) As per e-mail of 3 August 2017 from the respondents' then solicitor, Mr Stirrat, to the Tribunal, copy produced to the Tribunal at page 264 of the Joint Bundle, the claimant was in the respondents' stakeholder pension scheme, and the claimant and the respondents each contributed **1%** salary to the NOW scheme at the time of the claimant's dismissal by the respondents.

(8) Further, in the respondents' Counter-Schedule, copy produced to the Tribunal at page 276 of the Joint Bundle, loss of pension benefit for the claimant is stated to be at the rate of **£12.68 per month**.

(9) The claimant's deductions from wages for the NOW pension are shown in her payslips, copy produced to the Tribunal at pages 257 to 260 of the Joint Bundle, and her final payslip from the respondents, on 31 March 2017, at page 260, shows total pension fund for the year to date at **£90.35**.

(10). Neither party produced to the Tribunal any further documents in respect of the NOW pension scheme operated by the respondents, and contributed to by both employee and employer.

Respondents' Sickness Absence Policy and Procedures

(11) In order to manage long and short term sickness absence issues, the respondents have implemented and operate a Sickness Absence Policy and a Sickness Absence Procedure.

(12) The claimant advised the Tribunal that she accepted that both of these documents (copy produced to the Tribunal at pages 67 to 69 of the Joint Bundle for the Policy, and pages 70 to 86 for the Procedure) are set out in documents which are provided to and available to all staff employed by the respondents.

(13) The respondents' Sickness Absence Policy, Version 1 (undated), copy produced at pages 67 to 69 of the Joint Bundle), states in its introduction , at section 1.1, that *'…**the Company has put in place a procedure to work with employees whose level of attendance has fallen below what is deemed acceptable. The procedure is guided by principles of openness and fairness so that the employee is aware at every stage how they will be treated.'***

(14) The Sickness Absence Policy also refers, at section 1.1, employees to additional support measures which are available to the respondents' employees, including a retained Occupational Health service, an Employee Assistance Programme and regular promotion of Health Awareness resources.

(15) At section 1.3 (purpose and scope), copy reproduced at page 68 of the Joint Bundle, it is provided in the Sickness Absence Policy, that:

"***The primary objectives of the Sickness Absence Policy are as follows:-***

- ***To manage sickness absence effectively and proactively***

- ***To minimise sickness absence***

- ***To ensure consistency across the organisation***

It is the Company's aim to ensure the appropriate provision of support for staff who incur health difficulties. The approach adopted may differ according to the nature of the absence."

(16) At section 2, copy reproduced at page 69 of the Joint Bundle the Sickness Absence Policy defines short-term, and long-term absence – the latter being defined as ***"any period of absence from work due to illness lasting 4 weeks or more".***

(17) Further, in the Sickness Absence Policy (copy produced at page 69 of the Joint Bundle), there is a definition of "***Short Term Absence",*** and it is provided there that:-

"***Short term absence can involve patterns of absence due to illnesses that may or may not be connected. Such patterns could vary from a large number of single days to fewer occasions or absence involving up to a week or more, to a mixture of individual days and longer periods of absence. High levels of these types of absence may indicate underlying problems, which need to be explored and resolved.***"

(18) In the Sickness Absence Procedure (copy produced at page 84 of the Joint Bundle), "***long term absence***" is defined as "***any period of sickness absence lasting 28 calendar days or more",*** and it is further provided there that:-

> "***If an employee is absent due to long term illness, he or she must be treated fairly and sympathetically with all factors relating to their illness being considered on an individual case by case basis.***"

(19) In the Sickness Absence Procedure (copy produced at page 76 of the Joint Bundle), there is a section on ***"Managing Short Term Absence,*** and it is further provided there that:-

> "***The main aim of the Sickness Absence Procedure is to keep the Company sickness absence levels below the Company target (currently 4%). The Company expects people to be sick from time to time and sets the acceptable standard at 2 instances not exceeding 7 days lost in any 12 month period. Therefore action under the procedure will be taken as follow:-***
>
> ***Informal action will be taken:***
>
> - ***3 instances of absence in the previous twelve months (on a rolling basis) or***
> - ***2 instances totalling 8 days or more in a rolling twelve months***
>
> ***Formal action will be taken:***

- ***4 instances of absence in the previous twelve months (on a rolling basis) or***

- ***3 instances totalling 9 days or more in the previous 12 months (on a rolling basis).***"

(20) The respondents' Sickness Absence Procedure, Version 2 (July 2015), copy produced to the Tribunal at pages 70 to 86 of the Joint Bundle, sets out a staged and '***trigger point based'*** absence management and consultation process for the management of intermittent short term absence issues.

(21) This process is detailed at length in the Sickness Absence Procedure, including a flow chart representation of the process at Appendix 1, copy produced at page 86 of the Joint Bundle.

(22) A brief outline of the process is as follows:-

Informal Review – an Informal Review Meeting will be held in response to 3 instances of employee absence in the previous twelve months (on a rolling basis) or 2 instances totalling 8 days or more in a rolling twelve month period.

Formal Stages – an employee with intermittent short term absence issues will move through three formal stages where attendance standards continue to fall outwith the standards expected, as follows:-

Stage 1 – a formal meeting will be held in response to 4 instances of absence in the previous twelve months (on a rolling basis) or 3 instances totalling 9 days or more in a rolling twelve month basis. An employee will stay at stage 1 level for a 12 month period only, unless the absence issues persist.

Stage 2 - a formal meeting will be held in response to 4 instances of absence in the previous twelve months (on a rolling basis) or 3 instances totalling 9 days or more in a rolling twelve month basis. An employee will stay at stage 2 level for a 12 month period only, unless the absence management issues persist. In the event that 2 or 3 instances of absence totalling 8 days occur within the period of formal Stage 2, an extension to the stage 2 process may be applied.

Stage 3 – a formal meeting will be held in response to 4 instances of absence in the previous twelve months (on a rolling basis) or 3 instances totalling 9 days or more in a rolling twelve month basis.

Appeal - The Stage 3 process also encompasses an appeal stage - where the conclusion of the Stage 3 meeting is that dismissal is appropriate, the dismissed employee is provided with a right of appeal and a formal Stage 3 appeal meeting.

(23) As reproduced at page 81 of the Joint Bundle, the "***Right of Appeal***" provides that:-

> "***An employee has the right to appeal against the decision of dismissal imposed under Stage 3 of the Company's Sickness Absence Procedure.***
>
> ***Any appeal should be made in writing, stating clearly the grounds for appeal. On receipt of an appeal, the hearing will be arranged within 5 working days and the individual will receive at least 5 working days` notice of the arrangements. The individual has the right to be accompanied by a PCS representative (if a member) or a work colleague.***

The appeal panel will consist of a member of the Executive Team, and HR representative, and their decision will be notified in writing to the employee within 5 working days of the Appeal Hearing."

(24) Should the attendance of an employee continue to be at an unacceptable level within the timescale set out at the Stage 2, the respondents` Sickness Absence Procedure provides for Stage 3 (Final Formal) where the employee will be given 5 days notice, in writing, to attend a Stage 3 Hearing and (as per the copy procedure produced at page 79 of the Joint Bundle) it is expected that discussions have preceded this invite and, as at this stage dismissal will be considered as an outcome of the meeting, that it does not come as a surprise to the employee.

(25) The Stage 3 hearing panel should consist of two senior members of staff nominated by management, where practicable at a higher level than the individuals who heard the Stage 2 hearing. Where practical, an HR Manager, or a delegated HR Advisor, should be present, and this individual may be deemed to be one of the senior members of staff, or may be in addition to them. The panel set up to hear this stage of the process should where practicable be different from those involved in either Stage 1 or Stage 2.

(26) The Sickness Absence Procedure (still at page 79 of Joint Bundle) defines the nature of this final meeting, including allowing the employee the opportunity to provide information to help give a full understanding of their health and any ongoing issues, before a decision is made; consider referral to Occupational Health, if appropriate; and discuss the adverse effect unplanned absences have on the business.

(27) If the Stage 3 hearing results in dismissal of the employee, the outcome will (as per the Sickness Absence Procedure, at page 88 of the Joint Bundle) be confirmed in writing, detailing discussions and outcome, and the employee will be provided with written notification of the reason for their dismissal, the date employment will terminate, any payment due, i.e. pay in lieu of notice/annual leave, and of their right to appeal against the decision.

(28) The trigger point system outlined in the respondents' Sickness Absence Procedure is not applied by the respondents in an automated or unconsidered manner. At each 'formal stage' meeting the employee and the respondents' attendees consult and discuss the reasons for the absences, including consideration of underlying health issues and other relevant factors.

(29) Where appropriate, trigger points may be reasonably adjusted in the employee's favour to account for specific issues. Reasonable adjustments of this type were applied in the claimant's case, as set out below. Where necessary, the respondents will also utilise Occupational Health input and other support measures such as work station risk assessments. These measures were also applied in the claimant's case, as set out further below.

(30) The claimant did not raise any procedural complaints in her ET1 claim form lodged with the Tribunal, but she did so in her internal appeal against dismissal, which is narrated later.

(31) In their ET3 response, paper apart, at paragraph 4.5, copy reproduced at page 22 of the Joint Bundle, the respondents stated that they had "***assumed that the procedure applied by the Respondent is accepted as fair and appropriate in the circumstances".*** For the avoidance of doubt, they further stated that the claimant was provided with appropriate written notice of meetings, and of the sickness

absence evidence to be considered, and that she was made aware of her right to be accompanied, all in line with the procedural recommendations set out in the ACAS Code.

(32) At this Final Hearing, the claimant raised some procedural issues about the respondents' compliance with their own Sickness Absence Procedure, not foreshadowed in her ET1 claim form, but she raised no issues about their unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, and she sought no uplift of any compensatory award on that basis in the event that her claim was to succeed before the Tribunal.

(33) In any event, the ACAS Code of Practice does not apply to capability dismissals, although the ACAS Guide (March 2015) does provide, at Appendix 4, practical guidance on how to handle problems of absence and gives guidance about dealing with absence, including guidance on how frequent and persistent short-term absence should be handled, as also how longer term absence through ill-health should be handled. The ACAS Guide also cross refers to the advice on attendance management available in an ACAS advisory booklet on managing attendance.

Claimant's Sickness Absence Process

(34) From the copy documentation sent by the respondents to the claimant, copy reproduced at pages 106 to 256 of the Joint Bundle, it is evident that there was ongoing dialogue and communication between the employer and employee, in respect of the claimant's absences from work, over the period running from 6 August 2013 onwards. The process of the claimant's sickness absence was as follows:

Historic absence management process

(35) On 6 August 2013 the claimant attended an informal review with her then line manager, Emmy Henderson, in respect of her persistent short term absence of 8 days, 5 instances. A record of that discussion was produced to the Tribunal at pages 110 and 111 of the Joint Bundle.

(36) In line with the respondents' absence management procedures, the claimant moved into formal Stage 1 on 27 November 2013. Minutes of the Stage 1 meeting with Ms Henderson , and Ashleigh McDonald, Team Leader, were produced to the Tribunal at pages 115 to 117 of the Joint Bundle, along with copy letter from Ms Henderson to the claimant, dated 27 November 2013, copy reproduced at page 118.

(37) On 10 November 2014, as per letter from Michelle Lowson, Team Manager, copy produced to the Tribunal at page 126 of the Joint Bundle, the claimant was issued with an '***End of Process'*** letter which thanked her for her efforts in improving her absences over the period since moving to formal Stage 1, and to indicate that in line with her improved attendance she had been removed from the formal process.

Informal Review

(38) On 16 March 2015, the claimant attended an informal review meeting, with her then line manager, Kirsty Haigh, to discuss her intermittent absences, totalling 6 days occurring in May 2014, January 2015 and March 2015, all in connection with stomach bugs. During this meeting, the claimant indicated that she was aware that her attendance at work was poor. The claimant was warned that a failure to improve her absence may result in a move to formal Stage 1. A record of that discussion was produced to the Tribunal at page 135 of the Joint Bundle.

Formal Stage 1

(39) Following the informal review, the claimant continued to be absent from work on an intermittent basis. Absences were managed and documented as they arose through consultation with the claimant's line manager including monitoring self-certification and return to work forms, monitoring sick notes and return to work discussions, as appropriate.

(40) On 4 September 2015, the claimant attended a formal Stage 1 absence meeting with Julia La Piazza and Kirsty Haigh, Team Managers, to discuss her ongoing intermittent absences, these being 4 instances of absence totalling 15 days in the preceding 12 month period. These absences substantially exceeded the respondent's Sickness Absence Procedure trigger point.

(41) The health issues causing these absences were discussed as they related to each instance of absence, and included water infection, cold/flu and gastric illness. The claimant was warned that a failure to improve her absence record may result in a move to formal Stage 1. The Stage 1 meeting was minuted and the minutes were signed by the claimant, as per the copy minutes produced to the Tribunal at pages 144 to 146 of the Joint Bundle. The formal Stage 1 meeting was recorded in a letter to the claimant, from Ms La Piazza, dated 4 September 2015, as per the copy produced to the Tribunal at page 149 of the Joint Bundle.

Formal Stage 2

(42) Following the formal Stage 1 meeting, the claimant continued to be absent from work on an intermittent basis. Absences were managed and documented as they arose through consultation with the claimant's line manager including monitoring self-certification and return to work forms, monitoring sick notes and return to work discussions, as appropriate.

(43) On 15 December 2015, the claimant attended a formal Stage 2 absence meeting, with Kirsty Haigh and Julie La Piazza, to discuss 5 instances of absence totalling 17 days in the preceding 12 month period. These absences substantially exceeded the respondent's Sickness Absence Procedure trigger points. The health issues causing these absences were discussed, and included dizziness and headaches.

(44) The Stage 2 meeting was minuted and the minutes were signed by the claimant, as per the copy minutes produced to the Tribunal at pages 152 to 155 of the Joint Bundle. The Stage 2 meeting was also recorded in a letter to the claimant, from Ms La Piazza, dated 18 December 2015, as per the copy produced to the Tribunal at pages 156 and 157 of the Joint Bundle.

Occupational Health referral No.1

(45) Following a referral by her line manager, Julie La Piazza, the claimant undertook a telephone consultation Occupational Health ("OH") appointment, on 7 January 2016, with Elena Ramsay, Occupational Health Adviser with Optima Healthcare. A copy of the resultant OH report dated 7 January 2016 was produced to the Tribunal at pages 159 to 162 of the Joint Bundle.

(46) At the point of consultation, the claimant was back at work, having been absent the previous day due to a gastric upset. The OH Adviser noted that the claimant remained at high risk of absence in the immediate future, and that her absence rate was likely to be higher than average, until her health improved or her condition was better controlled. Should her health remain a concern, the OH Adviser advised a report from the claimant's GP. The respondents did not

seek, or request through the claimant, a report from the claimant's GP, at that time, or at all.

Stage 2 extension

(47) Following the formal Stage 2 meeting, the claimant continued to be absent from work on an intermittent basis. Absences continued to be managed and documented as they arose through consultation with the claimant's line manager including monitoring self-certification and return to work forms, monitoring sick notes and return to work discussions, as appropriate.

(48) In terms of the respondent's Sickness Absence Procedure, continuing absences reached the stage 3 trigger point level from May 2016, but (as is recorded in the relevant Return to Work meetings) the respondent took the decision to take a more flexible approach, and to adjust its trigger points to allow the claimant additional time to improve her attendance.

Occupational Health referral No.2

(49) Following a further referral from her line manager, Julie La Piazza, after a Return to Work meeting held on 30 June 2016, the claimant undertook a further telephone consultation Occupational Health ("OH") appointment, on 6 July 2016, with Brian Conroy RGN, an OH Adviser with Optima Healthcare.

(50) The resultant OH Report, dated 6 July 2016, and copy produced to the Tribunal at pages 193 and 194 of the Joint Bundle, notes that the claimant, diagnosed with mild COPD, is fit to undertake the normal range of duties. She is noted as being at work, and managing her condition well with medication.

(51) The OH Report also notes there had been an issue with paint fumes at work, from renovation works in the working environment, but that this is not a major risk or a long-term issue. The OH Report indicates that breaks from the environment should be permitted when required.

Stage 2 Review

(52) On 14 December 2016, the claimant attended a Stage 2 review meeting, with Kirsty Haigh, Team Manager, to discuss her levels of absence over the 12 month period since she reached formal Stage 2. Over the period of the claimant being at formal Stage 2, she had been absent on a further 8 occasions totalling 25 days absence. Absence at this level exceeds the respondents' Sickness Absence Procedure trigger point for movement to a formal Stage 3 meeting and potential dismissal.

(53) A copy of the Return to Work meeting form from 14 December 2016, signed by the claimant's line manager, Kirsty Haigh, but not signed by the claimant, was produced to the Tribunal at page 209 of the Joint Bundle.

(54) The respondents again took the decision to adjust their trigger points and allow the claimant a further extension to the formal Stage 2 process in order to allow her a further opportunity to improve her attendance levels.

(55) The respondents accordingly wrote to the claimant on 14 December 2016, by letter from Ms Haigh, copy reproduced at page 211 of the Joint Bundle, to confirm that she would remain at formal Stage 2 level for a further 6 month period. This letter further indicated to the claimant that:-

> ***"… if you are unable to sustain an improvement, it is likely that we would meet with you again at Stage 3 of the Sickness Absence Procedure, an outcome of this could be your dismissal"***.

Formal Stage 3

(56) On 13 February 2017, Jenifer Kane, the respondents' Operations Manager, held a formal Stage 3 review meeting with the claimant to discuss a further 5 days' absence in the extended Stage 2 period, and 8 instances of absence totalling 28 days in the preceding 12 month period. These absences substantially exceeded the respondents' Sickness Absence Procedure trigger points.

(57) The invite letter sent to the claimant, on 8 February 2017, copy reproduced at page 223 of the Joint Bundle, advised the claimant that one possible outcome of this hearing could be the termination of her employment by the respondents. She was advised of her right to be accompanied, or represented.

(58) Although given less than 5 working days' notice by the respondents, the claimant agreed to this meeting going ahead. The claimant chose to proceed with this meeting without a representative. Maria McShane, HR Advisor, was present at this meeting. The health issues causing these absences were discussed. The claimant confirmed that her desk position in the office had been moved 3 or 4 times to address her concerns regarding drafts and / or the temperature in the office. The claimant further confirmed that '***she didn't see what SLC could do to help with the issues that she has'***.

(59) At the meeting on 13 February 2017, the respondents, through Ms Kane, explained to the claimant that the respondents could no longer sustain her consistent levels of intermittent absence and that her

employment would accordingly be terminated, subject to a right of appeal in terms of the formal Stage 3 procedures. This meeting lasted 40 minutes, before a ½ hour adjournment, following which the claimant was verbally advised by Ms Kane that her employment with the respondents was being terminated with immediate effect.

(60) The respondents confirmed this decision in a letter to the claimant dated 14 February 2017. Copy letter was produced to the Tribunal, at pages 229 and 230 of the Joint Bundle. The termination of employment letter confirmed the level of absences which had been recorded, as well as the reasonable adjustments which had been made to trigger points and the Occupational Health support which had been provided. The claimant was made aware of her right of appeal.

(61) A copy of the respondents` "***Leaver Notification Forms***" in respect of the termination of the claimant`s employment dated 16 and 24 February 2017, were produced to the Tribunal at pages 104 and 105 of the Joint Bundle.

(62) Due to the respondents` HR Advisor, Maria McShane, those forms were in error in referring to the reason for the claimant`s leaving the respondents` employment as "***Disciplinary"***, when that was <u>not</u> the reason.

(63) Further, a copy of the claimant's final payslip from the respondents, dated 31 March 2017, was produced at page 260 of the Joint Bundle, showing final net pay (including salary and holiday pay) at £1,443.97.

(64) No copy P45 was produced to the Tribunal, by either party, but, at page 261 of the Joint Bundle, the Tribunal was provided with a copy of the claimant`s P60 end of year certificate from the respondents showing total remuneration of £15,467.45.

(65) There was also produced to the Tribunal, at pages 224 to 228 of the Joint Bundle, a 5 page typewritten script of the Stage 3 meeting held with the claimant on 13 February 2017.

(66) Although lined off for signature by the employee and representative, and chair of the meeting, and notetaker, the copy produced to the Tribunal was not signed by anybody, as a true and accurate reflection of the meeting.

(67) However, there was produced to the Tribunal, at pages 231 to 233 of the Joint Bundle, the claimant`s amendments to the minutes of that Stage 3 meeting held on 13 February 2017, which the claimant submitted to the respondents on 27 February 2017, after she had received her letter of termination of employment from the respondents, dated 14 February 2017, but received by her on 17 February 2017.

(68) In the invite letter of 8 February 2017, copy produced to the Tribunal at page 223 of the Joint Bundle, the claimant was advised of her right to be accompanied by a work colleague or recognised trade union representative at the Stage 3 meeting to be held on 13 February 2017, and she was also advised that she should use the respondents` Oracle HR database to view her sickness record in full. A copy of her Oracle absence record from 22 June 2011 to 25 January 2017 was produced to the Tribunal at pages 254 to 256 of the Joint Bundle.

(69) At the Stage 3 meeting on 13 February 2017, the claimant did not have a copy of her Oracle record, but she did have some notes with her, and her absences from November 2015 onwards were discussed with her. Further, she was able to address them individually and explain clearly the reasons for her being off work. At the Hearing before this Tribunal, the claimant accepted that the Oracle absence record produced by the respondents was accurate.

Termination of Employment letters

(70) As emerged at the Final Hearing, the respondents in fact sent the claimant two separate letters terminating her employment.

(71) The copy letter produced to the Tribunal, at pages 229 and 230 of the Joint Bundle, dated 14 February 2017, is a file copy letter, but from the additional documents received by the Tribunal, at pages 230 A & B, the original letter issued to the claimant, dated 14 February 2017, was on the respondents` headed notepaper, and pp'd by Mrs McShane, HR Advisor, for Mrs Kane, the Dismissing Officer.

(72) It referred to the claimant`s employment having been terminated "***with immediate***" effect, with her last working day being recorded as 13 February 2017. Further, it stated that she would receive payment "***until 13th March 2017***" in line with her contractual notice period in addition to any outstanding holiday pay. At the meeting, Ms Kane had advised her that she was being terminated, with immediate effect, and that she would be paid for the next 4 weeks, but she was not required to work.

(73) Subsequently, by further letter, but still dated 14 February 2017, from Mrs Kane, but unsigned, as per the copy produced to the Tribunal at pages 230 C/D, the claimant received, by email, from Maria McShane, on 20 February 2017, at 10:59am, a further letter of termination of employment, the only change in text being that the claimant was now to receive payment "***until 27th March 2017***".

(74) The claimant`s letter of termination of employment noted that since her last sickness absence hearing, she had been absent on 8 further occasions due to sickness absence totalling 28 days, and further advised her that:-

> "***high levels of absence impact on the operational efficiency of the Company and are not sustainable in the longer term. Despite giving you all of our support you have not been able to demonstrate any improvement***."

(75) Ms Kane's letter further stated that: "***Having reviewed all the information available to me, the decision was taken to terminate your contract with effect from 13 February 2017. The minutes of the meeting will follow***".

(76) The claimant was advised of her right to appeal the dismissal decision, and that any appeal must be in writing, to be received within 5 days of receipt of the letter of termination, and for the attention of Mr John Evans, the respondents` HR Director.

(77) There was also produced to the Tribunal, at page 234 of the Joint Bundle, an email exchange between the claimant and Maria McShane, the respondents` HR Advisor, between 17 and 20 February 2017, where on 20 February 2017, Mrs McShane sent the claimant an "***updated***" dismissal letter, stating that:-

> "***As you will reach additional service during the notice period the letter has been updated to reflect your final payment date***".

Stage 3 Appeal

(78) The claimant formally appealed against her dismissal by letter dated 21 February 2017, a copy of which was produced to the Tribunal at pages 235 to 237 of the Joint Bundle.

(79) She stated that she felt the respondents had not followed the procedures set out in their Sickness Absence Procedure, that her

disabilities were not fully taken into account with regards to her needs as an employee, and that reasonable adjustments to her working environment or working hours were not explored.

(80) Specifically, in the grounds of appeal, as well as stating that she was of the opinion that she had been treated unfairly by the decision to terminate her contract, the claimant further stated that, at the time of her dismissal, she knew of two colleagues who were going through Stage 3 reviews, but considerably younger than herself, and both having had shorter term of service, and she had recently been made aware that both retained their jobs, and that led her to believe that this may have been a case of age discrimination.

Occupational Health Referral No.3

(81) In order to support the appeal process, the respondents arranged for a further Occupational Health report to be produced. As per Maria McShane's email to the claimant, on 8 March 2017, copy produced to the Tribunal at page 238 of the Joint Bundle, the Appeal Manager requested an Occupational Health appointment for the claimant prior to holding the appeal meeting.

(82) There was produced to the Tribunal, at pages 239 to 243 of the Joint Bundle, the undated Management referral to Optima Health prepared by the respondents' HR Advisor, Maria McShane.

(83) It stated that the claimant, as the employee, was not absent from work, when, in fact, she was, and she had been since 13 February 2017, when she was dismissed, although 27 March 2017 was her revised leaving date.

(84) It also stated that there were "***disciplinary warnings***" in force in relation to the claimant, when, in fact, there were not, and it stated that she had been consulted about this referral, when, in fact, she had not

been consulted, prior to it being submitted to the Occupational Health provider.

(85) Further, there was also produced to the Tribunal, at pages 244 to 245 of the Joint Bundle, the Optima Health Occupational Health report dated 9 March 2017, prepared by Iain Dunkley, Senior Occupational Health Advisor, referring to the Management referral of 6 March 2017, which he stated that he had discussed with the claimant.

(86) In that Occupational Health report, Mr Dunkley stated that the claimant was ***"fit to carry out her normal duties at present***", and she would be viewed as disabled under the **Equality Act 2010**. He noted that minimising her being exposed to direct, cold blown air as far as possible, to maximise her comfort and wellbeing, was an adjustment that the respondents as employer could make to support the claimant at work or help facilitate a return to work.

(87) Further, Mr Dunkley's report also noted that the claimant's symptoms associated with her gastro-intestinal condition were well controlled with no significant change recently. By way of future plans and next steps, he stated that no routine review was recommended for the claimant.

Appeal Hearing

(88) There was produced to the Tribunal at page 238 of the Joint Bundle, emails of 3 March 2017 between the claimant and Maria McShane, the respondents` HR Advisor, in relation to the appeal arrangements.

(89) By letter dated 10 March 2017, copy produced to the Tribunal at page 246 of the Joint Bundle, the claimant was invited to an Appeal Hearing with Pauleen de Pellette, Customer Contract Process Manager, and Laura McCairn, HR Business Partner. She was advised of the right to

be accompanied by a work colleague or a recognised trade union representative.

(90) At that appeal hearing, the claimant attended, unrepresented, but accompanied by a colleague, Sandra Booth (a receptionist), as an observer, and for moral support, and the appeal was heard by Ms de Pellette, as sole decision maker.

(91) The respondents` minutes of that Stage 3 Appeal Hearing held on 16 March 2017, taken by Ms McCairn, HR Business Partner, were produced to the Tribunal at pages 247 to 251 of the Joint Bundle.

(92) The copy produced to the Tribunal was unsigned by anybody, although lined off for signature by the employee and representative, chair of the meeting and notetaker, as a true and accurate reflection of the meeting.

(93) In her evidence to the Tribunal, Ms de Pellette advised that these minutes had not been seen by her, as chair of the Appeal Hearing, and she apologised that they had not been sent out to the claimant either, following the Appeal Hearing.

(94) Further, the claimant, in her own evidence to the Tribunal, stated that she had never seen these minutes, until the Joint Bundle was intimated to her, but she accepted that they were an accurate account of what was discussed with her at that meeting, which she recalled lasted about one hour.

Appeal Outcome

(95) The claimant`s internal appeal against dismissal was rejected by the respondents` Appeal Manager, Ms de Pellette.

(96) There was produced to the Tribunal, at pages 252 and 253 of the Joint Bundle, copies of the respondents` letter with the outcome of the claimant`s appeal.

(97) That letter, dated 21 March 2017, from Pauline de Pellette, stated that:-

> "***Having considered your appeal very carefully and taken into account your representations, it has been decided to uphold the decision taken by Jennifer*** *(sic)* ***Kane, therefore the dismissal will remain as the outcome. The decision has been taken as I found the grounds of your appeal to be unfounded***."

(98) Ms de Pellette did not agree that the respondents did not follow the procedures as set out in their Sickness Absence Procedure, although she accepted that there had been an administrative error in the invite letter of 8 February 2017, inviting the claimant to the Stage 3 meeting, but it was resolved within half an hour, and she felt that the claimant`s disabilities had been fully taken into account, as the claimant was the subject of amended absence triggers.

(99) Further, to ensure that the respondents had the most up to date report on the claimant`s health and fitness for work, Ms de Pellette stated that she had asked for a check with Occupational Health that there had been no changes since the respondents had received a report from them in July 2016.

(100) Finally, Ms de Pellette advised the claimant that absences are reviewed on an individual basis, and she could not discuss other cases with the claimant but, having reviewed the circumstances of those other cases, she had found no evidence to support the claimant`s claim of age discrimination.

(101) While the outcome letter did not detail how those other cases had been reviewed by her, Ms de Pellette, in her evidence to the Tribunal, advised that she had received information from Maria McShane, HR Adviser, and she simply relied upon that information, and what she was told by Ms McShane, and she had not seen any information about the comparators herself.

Comparative Information: Claimant and Comparators

(102) There was produced to the Tribunal, at pages 38 to 57 of the Joint Bundle, a copy of the respondents` solicitor, Mr Clark's email to the Tribunal, dated 10 August 2017, enclosing Further Particulars in response to the claimant`s age discrimination claim, and attached Tables in respect of the claimant, and two comparators identified by her.

(103) At the Case Management Preliminary Hearing, before Employment Judge Wallington QC, on 13 July 2017, the claimant identified three actual comparators in respect of her direct discrimination claim, whom she believed were aged about 30 or less, and whom she stated had each been subject to a Stage 3 meeting at or around the same time as her, but they were not dismissed.

(104) She identified them by first names only, being "***James, Lauren and Nicola***", as per paragraph 6 of Employment Judge Wallington's Note, copy produced to the Tribunal at pages 27 to 35 of the Joint Bundle.

(105) Information about the claimant was provided in the Table produced at pages 44 to 46 of the Joint Bundle, detailing her absence/sickness history, and related procedure, and she attended at a Stage 3 meeting on 13 February 2017, when she was dismissed from the respondents` employment, being aged 61, and with 6 years` continuous service.

(106) Information about comparator No.1, whom the respondents did not name to preserve anonymity, but who was clarified to be "***James***", was produced to the Tribunal in the Table at pages 47 and 48 of the Joint Bundle, together with copy of relevant documentation from the respondents relating to his case, produced at pages 49 to 54.

(107) For the reasons detailed by the respondents, at paragraphs 3.1.1 to 3.1.4 of their Further Particulars dated 10 August 2017, copy produced at page 41 of the Joint Bundle, the respondents submitted that comparator No 1 was not an appropriate comparator because the circumstances were materially different from the claimant`s circumstances, and distinguishing factors were listed and detailed by the respondents.

(108) As at 13 February 2017, comparator No 1 was aged 34, having commenced employment with the respondents on 27 October 2014, and he attended a Stage 3 Hearing on 13 February 2017 with Alison Morris, Senior Team Leader and Maria McShane, HR Adviser, discussing his attendance since his Stage 2 Hearing held on 3 October 2016, he having had 5 occasions of absence since his Stage 2, totalling 47 days.

(109) As the respondents` Managers were concerned at his overall level of sickness absence being below the expected Company standard the outcome of his Stage 3 Hearing was that he remained on Stage 2 for the next 12 months, and the respondents would continue to monitor his attendance and support him where they could.

(110) Further, information about comparator No 2, whom the respondents likewise did not name to preserve anonymity, but who was clarified to be "***Laura"***, and not "***Lauren***", was produced to the Tribunal in the Table, at pages 55 to 57 of the Joint Bundle.

(111) As at 13 February 2017, she was aged 29, having commenced employment with the respondents on 29 May 2007, and she attended a Stage 3 meeting on 17 February 2017, i.e. after the claimant`s Stage 3 meeting, held on 13 February 2017, when she was dismissed from the respondents employment.

(112) For the reasons detailed by the respondents, at paragraphs 4.1 to 4.3 of their Further Particulars dated 10 August 2017, copy produced at pages 41 and 42 of the Joint Bundle, the respondents submitted that comparator No 2 was not an appropriate comparator because the circumstances were materially different from the claimant`s circumstances, and distinguishing factors were listed and detailed by the respondents.

(113) In particular, the respondents stated that the claimant was treated more favourably than comparator No 2, having received two adjustments to trigger points. It was further stated that comparator No 2 had been dismissed at Stage 3 in the same manner as the claimant and around the same time.

(114) At set out in the respondents' Further Particulars dated 10 August 2017, at paragraph 5.1 (at page 42 of the Joint Bundle), the third named comparator identified by the claimant, and named by her as "***Nicola***", was absent from work with a long term health condition from December 2016 to July 2017.

(115) The respondents stated that that employee was accordingly not dismissed around the time of the claimant`s dismissal on 13 February 2017, and that employee was not subject to Stage 3 procedure at all around that time. Accordingly, no further detail of that comparator's long term health issues was provided to the Tribunal by the respondents in respect of comparator No 3 to the Tribunal, and no

Table was produced by the respondents in respect of that comparator No 3.

(116) On 13 August 2017, the claimant, having seen Mr Clark's email, with the respondents' comparators Table, wrote to the Tribunal, copy produced at page 58 of the Joint Bundle, stating that comparator No 1 appeared to be the correct person, but comparator No 2 was incorrect, having the incorrect age and incorrect starting date with the respondents.

(117) The claimant stated that the "***main comparators***" (whom she identified as James and Lauren) both commenced employment in 2014, but Lauren is aged 21, and the claimant did not know who comparator No 2 cited by the respondents might be.

(118) In reply, Mr Clark, as per copy email of 14 August 2017 produced to the Tribunal at page 61 of the Joint Bundle, advised that the respondents believed that they had been able to identify the individual referred to by the claimant, with the additional information provided by her with age and start date, however, this individual (whom they did not identify) was subject of disciplinary proceedings, and this employee was subsequently dismissed, for persistent lateness.

(119) The respondents further stated that this individual was not subject to the respondents` Sickness Absence Procedure at all around the time of the claimant`s dismissal on 13 February 2017, and it was assumed that the claimant had misunderstood or been misinformed regarding that individual's circumstances.

(120) Accordingly, the respondents submitted that they do not consider that individual to be a relevant comparator in relation to the claimant`s age discrimination case and, in those circumstances, they did not provide

any information, to the Tribunal, or to the claimant, relating to absences of this individual.

(121) The respondents did, however, confirm that, other than the two comparators (Nos 1 and 2) previously identified by reference to their first names provided by the claimant, they are not aware of any other individual with a name, age and start date similar to that specified by the claimant.

Claimant's Circumstances post -dismissal by the Respondents

(122) But for 4 days` agency work where she earned £220 net working in an NHS admin job in Barrhead, through the ASA Agency, by the date of the Final Hearing before the Tribunal, the claimant had not secured any new employment, post termination of her employment with the respondents.

(123) As at the date of the Final Hearing, she was unemployed, and in receipt of Jobseekers` Allowance at the rate of £73.10 per week, from 7 April to 13 October 2017. Her Jobseekers` Allowance was due to stop on 13 October 2017.

(124) Copy correspondence from the DWP, Coatbridge Benefits Centre, dated 22 and 24 April 2017, relating to the claimant`s Jobseekers` Allowance, was produced to the Tribunal at pages 262 and 263 of the Joint Bundle.

(125) Attached to her email of 24 August 2017, copy produced to the Tribunal at page 265 of the Joint Bundle the claimant attached her Schedule of Loss, and a record of her Jobseeking Activity from the Universal Job Match site, as produced at pages 268 to 274 of the Joint Bundle, and the additional documents later added at pages 274 A/D.

(126) The claimant also produced to the Tribunal, as per the copy at page 36 of the Joint Bundle, a letter to the Tribunal, dated 7 August 2017, from her GP, Dr M K Rao, at Holytown Surgery, stating that the claimant, having registered with their practice on 20 June 2017, suffers from (1) COPD (Chronic Obstructive Pulmonary Disease) – mild; and (2) Diverticular Disease.

(127) Further, the GP`s letter provided the following additional information:-

> ***"(1) COPD – Cold air or cold weather can affect her COPD causing exacerbation of her condition. She can have exacerbation due to cold weather or otherwise during exacerbations, she has to be absent from work due to breathlessness and cough.***
>
> ***(2) Diverticular Disease – She can have flare up of her condition any time. During flare up of her condition, she can have abdominal pain and diarrhoea. During flare up of her condition, she has to be absent from work***."

(128) A one page typed extract of information of the claimant`s previous GP medical records, from January 2013 to December 2016, was also provided, as per the copy produced to the Tribunal, at page 37 of the Joint Bundle, it having been enclosed with Dr Rao's letter of 7 August 2017.

ACAS Early Conciliation and Tribunal Proceedings

(129) Following ACAS Early Conciliation between 28 March and 13 April 2017, as per the copy ACAS EC Certificate produced to the Tribunal, at page 1 of the Joint Bundle, the claimant presented her ET1 claim

form to the Tribunal on 10 May 2017, as per the copy produced to the Tribunal, at pages 2 to 12 of the Joint Bundle.

(130) As she received **"*Help with Fees***", the claimant paid no Tribunal fee to lodge her claim against the respondents.

(131) The respondents resisted the claim, by ET3 response lodged by their solicitors, on 12 June 2017, as per the copy produced to the Tribunal, at pages 13 to 26 of the Joint Bundle.

Claimant's Schedule of Loss,

(132) The claimant's Schedule of Loss, intimated on 24 August 2017, as per the copy produced to the Tribunal, at pages 266 and 267 of the Joint Bundle, stated as follows:-

COMPENSATORY AWARD

I completed 4 days of temporary work during the first week of April 2017. I am currently actively seeking alternative permanent employment but so far have not been successful. I recently completed a Routes to Work Course at New College Lanarkshire which included Microsoft Word and Excel to enable me to update my skills.

I have currently lost income of £4,111 between 28th March 2017 and 21st August 2017.

I have incurred costs, which include Rail Fares, Recorded Delivery, Postage, Printing and Copying and cost of Medical Evidence from my GP.

I would like to claim for Loss of Statutory Rights, Employers failure to follow their own procedures, time taken for legal advice at Citizens

Advice and Lawyers, Stress of the Appeal Process and Tribunal Process, Stress and Worry that because of my Age I may not be employed again as I am competing for vacancies with much younger applicants. I have therefore calculated future loss of earnings (net) and pensions contributions up to when I may expect receipt of my State Pension.

I feel therefore that I would expect to receive at least ***£40,000*** *in compensation.*

See attached schedule.

Current Loss of Income	*£4,111.50*
Costs of Printing, Copying, Postage etc. currently	*£ 70.00*

I am currently in receipt of Contribution Based Jobseekers Allowance of £73.10 per week, which will expire on 13th October 2017. I am not sure what income, if any, I will have after this date.

My Now pension is no longer receiving contributions of 1% from Myself and 1% from Student Loans Company £90.35 X 2 per annum

My Annual Salary was £13,441.56 net

Till April 2021 when my State Pension is due I will have Lost income of £9,640.28 x 4 = £38,561.12

Respondents' Counter-Schedule

(133) The respondents' Counter Schedule, intimated on 14 September 2017, as per the copy produced to the Tribunal, at pages 275 and 276 of the Joint Bundle, stated as follows:-

COUNTER SCHEDULE OF LOSS

1 DETAILS

Date of birth of claimant:	*11 April 1955*
Period of service:	*21 March 2011-27 March 2017*
Complete continuous service:	*6 years*
Age at effective date of termination (EDT):	*61 years*
Gross weekly basic pay (Salary £15,217):	*£292.63*
Net weekly basic pay:	*£258.49*

2 BASIC AWARD

1.5 x 6 years service x £292.63 (gross weekly basic pay)	***£2,633.67***
Less	
Amount received as statutory redundancy pay	*£0.00*
TOTAL BASIC AWARD	***£2,633.67***

3 FINANCIAL LOSS

Loss from 27 March 2017 to 12 October 2017	
Loss of basic salary (29 weeks x £258.49):	***£7,496.21***
Loss of statutory rights:	*£300*
Loss of pension benefit (29 weeks at £12.68 per month)	*£84.86*
	£7,881.07
Less	
Jobseeker's allowance/ income support received between 7 April 2017 and 13 October 2017 (27 weeks x £73.10)	*£1,973.70*
Sums obtained through mitigation to date of tribunal	*[TBC]*
	£1,973.70
TOTAL FINANCIAL LOSS	***£5,907.37***

4 NON-FINANCIAL LOSS

5

Injury to feelings	***£0.00***
TOTAL NON-FINANCIAL LOSS	***£0.00***

5 TOTAL

Unfair dismissal basic award	***£2,633.67***
Financial loss	***£5,907.37***
Non-financial loss	***£0.00***
GRAND TOTAL	***£8,541.04***

Claimant's Losses

(134) While the respondents had assessed injury to feelings at **£Nil,** the claimant in her evidence to the Tribunal, stated that she assessed her injured feelings at **£5,000** but, other than the GP`s letter of 7 August 2017 (copy produced at page 36 of the Joint Bundle) she produced no further medical evidence to record the nature and extent of her injured feelings, and she further advised the Tribunal in evidence that she had not been to see her GP about her feelings.

(135) Speaking as to her future employability, in her evidence to the Tribunal, the claimant advised the Tribunal that she had made attempts, since April 2017, to find new work, through the JobCentre. She stated that she did go online and check job sites between 27 March 2017 and 22 April 2017, when she got her JobCentre password, but these were not recorded on her activity history, as they pre-dated her getting her password to access that system. Other than Jobseekers` Allowance, she advised the Tribunal that her only income had been for 4 days work through an employment agency, where she had earned £220 net.

(136) The claimant further advised the Tribunal that she would like to get a job quickly, but with 6 months gone so far, and as she is competing with younger people for available jobs, age discrimination does occur while it is not supposed to happen. While she is hoping to get another job, she advised that she has to be realistic, and she may not get another job because of her age.

(137) As such, the claimant advised the Tribunal that she seeks future loss up until she gets her State Pension in April 2021. As per section 9.2 of her ET1 claim form, copy produced to the Tribunal at page 9 of the Joint Bundle, the claimant had there stated that:

"***As I am now currently unemployed and claiming jobseekers allowance I wish to be compensated for the amount I would have earned and as I am over 60 the chances of my gaining new employment are reduced so I may require compensation for lost income , at least until I reach pensionable age."***

(138) She confirmed in evidence to the Tribunal that she still seeks £40,000 financial loss from the respondents, plus loss of pension rights for 2 years. Further, speaking to her claim for injury to feelings, the claimant advised the Tribunal that, after hearing evidence from the respondents` witnesses at this Final Hearing, she feels her illnesses have been "***belittled***", and as if she had been treated as if she does not matter to the respondents.

(139) She also confirmed that she had not consulted her current GP, or her previous GP, or any GP, when she had lost her job with the respondents, and she disputed the respondents` assessment of her injured feelings at **£Nil,** saying that, to her, that looked like they were saying she did not have any feelings.

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

52. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Bundle of Documents lodged and used at the Final Hearing, which evidence and our assessment we now set out in the following sub-paragraphs:-

(1) <u>Mrs Jenifer Kane: - Respondents' Operations Manager (Dismissing Officer)</u>

(a) Mrs Kane, aged 54 years, was the first witness to be heard by the Tribunal on the first day of the Final Hearing, on Monday, 9 October 2017, with her evidence continuing on to the following day.

(b) As Operations Manager, for the last 3 years, she has responsibility for a total headcount of 60, including 7 Team Managers, at Bothwell Street, Glasgow HQ. Prior to the claimant's case, as Operations Manager, she advised us that she had dealt with Stage 3 absence meeting for other employees of the respondents, and previously she had been a Team Manager, and dealt with Stage 1 and 2 absence meetings for other staff.

(c) While the respondents' primary decision maker, who took the decision to dismiss the claimant from the respondents' employment, from her evidence, it was clear that she had no previous knowledge of the claimant, nor her specific job role and duties, and that she worked in a different location from the claimant, although she did speak in evidence to having had some discussion with the claimant's line managers.

(d) In giving her evidence to the Tribunal, she was a good historian of her involvement in the claimant's case, and her evidence was generally consistent with the contemporary documents in the Joint Bundle before us, and we found Mrs Kane to be a straightforward witness, who gave her evidence as best as she could recall matters from her involvement in the claimant's case. She spoke, at length, to the minutes of the Stage 3 meeting taken by Maria McShane, HR Adviser.

(e) As a general observation, we would note that while the claimant was briefed by the Employment Judge about the purpose of cross-examination, being to test the evidence from witnesses led by the respondents, and to put to them anything that she intended to rely upon in advancing her own case, the claimant's cross-examination of this witness, and indeed the other witnesses for the respondents too, was fairly short in time, not extensive in scope.

(f) The claimant did not challenge any of the respondents' witnesses on any aspect of the chronology of events, or material matters, and the claimant's cross-examination did not, in any way, undermine the evidence of this, or any of the other of the respondents' witnesses from whom we heard at the Final Hearing.

(g) We recognise, of course, that the claimant is an unrepresented party litigant, and we were, throughout the Final Hearing, conscious of our responsibilities, under the Tribunal's overriding objective, in terms of **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** to deal with the case fairly and justly, including ensuring, so far as possible, that parties were on an equal footing, but that does not extend to us proactively

acting as advocate for either party in these Tribunal proceedings,. .

(h) Despite the Judge's briefing to her, we were alert, from our judicial experience, that unrepresented party litigants are often confused by the process and purpose of cross-examination and, in this regard, the claimant in the present case was no different to the many other, unrepresented claimants from whom the Tribunal hears evidence in cases before the Employment Tribunal.

(i) Overall, we had no issues with the general credibility and reliability of Mrs Kane as a witness for the respondents, and in giving her evidence, she did so clearly and confidently. She spoke to having found it ***"very difficult***" to make the decision to dismiss the claimant, although she had discussed matters with Maria McShane, HR Adviser, during the adjournment, after the meeting with the claimant, and before the dismissal decision was verbally advised to the claimant.

. (j) She stated that age had absolutely not contributed to the claimant's dismissal, and she had not contacted any of the claimant's line managers at Hillington, as she felt that she had enough information from the absence management paper records, and from her own questions to the claimant.

(k) As she had not seen the claimant's amendments to the minutes of the Stage 3 meeting, we had to adjourn the Hearing to allow this witness to read them. Having done so, she explained that the minutes are not a *verbatim* record, and the claimant's proposed amendments did not make a difference to her decision to dismiss the claimant, as she felt the minutes were still an accurate reflection of the meeting.

(l) Candidly, she stated that she did not know when the claimant's amendments had come into the respondents, nor what had happened to them within the respondents' HR department. She advised us that the dismissal letter had been prepared by HR, and sent by her, and while normal practice would have been to send the minutes of the meeting out with the dismissal letter, she further stated that she did not know why that had not happened.

(m) Further, Mrs Kane spoke of the decision to dismiss the claimant being her decision, and that she was not involved at all in the claimant's internal; appeal against dismissal.

(n) While her evidence-in-chief was subject to only limited cross-examination by the claimant, Mrs Kane's evidence-in-chief was not undermined by that cross-examination, and it was also generally in accord with the contemporary records taken by the respondents at the time.

(2) <u>Mrs Maria McShane – Respondents' HR Adviser</u>

(a) On Tuesday, 10 October 2017, we heard evidence from Mrs McShane, aged 36 years, an HR Adviser, based in the respondents' Head Office at Bothwell Street, Glasgow, although she spoke to attending at the Hillington Offices, where the claimant worked, on the basis of one day per week, although the claimant advised us that she was unaware of that happening.

(b) Mrs McShane advised us that she holds a Masters Degree in HR Management, and she is an Associate Member of the CIPD. She has been in post for fourteen months as HR Adviser with the respondents. She was the only HR witness led by the

respondents albeit, from the evidence we heard, other HR advisers were involved from time to time.

(c) Specifically, Ms. Laura McCairn, an HR Business Partner, who had been the HR Adviser in attendance at the claimant's Appeal hearing with Ms de Pellette on 16 March 2017, was not led in evidence before us.

(d) In giving her evidence to the Tribunal, Mrs McShane spoke to her involvement in this case which started before the claimant's Stage 3 meeting, when she made a recommendation, in December 2016, that the claimant's case should go to Stage 3, and that Stage 3 meeting led to the claimant's dismissal.

(e) She also spoke to us about the details of the claimant and the comparators, in the respondents' Further Particulars and Tables lodged with the Tribunal. In listening to the evidence led before us, it was clear to us that Mrs McShane's role went all the way through from the Stage 3 meeting held by Mrs Kane to the claimant's appeal against dismissal dealt with by Ms de Pellette, although, in her evidence, and in answer to a direct question from the Employment Judge, Mrs McShane stated that she had had no involvement in the appeal process.

(f) As was to become clear to the Tribunal from the respondents' next witness, Ms Pauline de Pellette, the Appeals Manager, who rejected the claimant's internal appeal against dismissal, Mrs McShane's evidence to the Tribunal, in regards to the extent of her involvement in the appeal process, was far greater than what Mrs McShane led us to believe in her own testimony to the Tribunal, when she stated that she had had no such involvement.

(g) From the evidence before us, it is established that Mrs McShane processed the March 2017 Occupational Health referral in respect of the claimant, prior to the Appeal Hearing by Ms de Pellette, and Mrs McShane was there, as she told us in her own evidence, as the "***gatekeeper"*** to the respondents' procedures.

(h) She further advised us that she was there as an HR Adviser to ensure that the respondents' policies were followed. She distinguished her role as HR Adviser, from Mrs Kane's role as being the decision maker in deciding to terminate the claimant's employment with the respondents.

(i) As a historian of events, leading up to the claimant's dismissal from employment, and subsequent unsuccessful internal appeal against dismissal, we have to note and record that we have come to the view that Mrs McShane was a partial, in the sense of an incomplete, historian, rather than a partisan (as in the sense of one sided) historian, and that has raised a real and significant issue for us about how best to assess the general credibility and reliability of this particular witness for the respondents.

(j) While the claimant's cross-examination did not challenge, or undermine, Mrs McShane's evidence, in any material respect, in so far as she spoke to her involvement in the matters prior to the appeal, we cannot say that her evidence in respect of those earlier matters was incredible or unreliable.

(k) In considering Mrs McShane's denial of any involvement in the appeal process, and comparing and contrasting her evidence in that regard with the full and frank, transparent disclosure made to us by Ms de Pellette in her evidence, about Mrs

McShane's role in the appeal process, we prefer, on balance of probability, the Appeal Manager's recollection from Ms de Pellette about Mrs McShane's role, particularly as it is evidenced by some of the contemporary documents included in the Joint Bundle before us.

(l) We find it difficult to believe, given the extent of Mrs McShane's involvement in the process, including for the Occupational Health review, conducted prior to the Appeal Hearing, that she could simply have forgotten these matters, and regrettably we have to draw the inference that she was giving us evidence that was seeking to minimise her involvement in the case, after the claimant's appeal was lodged, and it was being progressed through the respondents' internal appeals mechanism, rather than her fully explaining to us the whole extent of her involvement in the claimant's dismissal and appeal.

(m) Our views in this regard were strengthened when, after pages 230 A/D were added to the Joint Bundle, being the claimant's original letter of dismissal dated 14 February 2017, we then saw that that letter, purportedly from Mrs Kane, as decision maker, was, in fact, pp'd on her behalf by Mrs McShane.

(3) <u>Ms Pauline de Pellette – Respondents' Senior Repayments Manager (Appeals Officer)</u>

(a) On the afternoon of the second day of the Final Hearing, being Tuesday, 10 October 2017, we then heard evidence from Ms de Pellette, the respondents' witness, who had dealt with the claimant's internal appeal against dismissal.

(b) Aged 52 years, we have to note and record that of all the respondents' witnesses led before us, Ms de Pellette was the

most impressive. Overall, we found her to be a convincing and confident witness, and we had no significant issues with her general credibility and reliability.

(c) She spoke with clarity and coherence about her role in the internal appeals process, and what had happened and why in the course of that appeals process, including her discussion with two HR Officers, whom she identified as a Maria McShane, and a Laura McCairn, an HR Business Partner, who had been the HR Adviser in attendance at the claimant's Appeal hearing with Ms de Pellette on 16 March 2017.

(d) Ms de Pellette was clear and unequivocal in her evidence to us that she was "***surprised"*** that there was no up to date Occupational Health report on the claimant, at the stage of her having been dismissed by Mrs Kane, and for that reason she instructed that there should be an up to date Occupational Health report obtained on the claimant, before the claimant's appeal against dismissal was heard by her.

(e) While she had expressed surprise that, prior to dismissal, there was not an up to date Occupational Health report, she spoke to the terms of the updated report, of 9 March 2017, obtained prior to the Appeal Hearing with the claimant on 16 March 2017, as making her "***more confident***" to make her decision to uphold the claimant's dismissal from the respondents' employment, and so reject her internal appeal against dismissal.

(f) It is a matter of regret, therefore, that we have to record that, despite the benefit of Ms de Pellette having instructed, and received, before the Appeal Hearing, the updated Occupational Health report on the claimant, she did nothing to

follow up on what we regard as obvious issues arising, for her to further investigate before coming to a final view on the claimant's internal appeal.

(g) Generally, Ms de Pellette spoke to the terms of her involvement in the claimant's appeal against dismissal, and to the relevant documents in the Joint Bundle before us, relating to the appeal letter, invite to the Appeal Hearing, respondents' minutes of the Appeal Hearing, and the Occupational Health report received by the respondents prior to the Appeal Hearing.

(h) In her evidence to the Tribunal, Ms de Pellette was open and transparent in acceptance that the respondents' minutes of the Appeal Hearing had not been seen by her, nor approved by her, and she apologised that they had not been sent out to the claimant, following the Appeal Hearing.

(i) Her evidence in this regard was commendable, and worthy of recognition. On behalf of the respondents, she took personal responsibility for an unfortunate organisational failing in their internal systems, albeit she had no personal responsibility for the preparation, or circulation of the minutes, but she had been the chair of the claimant's Appeal Hearing, and she clearly took that role seriously, and conscientiously, from what she explained to us about what she had done, and why.

(j) We further noted Ms de Pellette's admission to seeing no information about the comparators, identified by the claimant, and that she (Ms de Pellette) had simply relied on all that Maria McShane, HR Adviser, had told her about the comparators.

(4) <u>Mrs Patricia Wallace – Claimant</u>

(a) The final witness heard by the Tribunal was the claimant herself, aged 62 years, and her evidence was taken on the third day of the Final Hearing, being Wednesday, 11 October 2017, when she was questioned by the Employment Judge, as previously agreed by both parties, at the commencement of the Final Hearing.

(b) She came across, in giving her evidence-in-chief to the Tribunal, as a good, and reliable historian, to the events leading up to her dismissal from the respondents' employment, and her subsequent internal appeal against that dismissal, as spoken to in evidence by the three witnesses previously heard by the Tribunal led on behalf of the respondents.

(c) Generally, there was no real dispute between the parties about the various documents included in the Joint Bundle, and used at this Final Hearing, about the terms of the claimant's contract of employment, the terms of the relevant contractual procedures adopted by the respondents, and relating to the various meetings, and Dismissal and Appeal Hearings, conducted with the claimant, and the outcomes of those Hearings.

(d) In answering questions asked of her, during evidence in chief, by the Employment Judge, the claimant did so in a plain, straightforward manner, and with no evident difficulty in recalling events in the course of her absence management journey through the respondents' internal procedures.

(e) When she came to be cross-examined, by Mrs Sangster, Solicitor for the respondents, the claimant continued to give answers to the best of her recollection, and while she had some

difficulties with some matters, by and large, she continued to answer questions in a straightforward way.

(f) In reviewing her evidence, we considered that part of the claimant's difficulty in recollection was, we are sure, down to her nerves, and her attending and giving evidence in a public Hearing. We note and record here that we did not detect that, in any way, in giving her evidence, whether in chief, or in cross-examination, the claimant was seeking to be evasive or equivocal in answering questions put to her by the Judge, or Mrs Sangster on the respondents' behalf.

(g) Overall, we were satisfied that the claimant was doing her best, in circumstances that she found difficult, in giving evidence at a public Hearing, and we were satisfied that the claimant, in giving her evidence to the Tribunal, was open and she did so in a fairly straightforward manner. We had no issues about her credibility as a witness although, on some points, there was an issue about her recollection of events, and that impacted, but only slightly, in our overall assessment of her reliability.

(h) In the course of the claimant's evidence-in-chief, when the Employment Judge asked her about the document at pages 272/292 of the Joint Bundle (described as ***"Thermal Conflict Check List"***), an objection was taken by Mrs Sangster, Solicitor for the respondents, as the claimant had not, during her cross-examination asked any of the respondents' witnesses, previously heard by the Tribunal, about that document in the Bundle.

(i) The claimant insisted it was relevant and necessary to refer to it, as it showed that she was not the only person at the respondents' Hillington premises complaining about the cold.

What was included in the Joint Bundle, she explained, were 17 or 18 complaints by others similarly affected, and those comments had been prepared by others, after the claimant had distributed the Check List, downloaded from the HSE website, on 18 November 2016, and she also spoke to having told Steven Campbell, the Operations Manager at Hillington, on 21 November 2016.

(j) When the claimant clarified that she did not raise this matter of these Check List forms at her Stage 3 Hearing with Jenifer Kane, nor at her appeal with Pauline de Pellette, where she only referred generally to "***the cold at Hillington***", and she did not produce these completed check list documents, at either of her Dismissal Hearing, or at her Appeal Hearing, the claimant accepted that they were therefore documents that could not have been taken into account by the Appeals Officer, and so no further reference was made to the contents of these Check Lists in evidence before the Tribunal.

(5) <u>Joint Bundle of Documents</u>

(a) At this Final Hearing, the Tribunal was assisted by the Joint Bundle of Documents lodged. Generally, there was no dispute that, in relation to the documents contained in that Bundle, the correspondence, including e-mails and letters, between or among the claimant and the respondents were sent by and/or received by the parties as reflected in those documents.

(b) Similarly, there was no dispute that the records of meetings accurately reflected the date, attendees and issues discussed at such meetings, and that notes of meetings had been prepared by the party identified and at the time reflected in those documents.

(c) The existence of these agreed, contemporary records, included in the Bundle of Documents before us at the Final Hearing was of considerable assistance to us in getting as full a picture as possible of all relevant events, and the roles and involvements of specific individuals at the relevant time.

(d) There is, however, a *caveat* to our comments as above. On day 3 of the Final Hearing, being Wednesday, 11 October 2017, as a preliminary matter raised by the Employment Judge, at the start of that day's proceedings, and before proceeding to take the claimant's evidence-in-chief, an issue emerged when the Tribunal sought clarification from both parties relating to Jenifer Kane's letter of 14 February 2017, produced at pages 229 and 230 of the Joint Bundle. This enquiry by the Judge led to the production, and adding into the Joint Bundle, of additional documents, at pages 230 A/D.

(e) The Tribunal notes and records here that it was surprised that this matter was not identified by parties when preparing the Joint Bundle but, when the matter was raised, on day 3 of the Final Hearing, the claimant was helpfully able to produce the two versions of the letter of 14 February 2017, and the respondents' solicitor, Mrs Sangster, agreed that they all be added into the Joint Bundle.

(f) That said, if the Employment Judge had not spotted the e-mail of 20 February 2017 between Maria McShane and the claimant, produced in the Joint Bundle at page 234, the Tribunal may well not have discovered that the claimant had received two dismissal letters from the respondents.

(g) Although both letters are dated 14 February 2017, the first letter of termination of employment sent to the claimant, pp'd by Maria McShane, on behalf of Jenifer Kane, referred to the claimant receiving payment until 13 March 2017, whereas the revised version, unsigned (at both pages 230 and 230D) referred to payment until 27 March 2017.

Parties' Closing Submissions to the Tribunal

53. Following the close of evidence, after the first three days of the Final hearing, we proceeded to hear closing submissions from both parties on Thursday, 12 October 2017. Mrs Sangster, solicitor for the respondents, helpfully provided us with a detailed, written submission on their behalf, running to some twenty pages providing us with:-

(1) Introduction;

(2) Suggested Findings of Fact;

(3) The law on unfair dismissal;

(4) The application of the law in relation to unfair dismissal to the facts of the case;

(5) The law on direct age discrimination;

(6) The application of the law in relation to discrimination to the facts of the case; and

(7) Remedy.

54. For the sake of brevity, we do not record here *verbatim* the full terms of Mrs Sangster's written closing submissions, but we note and record that a full

copy has been retained and placed in the Tribunal's case file, and we have referred to those written closing submissions in the course of coming to our Judgment and writing up these Reasons. Suffice it to say, in shorthand, that the respondents deny that the claimant was unfairly dismissed, and they further deny that she was discriminated against by them on the grounds of age, as alleged or at all. For ease of reference, the revised text, as amended to address a few minor typographical errors identified by Mrs Sangster, at paragraphs 4.11, 4.14.2, and 5.2, is attached as an Appendix to these Reasons, with the revisals shown within bold underlined, bracketed sections.

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

56. At the Hearing on Submissions, on 12 October 2017, Mrs Sangster, the respondents' solicitor, spoke to the terms of her written closing submission, provided a hard copy to the Tribunal, with copy to the claimant, and we heard from the claimant thereafter, in reply. We do not record here *verbatim* the oral submissions made to us on that date as, for the respondents, they were, in the main, an oral delivery of the detailed written closing submissions already produced to us.

57. Mrs Sangster did so, using just over three quarters of the one hour time period allocated to her, whereas the claimant, in her oral submissions to the Tribunal, took only twenty minutes, of the one hour similarly allocated to her for the purposes of her closing submissions to us.

58. When Mrs Sangster's oral submissions concluded, the Employment Judge enquired of the claimant if she was ready there and then to reply, or whether she required some time to reflect on Mrs Sangster's submissions, before making her own oral submissions to the Tribunal. In response, the claimant stated that she did not need any time and that she would proceed to make her oral submissions to the Tribunal, without the need for any adjournment.

59. We record here what we have noted as being the claimant's oral submissions to us. In delivering her oral submissions, it was clear to the Tribunal that the claimant was becoming upset, and while an adjournment opportunity was offered to her, but declined by her, she stated that she wished to carry on and complete her statement to the Tribunal, and she did so, reading from some notes that she had clearly pre-prepared.

60. In her oral submission, she advised us as follows:-

a) The claimant started work with the Student Loans Company in Darlington, in March 2011, working there until January 2013, and then moved to the company in Glasgow, employed as an Administration Assistant, in pre-assessment, until her dismissal in February 2017.

b) During this period, she had been moved from Bothwell Street, Glasgow, to Hillington, in June 2014, and, in April 2014, she had moved house in anticipation of transfer to Hillington, so that she would be nearer to her work.

c) In November 2014, she was diagnosed with diverticulitis, after a colonoscopy, and during 2015, she experienced three close bereavements. In June 2015, her work place moved back to Bothwell Street, Glasgow.

d) In August 2015, she was diagnosed with a chest infection, and referred for a lung capacity test. Because of where she was living, in October 2015, she moved home to escape paint fumes from a neighbour.

e) She got her lung capacity test, in February 2016 and, in May 2016, she was diagnosed again with a chest infection, and given the results of her lung capacity test, which diagnosed mild COPD.

f) Then, in August 2016, her work place moved back to Hillington.

g) While considering her case on the evidence presented to the Tribunal, the claimant directed the Tribunal to pages in the Joint Bundle about temperature in the work place, an issue raised by herself, and these showed that cold was an issue for a period of around six months at Hillington.

h) If the respondents had made any reasonable adjustment for her benefit in regard to the cold, they were not approved, if the cold as documented over a six month period had not been resolved.

i) Also, included in the Bundle, at page 234, there was an e-mail questioning the procedures from Maria McShane, before the claimant's Appeal Hearing, and the claimant also referred us to relevant productions in the Bundle at pages 136 and 139 about the procedures.

j) At this stage, about ten minutes in to the claimant's oral submissions, the Employment Judge enquired of her if she wished an adjournment for a break, as she was becoming distressed in delivering her oral submission, but the claimant replied that she just wanted to get it over with, and she would continue with her oral submissions to us.

k) She then referred us to the three stages of the respondents' procedures, at page 80 of the Joint Bundle, and then took us to a return to work interview in August 2015, at pages 140 to 143, and submitted that a Stage 1 meeting could not be done without a valid informal review in place.

l) Further, she submitted, her Stage 2 meetings had also been conducted at the wrong time, but she accepted that she had not made these points, at her Stage 3 meeting, nor at her Appeal Hearing, and that accordingly these were points not available to the Dismissing Officer, or the Appeals Officer.

m) The claimant added that the respondents had provided the evidence in the productions in the Joint Bundle, and they had clearly not followed their own procedures in her case.

n) In Mrs Sangster's submissions for the respondents, the respondents had submitted that the claimant was the only person with three days' special paid leave at Hillington, but she insisted that she was not the only such employee.

o) She added that she did not think those three days should be put down just to her, as Maria McShane had said that thirty employees were sent home the first day, and the claimant added that she thought that the numbers involved were close to that on the other days too.

p) The claimant further stated that she did not deny that she had got those three days, as paid leave, but they were not specific to her only.

q) Although she hoped to get a job in the future, the claimant stated that there was no guarantee that she would do so, and she felt that having been dismissed by the respondents she was, as she put it, "***basically put me on the scrap heap".***

61. At the conclusion of her oral statement to the Tribunal, the Employment Judge observed that the claimant had not said anything about the content of Mrs Sangster's written submissions for the respondents, or the case law referred to by her, which had been previously intimated to the claimant, for her information, with copy Judgments, and hyperlinks to those Judgments on the internet.

62. It was highlighted to the claimant, by the Judge, that the claimant had the right to make submissions, and the opportunity to do so at this Hearing. He suggested that proceedings adjourn, and that would allow the claimant, and her colleague, who was in attendance, to review Mrs Sangster's written submissions, and for the claimant then to say if there was anything within it that she disagreed with, or wanted to make comment upon to the Tribunal, as regards the findings in fact proposed by the respondents, or as regards the relevant law, and how it applied to the facts of her case.

63. The Employment Judge stated that the Tribunal fully appreciated that, as an unrepresented, party litigant, the claimant may not feel able to address the legal issues, but he sought to reassure her that it was the role of the Employment Judge to advise the Tribunal about the relevant law, Mrs Sangster having done so in terms of her professional obligation to assist the Tribunal, as an officer of Court, but that the claimant could also address the Tribunal on these matters, if she wished to do so.

64. Proceedings adjourned for half an hour but, in the event the public Hearing did not resume until 12.20pm, rather than 12 noon, as originally envisaged. When proceedings resumed, the claimant then made some further oral submissions, in reply to Mrs Sangster's written submissions. She submitted, in particular, that she does not have a job, unlike comparator No.1, and ***"if that's not less favourable treatment, what is?"***

65. Mrs Sangster declined the opportunity offered to her by the Tribunal for her to reply to the claimant's closing submissions and stated that she had nothing further to say, and she relied on her earlier written submissions to us.

66. Thereafter, the Tribunal, through the Judge, asked some questions of Mrs Sangster, but not the claimant, and Mrs Sangster clarified that the claimant's absences were persistent, short-term absences, rather than long-term, and that there is a distinction in the respondents' Sickness Absence Procedures, and in case-law, between short and long term absences, and that these two scenarios should be treated quite differently. She further submitted that what the respondents had done here was fair and reasonable, both substantively and procedurally.

67. Further, asked about the Optima Healthcare OH report on the claimant, dated 9 March 2017, Mrs Sangster accepted that it showed the claimant as fit to work, subject to workplace adjustments, and that it suggested the claimant was fit to work long-term. She stated that the Management referral to OH was

made on the basis of the claimant having short-term sickness absences, and added that it would not have been appropriate to advise the OH provider that the claimant was under notice of dismissal.

68. In any event, Mrs Sangster further advised us that the claimant spoke to the OH adviser, and she advised him of her current circumstances. She conceded that she did not know why the OH referral referred to the claimant having disciplinary warnings, and added that she had no knowledge of any disciplinary warnings against the claimant, but she noted that the claimant had not cross-examined Mrs McShane about the referral document.

69. Further, as the claimant had agreed to attend the OH appointment, which like earlier referrals was by telephone interview, and not personal attendance, that was consultation with the claimant, as she agreed to be interviewed by OH.

70. Mrs Sangster also explained why, in her view, the Court of Session guidance, in **BS v Dundee City Council**, has no application to the claimant's case, and how, in her view, the respondents have complied with the **ACAS Guide, Appendix 4**, and what it provides about dealing with absence cases.

71. She submitted that the difficulty faced by an employer, like Dundee City Council in **BS**, faced with long term absence of an employee, is quite a different situation to the employer's situation in dealing with persistent, short-term absences. Further, she added, there is the unexpected nature of the absence, and the difficulties caused to the employer. She did, however, agree that the 3 matters of (1) whether it is reasonable for an employer to wait any longer; (2) the employee's views; and (3) the likely prognosis, is a ***"similar exercise***" for an employer, whether the employee concerned is on short or long term sickness absence.

72. She submitted that the respondents had complied with the applicable bullet points in **Appendix 4 of the ACAS Guide**, and she clarified that the

respondents had not dealt with the claimant's absence as a disciplinary / conduct matter, despite what the Leavers Notification paperwork stated. There was, she said, no issue about the genuineness of the claimant's medical position, and the respondents did not require the claimant to seek any further medical certificate.

73. Further, while there was not any evidence before the Tribunal on whether, at the time of dismissal, the respondents had considered any other suitable employment for the claimant. Mrs Sangster stated that it was not reasonable for the respondents to have considered suitable alternative employment, and that they had reached a reasonable conclusion based on the information available to them at that time. On the basis that each case depends on its own facts, Mrs Sangster added that these bullet points were a list, but not all bullet points would be appropriate in every single case.

Authorities relied upon by the Respondents

74. On the first day of the Final Hearing, on Monday 9 October 2017, given the claimant was an unrepresented, party litigant, and the respondents were represented by a solicitor, the Employment Judge, having regard to the Tribunal's duty, under **Rule 2**, to ensure parties are, so far as practicable, on an equal footing, enquired of the respondents' solicitor, Mrs Sangster, how, when the case came to closing submissions on Thursday 12 October 2017, she proposed to deal with closing submissions.

75. Mrs Sangster indicated that she would probably be referring to around ten or so case law authorities, and she would be preparing a written skeleton argument for us at the Hearing on Submissions, on 12 October 2017, and she readily agreed to intimate to the claimant, as soon as possible, a list of authorities, with hyperlinks, where possible, to the ***Bailli*** website, so that the claimant could consider the cited cases in advance of Thursday, 12 October 2017, rather than have to deal with them all for the first time on the day set down for closing submissions.

76. The Tribunal was pleased to note the respondents' solicitor's ready willingness to comply with the professional duty on her to assist the Tribunal, and to co-operate with the other party, to ensure compliance with the overriding objective under **Rule 2**, and ensuring the case is dealt with fairly and justly, including ensuring the claimant was put on an equal footing with the respondents as regards issues likely to arise at the Hearing on Submissions.

77. When, on the afternoon of the second day, being Tuesday, 10 October 2017, the Employment Judge, at the close of that day's evidence, raised certain housekeeping matters about evidence the following day, the Employment Judge referred Mrs Sangster to the Court of Session, Inner House Judgment in **BS v Dundee City Council [2013] CSIH 91**, **[2014] IRLR 131,** and stated that the Tribunal would wish her to include that judgment and deal with it in her closing submissions for the respondents.

78. The Employment Judge also advised the claimant that, at the Hearing on Submissions, she should address the relevant law, and case law authorities identified by the respondents, as she felt appropriate to do, but that it was for the Employment Judge to direct the Tribunal panel on the relevant law and while Mrs Sangster had a professional duty, as an officer of Court, to bring relevant case law authorities to the Tribunal's attention, the Tribunal did not expect the claimant, as an unrepresented party litigant, to prepare a written set of closing submissions, but she could prepare such a written document, if she wished to do so.

79. At the close of the claimant's evidence on the third day, being Wednesday 11 October 2017, when discussing housekeeping arrangements for the following day, the Employment Judge directed that to allow closing submissions to be heard and concluded in the morning session, and so leave the afternoon session for some preliminary, private deliberation by the full Tribunal panel, he proposed that Mrs Sangster have one hour to deliver her oral submissions

to the Tribunal, and speaking to her written skeleton argument, and that the Tribunal would then allow the claimant the same time, up to one hour, to make her own closing submissions to the Tribunal.

80. The claimant indicated that she did not expect to be very long in her closing submissions, and the Employment Judge again reminded her that she could do so orally, and/or in writing, if she so wished.

81. The respondents produced to the Tribunal, and referred us to the following case law authorities:-

A. UNFAIR DISMISSAL

Wilson v Post Office [2000] IRLR 834; [2000] EWCA/Civ.3036

Iceland Frozen Foods Ltd v Jones [1982] IRLR 439

Post Office v Jones [1977] IRLR 422

International Sports Co Ltd v Thomson [1980] IRLR 340

Lynock v Cereal Packaging Ltd [1988] IRLR 510

Davis v Tibbett and Britten Group plc [2000] EAT/460/99

Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351

Paul v East Surrey District Health Authority [1995] IRLR 305

B. DISCRIMINATION

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; [2003] UKHL 11

Madarassy v Nomura International plc [2007] IRLR 246; [2007] EWCA Civ. 33.

Efobi v Royal Mail Group Limited [2017] UKEAT/0203/16

C. REMEDY

Polkey v AE Dayton Services Limited [1987] IRLR 503; [1987] UKHL 8

Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604; [2011] EWCA Civ. 545

82. Mrs Sangster's written closing submissions also referred us to some further authorities, although copy of these judgments were not provided to us, in the respondents' Bundle of Authorities produced for us, as follows:-

Ridge v H M Land Registry UKEAT/0485/12

Grundy (Teddington) Ltd v Willis [1976] ICR 323 QBD

Hadjioannou v Coral Casinos Ltd [1981] IRLR 352

83. In considering the case law authorities cited to us by Mrs Sangster, and, in particular, her reliance on **Efobi v Royal Mail Group**, the Tribunal has taken into account that there has now been the appeal judgment from the Court of Appeal in **Ayodele v Citylink Ltd & another [2017] EWCA Civ.1913**, as issued by Mr Justice Singh on 24 November 2017, which decided that the burden of showing a prima facie case of discrimination, under **Section 136 of the Equality Act 2010**, remains on the claimant, and that **Efobi** was wrongly decided by the EAT, and it should not be followed.

84. Further, the Court of Appeal held that the previous decisions of that Court, such as **Igen,** as approved by the Supreme Court in **Hewage,** remain good law and should continue to be followed by the Courts and Tribunals. We address this later in our Reasons when discussing ***"Relevant Law: Age Discrimination".***

85. Given **Ayodele** is a judgment of a higher Court, and so binding upon us, we did not consider it necessary to invite further submissions from parties, particularly as that would have occasioned further delay, and in circumstances where the claimant, as an unrepresented party, was unlikely to have made any further submissions to us, given she did not address the relevant law at the Hearing on Submissions before us.

86. Further, given the judgment in **Ayodele,** holding that **Efobi** was wrongly decided by the EAT, and it should not be followed, we did not anticipate Mrs Sangster would have had any substantive submissions to make to us either, other than to note the case she had relied upon had been wrongly decided.

Reserved Judgment

87. In concluding proceedings, on the afternoon of Thursday, 12 October 2017, we reserved our Judgment, and the Employment Judge advised both parties' representatives that we would issue our full, written Judgment, with Reasons, in due course, after private deliberation at a Members' Meeting to be arranged.

88. By letter from the Tribunal, dated 12 October 2017, both parties were advised that, on account of the Judge's forthcoming annual leave, it was not anticipated that the Tribunal would be able to meet again until at least week commencing 13 November 2017, at earliest, and, after some preliminary discussion, at the close of the submissions on 12 October 2017, the Tribunal would not anticipate its full reasoned Judgment being available until around the end of November 2017 at earliest.

89. The Tribunal agreed to keep both parties advised as to when a Members' Meeting was arranged and, at that stage, to give a better indication as to a likely timescale for issue of the final Judgment with Reasons.

90. Thereafter, by further letter to both parties, dated 13 October 2017, they were advised that following preliminary private deliberation on the afternoon of 11 October 2017, the full Tribunal had agreed to meet again on Friday, 17 November 2017 to conclude their private deliberations, and thereafter proceed to written Judgment and Reasons and that a further letter detailing when the Tribunal expected its final written Judgment to be issued to both parties would follow after that Members' Meeting.

91. Further, update letters were provided to both parties by the Tribunal on 22 November and 21 December 2017, and again on 5 March 2018, apologising for the delay, on account of the Judge's other judicial commitments. In arriving at this our final judicial determination of this case, the full Tribunal met again, by telephone conference call, on 14 March for a further, Members' Meeting, following which this written Judgment and Reasons was unanimously agreed for issue to parties.

92. It represents the final product from our private deliberation on the evidence led, and closing submissions made, to us at the Final Hearing, and us then applying the relevant law to the facts as we have found them to be in our findings in fact, as set forth earlier in these Reasons.

Issues for the Tribunal

93. At the Case Management Preliminary Hearing held before Employment Judge Peter Wallington QC, on 13 July 2017, as per paragraph 10 of his written Note and Orders of the Tribunal dated 14 July 2017, it is recorded that, after discussion with the claimant in person, and Mr Andrew Clark, solicitor, who appeared for the respondents on that occasion, both parties

confirmed that the issues for determination by the Tribunal at this Final Hearing were as follows:-

(1) <u>Unfair dismissal</u>

(a) What was the reason or principal reason for the claimant`s dismissal? Is it a reason within Section 98(2) of the Employment Rights Act 1996 or some other substantial reason within Section 98(1)(b)?

(b) Having regard to the reason shown by the respondent, was the dismissal fair or unfair under Section 98(4) of the Employment Rights Act 1996? [Issues that will arise in relation to this question include alleged disparity of treatment of the claimant and the individuals named as comparators, and whether and if so to what extent the claimant`s health was the result of or had been aggravated by her working conditions.]

(c) If the answer to (b) is "unfair" what basic and compensatory awards should be made taking into account:-

(i) whether, if a fair procedure had been followed, the claimant would or might have been dismissed in any event (and if so when);

(ii) whether, independently in the circumstances leading to the claimant`s dismissal, she would have been dismissed at a later date (and if so when) by reason of redundancy;

(iii) whether the respondent can show that the claimant failed to take reasonable steps to mitigate her loss?

(2) <u>Age Discrimination</u>

The claimant was aged 61 at the date of her dismissal. She relies on the age group of people aged over 55.

(a) *Did the respondent treat the claimant less favourably by dismissing her because of her age then it treated or would treat others not in her age group in not otherwise material different circumstances? For this purpose the claimant relies as comparators on the persons identified as James, Lauren and Nicola who were employed at the respondent's Hillington premises and were subject to the respondent's Sickness Absence Procedure at Stage 3 at about the time of the claimant`s dismissal.*

(b) *If the answer to (a) is yes, can the respondent show objective justification for the less favourable treatment of the claimant? In particular what was the legitimate aim and on what basis were the means adopted a proportionate means of achieving that aim?*

(c) *If the answer (b) is no, what compensation should the claimant be awarded*

94. At this Final Hearing, when the Employment Judge sought to clarify the issues for determination, neither the claimant, nor Mrs Sangster, could explain the relevance of the words, at issue 1(c) (ii) above, stating: "***by reason of redundancy***". It was noted that the claimant had not brought a complaint complaining of unfair dismissal on account of redundancy, nor did she complain seeking payment of any redundancy payment from the respondents.

95. Not having been present at that Preliminary Hearing, Mrs Sangster could not assist further, but she did clarify that the respondents were disputing unfair dismissal, on the grounds that the claimant had been fairly dismissed by the respondents, on the grounds of capability, and / or some other substantial reason, and so she proposed that Employment Judge Wallington's wording be revised to read: "***by reason of capability, and / or some other substantial reason."***

96. The claimant agreed to that revisal, and the Tribunal did so likewise, the revised wording being more apt for the case before us for this Final Hearing.

Relevant Law: Age Discrimination

97. We have decided to consider this part of the claim first, and to look at the unfair dismissal head of claim second. Mrs Sangster addressed the relevant law on direct age discrimination in section 5 of her written closing submissions for the respondents and, with the exception of her reliance on **Efobi**, which has now been overturned by the Court of Appeal, in **Ayodele,** as we mentioned earlier in these Reasons, she has referred us to the relevant statutory provisions in **Sections 13 and 136 of the Equality Act 2010,** and to relevant case law authorities from the higher Courts and Tribunals.

98. The **Equality Act 2010** makes provision, amongst other things, for discrimination complaints being brought before the Employment Tribunal. **Part 2, chapters 1 and 2**, deal with the key concepts of "***protected characteristics"***, at **Sections 4 to 12**, and ***"prohibited conduct",*** at **Sections 13 to 27.**

99. **Part 5** deals with "***work"*** and "***employment***", and **Section 39(2)** provides that: ***"An employer (A) must not discriminate against an employee of A's (B) …. (c) by dismissing B ; (d) by subjecting B to any other detriment."***

100. **Part 9, chapter 3**, makes provision about "***enforcement"*** though the Employment Tribunal, and **Sections 120, 123 and 124** provide for the

Tribunal's jurisdiction to determine complaints in relation to a contravention of **Part 5** (work), time limits, and remedies respectively. **Part 9, chapter 5,** at **Section 136**, make provision about the burden of proof applying to claims before the Tribunal.

101. The claimant's complaint against the respondents is a **Section 120** complaint. No issue of time-bar arises in the present case. For a successful complaint, remedies available to the Tribunal include declaration of rights, compensation, and recommendation. By cross-reference, in **Section 124(6),** to **Section 119**, compensation can include compensation for injured feelings. The claimant here seeks compensation for loss of earnings, and an award for injury to feelings.

102. The protected characteristics identified in **Section 4** include age, disability, sex, and various others. In the present case, the claimant relies only upon age, which is further defined at **Section 5**, which refers to persons of a particular age group. She was aged 61 at the date of her dismissal, and she relies on the age group of people aged over 55.

103. Although she has led evidence before this Tribunal of her various medical conditions, the claimant, in this claim before the Tribunal, has not relied upon disability as a protected characteristic in her own case. Disability is, of course, defined at **Section 6(1),** as being that a person ("P") has a disability where they have a "***physical or mental impairment***" that has a "***substantial and long term adverse effect on P's ability to carry out normal day-to-day activities".***

104. We have not been required to consider the question of whether or not the claimant was, at any relevant time, a disabled person, within the statutory definition, which is, of course, an essential element of any claim for unlawful disability discrimination, because the claimant has not brought any such claim against the respondents.

105. **Section 13(1)** defines the concept of "***direct discrimination***", which is the only type of discrimination relied upon by the claimant in the present case, and it provides that:

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

106. The examination of "***less favourable treatment***", because of the protected characteristic, involves the search for a comparator, whether real / actual, or hypothetical, and a causal link. **Section 23(1)** provides that, on a comparison of cases for the purposes of **Section 13**, there must be ***"no material difference between the circumstances relating to each case".***

107. A mere assertion of discriminatory treatment is not sufficient for a successful case, for there must be something more. The bare facts of a difference in status and a difference in treatment only indicate the possibility of discrimination and they are not, without more, sufficient material from which an Employment Tribunal could conclude that, on the balance of probabilities, the respondents have committed an act of unlawful discrimination.

108. This is often described as the claimant having to establish a prima facie case of discrimination following which the respondents have to provide an explanation, the bare fact of a difference in status and treatment is not sufficient; there must be something more, and as established in **Zafar v Glasgow City Council [1998] ICR 120 (HL)** unreasonable treatment by itself is not sufficient to establish a prima facie case: the circumstances surrounding the respondents' actions need further scrutiny.

109. Once a claimant lays a factual foundation from which a finding of discrimination, absent an explanation , could be made, the burden shifts to the employer to give that explanation, meaning that the employer must seek to rebut the inference f discrimination by showing why they have acted as they have, and the employer's explanation must be adequate, meaning not

that it should be reasonable or sensible, but simply sufficient to satisfy the Tribunal that the reason for the treatment complained of had nothing to do with the protected characteristic relied upon as founding the complaint ; see **Zafar,** and also **Bahl v The Law Society [2004] IRLR 799 (CA).**

110. As to the "***burden of proof***", the judicial guidance from the EAT and higher Courts on the previous anti-discrimination laws, before the **Equality Act 2010,** still applies, as per **Igen v Wong [2005] IRLR 258 (CA),** and, as recognised by **Laing v Manchester City Council [2006] IRLR 748 (EAT),** and **Madarassay v Nomura International plc [2007] IRLR 246 (CA),** as endorsed by **Hewage v Grampian Health Board [2012] UKSC 37**, all the evidence before the Tribunal has to be considered in deciding whether there is a sufficient prima facie case established by the claimant so as to require an explanation from the respondents.

111. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a Tribunal would ordinarily expect cogent evidence to discharge that burden of proof.

112. In coming to our final decision on this case, we have been assisted by the helpful, and clear, guidance provided on the "***proper approach to the facts in Equality Act cases"***, as set forth by His Honour Judge Shanks, in the EAT judgment, handed down by him on 14 March 2017, in **Talbot v Costain Oil, Gas & Process Ltd & Ors [2017] UKEAT/0283/16, [2017] ICR D11**, at paragraphs 15 and 16 which state as follows:-

> *"15. My attention was drawn to no fewer than ten authorities on the vexed question of how a Tribunal should approach the issue of whether there has been unlawful discrimination under the **Equality Act 2010** and its statutory predecessors, most importantly **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT (decided in 1996 though reported much later) and **Anya v University of Oxford** [2001] EWCA Civ*

405. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination. It seems to me that the principles to be derived from the authorities are these:

(1) It is very unusual to find direct evidence of discrimination;

(2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;

(3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;

(4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;

(5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there

are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;

(6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;

(7) If it is necessary to resort to the burden of proof in this context, section 136 of the ***Equality Act 2010*** *provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination.*

16. Those principles relate particularly to deciding whether proven unfavourable treatment involves unlawful discrimination but it is also necessary in this kind of case for Tribunals to keep in mind general principles about fact-finding when deciding the so-called "primary facts" (which will often, as here, include matters which are themselves said to amount to discriminatory treatment). Thus, as juries are told every day in the criminal courts, it is necessary to have regard to the overall picture presented by the evidence in deciding any discrete issue of fact. It is also necessary to consider the inherent probabilities of what a witness is saying and how well it fits with "objective" facts (i.e. things which are undisputed or indisputable). And in deciding where the truth lies the fact-finding tribunal should make some overall assessment of the relevant witness or party, which includes taking account, for example, of how he dealt with

> *questions in cross-examination, any demonstrable lies or exaggerations, and (perhaps only to a limited degree nowadays) his so-called "demeanour". Reference to the burden of proof in a civil case is really a matter of last resort, to be avoided if at all possible."*

113. Although **Talbot** was not cited to us by either party, we have taken its guidance into account, without going back to parties' representatives, for any further submissions they might wish to make, because it seems to us, from the opening of paragraph 15 in **Talbot,** just quoted above, that HHJ Shanks having had no fewer than 10 case law authorities cited to him, on what he described as the "***vexed question of how a Tribunal should approach the issue of whether there has been unlawful discrimination",*** had derived his list of 7 principles from those authorities.

114. In **Laing v Manchester City Council**, the then EAT President, Mr Justice Elias, at paragraphs 73 to 75 stated that:

> *"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case... An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon .... it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. ... The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It*

is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'

115. In **Martin v Devonshire Solicitors [2011] ICR 352 (EAT),** Mr Justice Underhill, then President of the EAT, emphasised (at paragraph 39) that:-

"While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation...They have no bearing on whether a Tribunal is in a position to make positive findings on the evidence one way or another, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law."

116. We have also borne in mind that the Supreme Court in **Hewage –v Grampian Health Board**, per the then Deputy President, Lord Hope of Craighead, at paragraph 32, has confirmed: -

*"The points made by the Court of Appeal about the effect of the statute in these two cases [**Igen and Madarassy**] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in **Martin v Devonshires Solicitors [2011] ICR 352, para 39**, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."*

Discussion and Disposal: Age Discrimination

117. Mrs Sangster addressed the application of the relevant law on direct age discrimination to the facts of the present case in section 6 of her written closing submissions for the respondents.

118. We refer to those submissions, and we accept, as well-founded, her arguments that the respondents' evidence has shown that age played absolutely no part in the claimant's dismissal. Moreover, on the burden of proof, the claimant has failed to do anything more than assert that she believes that she may have been the subject to age discrimination. She has not led any cogent evidence before us to seek to establish that the respondents' decision makers in respect of her dismissal, and subsequent unsuccessful internal appeal, were motivated in some way by her age.

119. We are satisfied, further, that none of the comparators cited by her are appropriate comparators, in terms of **Section 23,** on the basis of the detailed information provided by the respondents in their Further Particulars and Comparator Tables, as the evidence led before us shows that there were material differences in the circumstances of those comparators and the circumstances of the claimant.

120. In these circumstances, we have readily come to the conclusion that it is appropriate for us to dismiss this part of the claim against the respondents. It is not well-founded, and having failed to establish her case, it is appropriate that we dismiss that part of her claim.

Relevant Law: Unfair Dismissal

121. Mrs Sangster addressed the relevant law on unfair dismissal in section 3 of her written closing submissions for the respondents and, in doing so, she has referred us to the relevant statutory provisions in **Sections 94 and 98 of the Employment Rights Act 1996,** and to relevant case law authorities from the higher Courts and Tribunals.

122. In coming to our decision that the claimant has been unfairly dismissed by the respondents, we have reminded ourselves of the relevant law on unfair dismissal, as contained in **Section 98 of the Employment Rights Act 1996** ("***ERA***").

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

124. In the respondents' ET3 response, paper apart, at paragraph 1.1, copy produced to us at page 20 of the Joint Bundle, it refers to the reason for dismissal as ***"capability",*** in terms of **Section 98(2)(a),** but later, at section 7/1, as page 25 of the Joint Bundle, it refers to ***"capability (and / or, alternatively, some other substantial reason"*** ("***SOSR"***).

125. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by the employer, which cause the employer to dismiss the employee: **Abernethy v Mott, Hay & Anderson [1974] IRLR 213.**

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

127. If the Tribunal finds that the claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to their old job, or re-engagement to another job with the same employer, or alternatively award compensation. The claimant has indicated

in this case that she seeks an award of compensation only in the event of success before the Tribunal. Compensation is made up of a basic award and a compensatory award.

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

129. **Section 123 (1) of ERA** provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

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

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

132. An employer may be found to have acted unreasonably under **Section 98(4) of ERA** on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced

by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred. This approach (known as a **Polkey** reduction) approach derives from the well-known case law authority from the House of Lords' judgment in **Polkey v AE Dayton Services Ltd [1987] IRLR 503 / [1988] ICR 142 (HL). I**n this event, the Tribunal requires to assess the percentage chance or risk of the claimant being dismissed in any event.

133. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") provides that if, in the case of proceedings to which the section applies, which includes an unfair dismissal complaint, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift.

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

135. However, where an employee is absent because of illness or injury, the guidance set forth in **Appendix 4 to the ACAS Guide to Discipline and Grievances at Work** should, where appropriate, be followed.

136. Given the ACAS Code and Guide are generally regarded as being benchmarks of appropriate behaviour by employers and employees in workplace disputes, it seems to us to be wholly appropriate that the Tribunal, in determining this case, should have regard to **Appendix 4**, and what the

reasonable employer and employee might be expected to do in the situation of handling an absence through ill-health.

Discussion and Disposal: Unfair Dismissal

137. Mrs Sangster addressed the application of the relevant law on unfair dismissal to the facts of the present case in section 4 of her written closing submissions for the respondents.

138. Having carefully considered the evidence, we have decided that the claimant was dismissed by the respondents on grounds of capability, as the principal reason for dismissal.

139. While Mrs Sangster, in her oral submissions, sought to persuade us that SOSR was the more pertinent label here, and it was the primary reason, which failing capability in the alternative, we do not consider that that statutory definition of SOSR was in the mind of the respondents' decision makers, at the time of dismissal, or rejection of the claimant's internal appeal.

140. It is of note that the termination of employment letters issued to the claimant, on behalf of the respondents, with the benefit of advice and assistance from the respondents' in-house HR department, do not refer to SOSR.

141. While she addressed various case law authorities on unfair dismissal, Mrs Sangster's written closing submissions did not refer to the guidance provided by the Court of Session in the case of **B S v Dundee City Council [2013] CSIH 91**, even when it had been specifically flagged up by the Judge, in advance of the Hearing on Submissions. In clarification of her position, the Judge enquired of her as to her views on the applicability of the judicial guidance in that **BS** case to the facts and circumstances of the present case.

142. In reply, Mrs Sangster stated that having looked at the **BS** judgment, she was not convinced that it was relevant to this case, as the employee in **BS** had been absent, long-term, for over one year, and there are more relevant

case law authorities on persistent, short-term absences, as cited by her in her submissions to the Tribunal.

143. She noted how the facts and circumstances of **Wilson v Post Office** were very similar to the facts of the present case, involving a 3 stage absence procedure, and an appeal. She further submitted that the label to be attached does not alter the procedure used by the respondents in the present case, which she submitted had led to a fair dismissal of the claimant.

144. She also submitted, under reference to **Royal Liverpool**, that the PCU trade union recognised by the respondents had agreed the respondents' Sickness Absence Policy., and that dismissal fell within the band of reasonable responses, and that it was reasonable in all the circumstances.

145. Further, while she accepted that there are issues identified over the 3 days of this Final Hearing that the respondents, as an employer, can learn from, she submitted that those learning points did not fundamentally impact on the fairness of the procedures used by the respondents as a whole. She invited the Tribunal to dismiss the unfair dismissal head of claim.

146. Having carefully reflected on the whole evidence, and parties' competing closing submissions to us, we have decided that we cannot dismiss the claim, as Mrs Sangster invited us to do. Instead, we have agreed with the claimant's submission that we should find that she has been unfairly dismissed by the respondents.

147. In coming to this conclusion, we note that, in making its decision in the **BS** case, the Court of Session made reference to two earlier decisions namely that of **Daubney v East Lindsey District Council [1977] ICR 556** and **Spencer v Paragon Wallpaper Ltd [1977] ICR 301**.

148. Following those two earlier cited cases, the Court of Session went on to say this at paragraph 27 of its **BS** judgment, as follows:

> ***"Three important themes emerge… First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that it operates in his favour; if, on the other hand he states that he is no better and does not know he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered"***

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

150. Once an employer has shown a potentially fair reason for dismissal, the Tribunal must go on and decide whether the dismissal for that reason was fair or unfair, and this involves deciding whether the employer acted reasonably or unreasonably in dismissing the employee for the reason given.

151. As **Section 98(4)** makes clear, it is not enough that the employer has a reason that is capable of justifying dismissal, as the Tribunal must be satisfied, in all the circumstances, that the employer was actually justified in dismissing for that reason. There is no burden of proof on either party in this

regard, and the issue whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

152. The test of whether or not the employer acted reasonably is an objective test, where the Tribunal must not substitute its own views, and decide what it would have done in the circumstances, but it must look at the way in which a reasonable employer in those circumstances, in that line of business, would have behaved.

153. In terms of **Section 98(4),** the Tribunal must have regard, amongst other things, to the size and administrative resources of the employer, and it is clear that the respondents here are a large employer in the public sector. From the evidence heard, we know it operates at Darlington, as well as in Glasgow, and at Hillington.

154. Unfortunately, when the ET3 response was lodged on behalf of the respondents, sections 2.7 to 2.9 were left blank, as shown at page 13 of the Joint Bundle. They are not mandatory sections which must be completed, but it is helpful to the Tribunal if they are, so that a Tribunal dealing with a case has some idea as the size of the employer's organisation, and so this Tribunal has no real evidence before it as to how many people the respondents employ in GB, nor how may were employed at Hillington, the place where the claimant worked.

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

156. For the claimant, it is submitted, quite simply, that her dismissal was unfair, and in her oral submissions, she spoke more from the heart, and with personal emotion, than with reference to the relevant legal principles. In short, as we understood her position, at the end of her oral submissions, by saying she had been placed on the ***"scrap heap***" by the respondents, we took her to be suggesting to us that her dismissal by the respondents was a decision made beyond the band of reasonable responses.

157. While we do not seek to minimise the operational impact that any employee's absence from work may have on their employer's business, that extent and significance of that impact needs to be assessed having regard to the size and administrative resources of the employer. What struck us, in hearing this case, is that the employer's witnesses spoke of operational impact, in general, rather than specific terms.

158. It was not clear to us that either Mrs Kane, or Ms de Pellette, had a proper understanding of the nature and extent of the actual impact of the claimant's absences, from time to time, on the operational efficiency of the respondents' company. No direct line manager was led in evidence before us, to speak directly to this important point, nor was any documentary evidence before us, or the respondents' internal decision makers. While Ms de Pellette spoke of contacting the claimant's line managers, at the time of dealing with the appeal against dismissal, that evidence was unclear as to what specific impact had been evidenced to her.

159. We consider it of significance that, in the claimant's dismissal letter, dated 14 February 2017, copies produced at pages 229 to 230D of the Joint Bundle, Mrs Kane refers to: ***"As previously advised high levels of absence impact on the operational efficiency of the company and are not sustainable in the longer term."***

160. From such limited evidence as we had before us, it seems the claimant's absences were managed locally by her line manager or supervisor, or other

work colleagues, covering her duties, and / or managing her work, as well as their own, as best they could, by prioritising what could be done using the available staff, and as would be routinely done in any team to deal with staff absences caused by holidays, sickness, abstraction for training, or whatever.

161. On the evidence available to us, this was not a case where any overtime was incurred to backfill and provide a temporary replacement / cover, or bring in a temporary / agency staff to cover. Further, if the operational impact on the respondents' business, as alleged by the respondents, was significant to any meaningful extent, that was not quantified in any tangible way for us by any evidence led by the respondents.

162. Further, if there was any real operational impact on the respondents' business, we do wonder why the respondents' decision maker, Mrs Kane, in deciding to dismiss the claimant, with immediate effect, did not require the claimant to work her notice up to and including 27 March 2017.

163. Instead, it is a matter of agreement between the parties that the claimant's last day at work was 13 February 2017, yet her revised effective date of termination was some 6 weeks' later, on 27 March 2017. It makes no rationale business or financial, sense to this Tribunal for the respondents to have incurred such a cost, yet obtain no benefit by way of productive labour from the claimant in that period.

164. It is also a source of concern to the Tribunal that the respondents' decision makers, at first instance, and on appeal, do not seem to have engaged meaningfully with the claimant's local line managers at Hillington to get the ***"big picture".*** Instead, they seem to have been reasonably content to rely on whatever papers were provided to them by HR, and the Tribunal does wonder whether HR were calling the shots here, rather than Mrs Kane and Ms de Pellette, albeit both stated they were the decision makers.

165. As the Employment Appeal Tribunal has held, in **Ramphal v Department for Transport [2015] IRLR 985**, per His Honour Judge Serota QC, at paragraph 55, while a senior manager in a business, such as an investigating officer, is entitled to call for advice from HR, HR must be very careful to limit advice essentially to questions of employment law and practice and process, and avoid straying into areas of culpability, let alone advising on what is the appropriate sanction.

166. It seems to us that the same considerations apply to senior managers chairing capability / conduct hearings, and those dealing with internal appeals. The role of the decision maker and HR adviser are different, and should be seen to be so. The Tribunal also noted that while the respondents' Sickness Absence Procedures speak of a panel, the standard practice seems to be that it is a senior manager, and not a panel.

167. There is thus an obvious inconsistency between what the respondents' procedures say they will do, and what they, in practice, do do. We are sure that, if that matter has not already been addressed, after the Final Hearing before us, where it emerged in evidence, the respondents' HR Director will wish to instruct a review of the internal policy and procedures now, in light of the facts and circumstances in this case, and how those procedures were operated by the respondents.

168. In coming to our decision that the respondents' decision to terminate the claimant's employment, and the subsequent rejection of her internal appeal against dismissal, are outwith the band of reasonable responses, the Tribunal is mindful that it must not substitute its views for those of the employer, but we do not consider that any reasonable employer would have dismissed the claimant, or rejected her appeal, on the basis of the facts known to the decision makers at the relevant time.

169. In short, there was no real evidence of any significant operational impact on the respondents' operational efficiency, and given the claimant's length of

service with the company, clear of any disciplinary default, we consider that the reasonable employer would have either given her a further opportunity to improve her attendance levels, or imposed a sanction less than dismissal, such as a Final Written Warning.

170. Separately, we are concerned that in upholding the original dismissal, Ms de Pellette, although she instructed the updated OH report, appears to have paid little regard to its terms, in circumstances where, from its terms, we consider there were obvious errors calling for clarification, and a need to consult with local managers about how the claimant could be employed at Hillington, or elsewhere, or how much longer they could give her to improve, before finally saying enough is enough.

171. Similarly, no consideration appears to have been given by her, or Mrs Kane before her, to seeking a medical report from the claimant's GP, as had been suggested at the January 2016 OH referral.

172. Finally, we do not consider that it was reasonable for Ms de Pellette to appear to do no more than "***rubber-stamp***" Mrs Kane's earlier decision, and to advise the claimant that, having reviewed the circumstances of the other comparator cases, she could find no evidence to support the claim of age discrimination, when all she had done was to rely on information provided by Mrs McShane from HR.

173. In our view, a reasonable employer would not have acted as the respondents have done, and that is why we have found the claimant's dismissal to be unfair. In our view, the reasonable employer would have made further and proactive enquiry about that OH report and / other medical advice and its impact, if any, on claimant's ability to attend at work. However, no such further enquiry was made by the respondents. That would have been a prudent and sensible step for them to have taken.

174. In the Tribunal's view, a reasonable employer, given the circumstances, would not have proceeded to dismiss at that stage, particularly in circumstances where the claimant wished to remain in their employment, and the updated OH report seemed to suggest she was fit to do so.

175. In such circumstances, the Tribunal considers that a reasonable employer would either have adjourned the appeal meeting on 16 March 2017, and agreed to reconvene on a later date, or, alternatively, with the claimant's consent, sought a further medical report direct from the claimant's GP, or perhaps a specialist Occupational Health consultant, who would have medically examined her, rather than conducting a telephone interview , as had previously appended with Optima Healthcare, and thereafter met again with the claimant to discuss that further OH consultant's report, and the claimant's fitness to return to work.

176. Put simply, the respondents' decision makers here moved too far too fast. In conclusion, in addressing the balancing exercise required of the Tribunal, in terms of the **BS** judgment, we decided that there was a basis for deciding that, in all the circumstances of this case, a reasonable employer would have waited longer before dismissing the claimant.

Remedy for the Claimant: Compensation

177. Having found the respondents liable to the claimant, in respect of that unfair dismissal, we have then proceeded to consider what remedy from the Tribunal is appropriate, and what financial compensation (if any) is payable to the claimant.

178. Specifically, our task has been to assess the amount of compensation payable by the respondents for that unfair dismissal, taking account of any appropriate reductions, as sought by the respondents.

179. A declaration of unfair dismissal is an integral part of the remedy we have awarded to the claimant. If a Tribunal finds that a claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to their old job, or re-engagement to another job with the same employer, or alternatively award compensation.

180. The claimant has indicated in this case that she seeks an award of compensation only in the event of success before the Tribunal. Compensation, in terms of **Section 118 of the Employment Rights Act 1996** ("***ERA***") is made up of a basic award and a compensatory award.

181. A basic award, based on age, length of service and gross weekly wage, in terms of **Section 119 of ERA**, can be reduced in certain circumstances, defined under **Section 122(2) of ERA**, which we detailed earlier in these Reasons at paragraph 128 above.

182. So too, a compensatory award can be reduced in certain circumstances, defined under **Sections 123(1), (4) and (6) of ERA**, which we detailed earlier in these Reasons at paragraphs 129 to 131 above.

183. **Section 123(1) of ERA** provides that the compensatory award is ***"such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer".***

184. In their ET3 response, paper apart, paragraphs 7.4 to 7.6, copy produced to the Tribunal at page 26 of the Joint Bundle, the respondents made certain arguments, relating to remedy, for the Tribunal to consider if it found, as we have found, that the claimant was unfairly dismissed by the respondents.

185. Looking now at those arguments, taken from their ET3, it was there stated as follows:-

> 7.4. If, which is denied, a tribunal finds that the dismissal was procedurally unfair, the Respondent will rely on Polkey v AE Dayton Services Ltd [1987] IRLR 503 to argue that the Claimant would have been dismissed in any event and to seek reduction of any award for compensation to nil or at least substantially.
>
> 7.5. Furthermore, and in the alternative, if the Claimant is held to have been unfairly dismissed (which is denied), any compensation payable to her should be reduced to nil or at least substantially having regard to:
>
> > 7.5.1. Section 123 of ERA; and
> >
> > 7.5.2. To take account of any sums earned by the Claimant in alternative employment elsewhere or through social security benefits since her dismissal.
>
> 7.6. It is denied that, if the Claimant is held to have been unfairly dismissed (which is denied), the Claimant should receive 'career losses' to account for the period up to her 'pensionable age', as alleged or at all. The Respondent will submit that the Claimant has sufficient skills, is sufficiently fit for work and is located within a suitably active job market, to mitigate her losses fully over the entirety of the period up to her pensionable age.

186. Mrs Sangster provided closing submissions, on remedy, at section 7 of her written submissions, if we found, as we have, that the claimant's dismissal was unfair. We have not found the age discrimination complaint well-founded, and as it has failed, and we have dismissed it, we do not need to address parties' competing views on whether or not an injury to feelings award is appropriate and, if so, in what amount, as no such award is appropriate in a successful ordinary unfair dismissal complaint.

187. We pause here to note that in an ordinary (as opposed to automatically unfair) unfair dismissal claim, the compensatory award is strictly limited to making good the employee's financial losses, and in no sense can an Employment Tribunal seek to bring into its calculations (as the claimant seemed to be inviting us to do) any punitive element in order to punish the employer or reflect the Tribunal's disapproval of the employer's employment practices.

188. In giving judgment in the House of Lords in **Dunnachie v Kingston upon Hull City Council 2004 ICR 1052**, it was made clear that compensation for unfair dismissal covers economic loss alone, and so the Tribunal cannot award on the basis of non-economic losses, such as damages for the manner of dismissal, or for injury to feelings.

189. In any event, in the present case, there was no supporting evidence presented of the claimant's alleged injury to feelings (quantified by her at **£5,000**). This head of loss was pursued by the claimant on the basis of assertion, rather than any supporting evidence, from which we could properly assess the extent and nature of, and thus calculate damages attributable, to any injured feelings. In particular, the claimant provided no medical evidence to support her claim for damages for injury to feelings.

190. In the present case, the respondents sought reductions in compensation on many different basis, as set forth in Mrs Sangster's closing submissions, but we have rejected all of their applications for reductions in compensation payable to the claimant. Specifically, as the claimant was not in any way culpable or blameworthy in her conduct, a reduction for contributory fault is not appropriate.

191. Further, we have refused the respondents' application for a **Polkey** reduction in the compensation payable to the claimant on the grounds that the claimant would have been dismissed in any event if the respondents had followed a fair procedure.

192. On the evidence before the Tribunal, we felt there was insufficient evidential basis for us to determine that the claimant would have been dismissed in any event if the respondents had followed a fair procedure.

193. What might have happened, had the claimant been given an adjournment of the appeal meeting held on 16 March 2017, and had it been reconvened after the respondents had secured a medical report on the claimant from her GP

is mere speculation, as is what might have happened had the respondents instructed a specialist OH medical report from a specialist consultant.

194. By way of further observation, we are satisfied that the claimant has not failed to mitigate her losses, as alleged by the respondents. On the contrary, while, as at the close of the Final Hearing, she had not secured any new full-time employment, she had worked 4 days for the ASA agency, and as her Schedule of Loss states, she had completed a Routes to Work course, and updated her skills.

195. A further useful benchmark for us, in that regard, is the fact that the claimant has received State benefits, in the form of Jobseekers' Allowance, for which it is within judicial and general knowledge that a claimant needs to satisfy their local Job Centre that they are actively seeking new employment to receive that State benefit.

196. While the respondents sought reduction in compensation, not on the basis of any contributory conduct or fault, on the part of the claimant, but on the basis that she has failed to mitigate her loss, and that any compensatory award should be reduced to reflect this fact, we have rejected that argument as not well-founded.

197. We are satisfied, from what we have set out above, in our findings in fact earlier in these Reasons, at paragraph 51(122) and (123), and (135) and (136), that the claimant has made reasonable efforts to try and find another job to replace her previous job with the respondents, but she has, so far, been unsuccessful in securing a new job.

198. While we were not addressed by either party on the relevant law, as regards mitigation of loss, we have reminded ourselves the principles established by the Court of Appeal, in **Wilding v British Telecommunications plc [2002] IRLR 524**, were re-affirmed by Mr Justice Langstaff, then President of the Employment Appeal Tribunal, at paragraph 16, in **Cooper Contracting Ltd**

v Lindsey [2015] UKEAT/0184/15, now reported at **[2016] ICR D3**, and more recently by the Scottish EAT Judge, Lady Wise, in her unreported judgment in **Donald v AVC Media Enterprises Ltd [2016] UKEATS/0016/14**, at paragraphs 25 to 30.

199. Put simply, the burden of proof is on the wrongdoer; a claimant does not have to prove that they have mitigated loss, and the standard of proof on mitigation of loss is that of a reasonable person and the Tribunal must not apply too demanding a standard on the victim ; the claimant is not to be put on trial as if the losses were their fault when the central cause is the act of the wrongdoer ; and the test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate :- as per Mr Justice Langstaff in **Cooper** at paragraph 16 (1), (7) and (8).

200. We have decided that, in the circumstances of this case, and on the evidence available to us at this Final Hearing, the respondents have not established that the claimant has acted unreasonably in failing to mitigate.

201. Further, in our view, it would be wholly unjust and inequitable to the claimant, in circumstances where we have found that she had been unfairly dismissed by the respondents, if we did not award her any compensation at all for that unfair dismissal.

202. The issue which now arises is what is the appropriate amount of compensation that we should order the respondents to pay to the claimant for her unfair dismissal.

203. In assessing compensation, we took as our starting point the calculations in the claimant's Schedule of Loss, prepared by her, as an unrepresented, party litigant, and provided by her to the Tribunal and to the respondents on 24 August 2017, as detailed more fully at paragraph 51 above, in our finding in fact (132).

204. The issue for this Tribunal was to assess the claimant's basic and compensatory awards. The respondents agreed her basic award at **£2,633.37**, as per paragraph 7.2 of Mrs Sangster's written closing submissions, cross-referring to the respondents' Counter Schedule, at pages 275 and 276 of the Joint Bundle.

205. We are satisfied that that amount for the basic award has been properly calculated, and so we award it in full, there being no applicable reductions to the basic award to be applied by us.

206. On the matter of the compensatory award, however, we have not awarded the claimant the sum of **£40,000 +,** that she sought in her Schedule of Loss by way of financial compensation, and so it is appropriate that we explain why not.

207. In determining the compensatory award, the Tribunal must proceed on the basis of the claimant's weekly net pay when employed with the respondents. The gross and net weekly figures stated in the respondents' Counter Schedule were agreed by the claimant, with her net weekly pay with the respondents agreed by her as being **£258.49**.

208. We now proceed to assess the compensatory award. For past loss of earnings, from date of termination (27 March 2017) to date of close of Final Hearing (12 October 2017), that is a period of **29 weeks**. Assessed at net weekly earnings of **£258.49** per week that computes at **£7,496.21**.

209. To that amount, we need to add the appropriate figure for loss of pension rights for that same period. While her Schedule of Loss refers to pension loss, and the claimant has quoted certain figures, we do not know the basis of her figures, other than we note, from her final payslip (produced at page 260 of the Joint Bundle), the figure of **£90.35** is shown as her total pension fund for the year ended.

210. In these circumstances, we have not used her figures, but instead we have used the respondents' figures, where reference is made to loss of pension benefit at the rate of £12.68 per month, calculated to be **£84.86** for the 29 week period. As the employer, we have taken it that this monthly rate will have been obtained from the respondents' payroll records, although the basis of the calculation is not shown transparently in the respondents' Counter Schedule.

211. We also need to set off the claimant's earnings from her 4 day's agency work, with ASA, where, as per our finding in fact (122), she received net earnings of **£220**. While no supporting documentation was produced by the claimant, to vouch that sum and when it was paid, we are content to accept the claimant's evidence on the point, it not having been challenged by the respondents.

212. Next, neither the Schedule of Loss, nor the respondents' Counter Schedule, make any explicit reference to any amount by way of future losses for the claimant flowing forward from the close of the Final Hearing before this Tribunal, other than that the respondents assess her future losses at £nil. The claimant, on the other hand, seeks a global sum of **£40,000+.**

213. We have decided that the claimant is unlikely, in the current job market, to obtain new employment for at least 6 months from the date of this Final Hearing. We agree with the respondents, as per their ET3 response, and Mrs Sangster's reference to **Wardle**, that the claimant should not receive '**career losses'** to account for the period up to her **'pensionable age'**.

214. On that basis, we have decided that it is appropriate to award her compensation for future loss of earnings, for a period of **26 weeks**, plus loss of pension benefit for that same period. Assessed at net weekly earnings of **£258.49** per week that computes at **£6,720.74**.

215. To that amount, we need to add the appropriate figure for loss of pension rights for that same period. Using the respondents' figures, where reference is made to loss of pension benefit at the rate of **£12.68 per month**, we calculate that that computes at **£2.92 per week**, multiplied by 26, which then produces a figure of **£75.92** for the 26 week period.

216. The claimant's Schedule of Loss did not seek any specific amount for compensation for loss of statutory rights, but she did identify it as a head of loss, which we note the respondents' Counter Schedule valued at the sum of **£300**, and we agree that that figure is a fair and reasonable amount for that element of her compensatory award.

217. As regards other heads of loss identified by the claimant in her Schedule of Loss, the claimant referred to sundry costs for printing, postage, etc., but she did not produce any vouching documentation in respect of those outlays.

218. While the sum sought, at **£70.00**, is fairly modest, we have decided not to award any sum to the claimant in that regard, as we cannot be satisfied what sums she has incurred, for what purpose, and so we cannot satisfy ourselves that the sum sought is fair and reasonable in all the circumstances.

219. Further, while the claimant's Schedule of Loss also refers to how she would like to claim for time taken for legal advice at Citizens Advice and lawyers, no details or vouching is produced by her, and we are aware that CABs generally do not charge clients, and operate on a pro bono voluntary basis.

220. As regards her claim for the "***stress***" of the appeal process, and the Tribunal process, non-pecuniary loss is not recoverable in an ordinary unfair dismissal claim and so, even if the claimant had vouched whatever losses she has suffered, we would have had no statutory power to award her damages for non-pecuniary loss: in this regard, we refer to the House of Lords' judgment in **Dunnachie** mentioned earlier in these Reasons.

221. In all the circumstances, we have decided that the claimant is entitled to a monetary award of **£17,090.92** from the respondents, comprising a basic award agreed at **£2,633.37**, and a total compensatory award of **£14,457.55**, calculated as detailed earlier in these Reasons, being the sum of the various amounts awarded in respect of each of past loss, future loss, and loss of statutory rights.

222. As the claimant advised the Tribunal that she had been in receipt of State benefits, namely Jobseekers' Allowance, after termination of her employment with the respondents, the **Employment Tribunal (Recoupment of Benefits) Regulations 1996** apply to this award of compensation made by the Tribunal. The effect of recoupment is explained in the Schedule attached to this Judgment.

223. While the respondents' Counter Schedule netted off the claimant's benefits, quantified at **£1,973.70**, from her past loss of earnings that is not appropriate for us to do, as recoupment is the appropriate mechanism where State benefits, such as JSA, have been paid to a successful claimant in Tribunal proceedings.

No Reimbursement of Tribunal Fees

224. The claimant has paid no Tribunal fees in connection with this claim. She received "***Help with Fees***", for the initial Tribunal lodging fee of **£250** on presentation of her ET1 claim form.

225. While Notice of Payment for a Hearing fee of **£950** was issued to her, on 24 July 2017, for payment by 11 September 2017, no Hearing fee was paid, in light of the Supreme Court's judgment, on 26 July 2017, in **R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51,** that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature.

226. While HMCTS has undertaken to repay such fees, in the circumstances of the present case, where no Tribunal fees have been paid by the claimant, the Tribunal will not require to draw to the attention of HMCTS that this is a case in which fees have been paid and where they are therefore to be refunded to the claimant.

Employment Judge: I McPherson
Date of Judgment: 03 April 2018
Entered in register: 04 April 2018
and copied to parties

This is the revised copy of the respondents' closing submissions to the Tribunal, as referred to at paragraph 54 of the foregoing Reasons.

The revised text is amended to address a few minor typographical errors identified by Mrs Sangster, at paragraphs 4.11, 4.14.2, and 5.2, shown within [**bold underlined, bracketed sections].**

SUBMISSIONS FOR THE RESPONDENT

1.. INTRODUCTION

1.1 The claims before the Tribunal are of unfair dismissal and direct age discrimination.

1.2 The Respondent denies that the Claimant was unfairly dismissed and denies that the Claimant was discriminated against on the grounds of age, as alleged or at all. The Respondent's submissions on this are split into the following sections:

1.2.1 Suggested findings in fact

1.2.2 The law in relation to unfair dismissal and the application of the law to the facts of this case; and

1.2.3 The law in relation to age discrimination and the application of the law to the facts of this case.

1.3 The matter of remedy is also addressed, in case the Tribunal is not with me in relation to my primary submissions.

2.. SUGGESTED FINDINGS OF FACT

2.1 The Claimant commenced employment with the Respondent in 2011. She was employed latterly as an Administration Assistant until her dismissal on 13 February 2017.

2.2 The Claimant was diagnosed with diverticular disease in November 2014 and mild COPD in May 2015. Occupational health reports were obtained by the Respondent from Optima Health in January 2016, June 2016 and March 2017. Those reports disclose that the conditions are easily and well managed.

2.3 At the relevant times the Respondent operated a Sickness Absence Policy and a Sickness Absence Procedure (the **Procedure**), which provided a framework for managing with employee who are absent from work due to sickness. The Sickness Absence Policy and Procedure were discussed and agreed with the trade union recognised by the Respondent, prior to implementation. The Procedure provides, in the case of persistent short term

absences, for an informal review, followed by a formal procedure involving three stages, the last of which could result in dismissal. The Procedure provides for formal action to be taken when certain triggers are reached, namely either

2.3.1 4 instances of absence in the previous 12 months (on a rolling basis); or

2.3.2 3 instances totalling 9 days or more in the previous 12 months (on a rolling basis).

There is a separate process for managing long term absences contained in the Procedure.

2.4 From May 2014 to the date of her dismissal February 2017, the Claimant had a multiple absences from work which were managed under the Procedure. Following each and every absence she attended a Return to Work interview at which her absence was discussed and a Return to Work Form completed and signed by the Claimant and her manager. That form included issues such as the reasons for the absence, the support the Respondent could provide, whether an occupational health referral was required and the terms of the Procedure, including the triggers detailed within that.

Informal Review

2.5 On 16 March 2015, the Claimant attended an Informal Review Meeting under the Procedure to discuss her intermittent absences from work. The Claimant indicated that she was aware that her attendance at work was poor. The Claimant was warned that a failure to improve her absence may result in a move to formal Stage 1.

Stage 1

2.6 The Claimant attended a formal Stage 1 meeting under the Procedure on 4 September 2015. The conclusion from the meeting was that the Claimant's level of absence was higher than the Respondent's acceptable standard. Accordingly, the Claimant was informed that her absence would be monitored under Stage 1 of the Procedure for the next 12 months. The Claimant was warned that if the Claimant was unable to sustain an immediate improvement in her level of attendance, then it was likely that the Respondent would meet with the Claimant again at Stage 2 of the Sickness Absence Procedure. This was confirmed by letter dated 4 September 2015.

Stage 2

2.7 The Claimant attended a formal Stage 2 meeting under the Procedure on 15 December 2015. The conclusion from the meeting was that the Claimant's level of absence was higher than the Respondent's acceptable standard. Accordingly, the Claimant was informed that her absence would be monitored under Stage 2 of the Procedure for the next 12 months. The Claimant was warned that further absences could lead to progression to Stage 3 of the Procedure and that that may result in her dismissal. This was confirmed by letter dated 18 December 2015.

Stage 3

2.8 Following the Stage 2 warning, the Claimant was absent from work as follows:

2.8.1 On 6 January 2016 for 1 day for sickness and diarrhoea;

2.8.2 On 25 April 2016 for a day for virus/bug and sickness and diarrhoea;

2.8.3 From 16 May 2016 for 10 days for "breathing difficulties." The Claimant narrated that it was initially felt that the absence was caused by her chronic obstructive pulmonary disease (COPD). However, this had later been diagnosed as a chest infection;

2.8.4 For 1 day on 29 June 2016 complaining of severe diarrhoea and abdominal pain;

2.8.5 For 2 days from 13 September 2016 for a "chill with diarrhoea and constant urinating";

2.8.6 For 10 days from 10 October 2016 for a reported chest infection, for 1 day on 16 November 2016 for an allergic reaction; and

2.8.7 For 1 day from 12 December 2016 as a result of stomach pains & diarrhoea.

2.9 The Claimant had met the trigger point for Stage 3 on each of the above absences. The Respondent decided not to progress the Claimant to Stage 3 of the procedure at on each occasion. The Claimant was however advised that she would remain at Stage 2 of the Procedure, and would continue to be monitored. She was advised that any further absence could trigger Stage 3 in the Procedure.

2.10 The Claimant was then absent from 19 January 2017 for a further 4 days for stomach bug initially and latterly due to a faulty inhaler.

2.11 Following the Claimant's absence commencing on 19 January 2017, the Claimant had been absent on 8 occasions in the previous twelve months, totalling 28 days absence from work. The Claimant was, at that stage, invited to a Stage 3 hearing by a letter which was emailed to her on 8 February 2017. The letter originally erroneously stated that the Stage 3 meeting would take place that day. However, within 30 minutes this issue had been resolved and the Claimant had been issued with a revised letter stating that the meeting would take place on Monday 13 February 2017. This provided 5 days' notice of the meeting, in accordance with the Procedure. The letter warned the Claimant that one possible outcome of the Stage 3 hearing was the termination of her contract of employment. Regardless of whether she received the second letter or not (which she disputes), she indicated she was aware of the date for the Hearing, what would be discussed and that she wished to proceed with the Hearing on the date identified. She raised no issues in relation to this at the Stage 3 Hearing.

2.12 A formal Stage 3 meeting therefore took place under the Procedure on 13 February 2017. The meeting was conducted by Jenifer Kane, Operations Manager. Maria McShane, HR

Advisor, was present for the purposes of note taking and advice on policy and procedure. The reasons for the absences were discussed. The Claimant did not link either her diverticular disease or COPD to her sickness absences. The Claimant said that "*she didn't see what SLC could do to help with the issues that she has*".

2.13 On the basis of the information available, Jenifer Kane concluded that there was no evidence that her intermittent absence were caused by her COPD and/or her diverticular disease. In addition, there was nothing to suggest that her attendance would improve in the future and there were no steps that she could identify that would reduce her levels of absence. Considering the levels of absence of her absence, the reasons for these and the impact of the absences on the business, Ms Kane reasonably considered that the Respondent could no longer sustain her consistent levels of intermittent absence and that the Claimant would accordingly be dismissed, subject to a right of appeal.

2.14 A letter confirming that decision was issued to the Claimant on 14 February 2017. The Claimant was informed that her last day of employment would be 13 February 2017 and that she would be paid up until 13 March 2017. This was later corrected to confirm that she would be paid up to 27 March 2017. The Claimant was advised of her right of appeal.

2.15 The Claimant formally appealed against her dismissal by letter dated 21 February 2017.

2.16 In order to support the appeal process and to ensure that the Respondent had fully up to date medical information, the Respondent arranged for the Claimant to attend a further Occupational Health appointment on 9 March 2017. The Claimant agreed to participate in that process. The Claimant did not receive acknowledgement of her appeal within the timescales outlined in the Procedure, due to an oversight. An appeal hearing was however subsequently arranged and took place within a reasonable timescale.

2.17 The Claimant was invited to attend an appeal hearing by letter dated 10 March 2017 to be conducted by Pauline de Pellette, Customer Contact Process Manager and Laura McCairn, HR Business Partner. The Claimant was informed of her right to be accompanied at the appeal hearing.

2.18 Pauline de Pellette conducted the appeal hearing on 16 March 2017 with Laura McCairn present for the purposes of note taking and to provide advice on policy and procedure. The Claimant was accompanied by Sandra Booth. After considering the Claimant's reasons for her appeal, Pauline de Pellette adjourned the hearing for further investigation.

2.19 In particular, Pauline de Pellette wished to investigate further one of the issues that the Claimant raised in her appeal, namely that she felt that she had been discriminated on the basis of her age because colleagues, who were younger than her and who were also going through Stage 3 reviews that week, were not dismissed. Pauline de Pellette instructed Maria McShane to investigate this aspect of the appeal. Maria McShane did so and confirmed to Pauline de Pellette that there was no substance to the allegation of age discrimination made by the Claimant.

2.20 Having considered the Claimant's appeal, Pauline de Pellette upheld the decision to dismiss the Claimant in light of the number of absences, the reasons for these the lack of any improvement in the Claimant's level of absence, the adjustments that had been made to the Procedure and the lack of a link between the absences and her conditions. On 21 March 2017, the Respondent wrote to the Claimant to confirm that her appeal was unsuccessful and provide a detailed response to each of the points of appeal. The Respondent reasonably concluded there was no evidence to support any allegation of age discrimination.

3.. THE LAW ON UNFAIR DISMISSAL

3.1 Section 94 of the Employment Rights Act 1996 (**ERA**) provides that an employee has the right not to be unfairly dismissed.

3.2 For a dismissal to be fair:

3.2.1 it must be for one of the potentially fair reasons contained in the ERA; and

3.2.2 the employer must have acted reasonably in treating the potentially fair reason as a sufficient reason for dismissing the employee in accordance with equity and substantial merits of the case in terms of section 98(4) of the ERA.

Reason

3.3 It is for the Respondent to show the reason (or principle reason if more than one) for the dismissal (section 98(1)(a) of the ERA)

3.4 A reason relating to the capability of the employee to perform work of the kind which she was employed to do is one of the permissible reasons for a fair dismissal (section 98(2)(a)). Capability in relation to an employee means her capability assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(3)(a)).

3.5 'Some other substantial reason' is also a permissible reason for a fair dismissal (section 98(1)(b) of the ERA).

3.6 There has been some uncertainty historically in the case-law as to whether the potentially fair reason for a dismissal for excessive short-term absences is more properly categorised as "capability" or "some other substantial reason". However, clarification was given by the Court of Appeal in ***Wilson v Post Office 2000 IRLR 834*** in which the Court of Appeal held that the dismissal should be properly categorised as "some other substantial reason" rather than capability where the employee was fit to carry out duties and the reason for the dismissal was the fact that the Respondent could no longer tolerate the impact of her unplanned absences.

3.7 The matter was considered again in ***Ridge v HM Land Registry UKEAT/0485/12***, in which the EAT observed at paragraph 61 that:

It can be a difficult question whether to classify a dismissal following repeated periods of absence as a capability dismissal or a "some other substantial reason" dismissal. The Employment Rights Act 1996 contains a definition of "capability": it means "capability assessed by reference to skill, aptitude, health or any other physical or mental quality." If these considerations are to the forefront of the employer's mind when dismissing an employee, then the reason for dismissal will relate to the capability of the employee for performing work of the kind which he was employed by the employer to do: see section 98(2)(a) . But it is not unusual, particularly in cases of repeated short-term absence for a variety of reasons, for the recurring absences themselves to be the reason for dismissal, the operation of an attendance policy having been triggered: see ***Wilson v Post Office [2000] IRLR 834****. In that case the better label may be "some other substantial reason".*

3.8 Ultimately, the legal "label" for the dismissal is a matter for the Tribunal to determine, but does not alter the procedure to be followed in cases of persistent short term absence, which are considered below.

Whether the employer acted reasonably

3.9 The next question for the Tribunal to consider is set out in section 98 (4) of the ERA, namely whether the Respondent acted reasonably in treating the Claimant's absences as sufficient reason for terminating her employment. As the Tribunal is aware section 98(4) provides:

…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

3.10 The correct approach to this test is to decide whether the decision to terminate the Claimant's employment falls within the "band of reasonable responses test" as set out by the EAT in ***Iceland Frozen Foods Lt v Jones [1982] IRLR 439.***

3.11 As the Tribunal will be aware, the test does not permit the Tribunal to step into the Respondent's shoes and decide what it would have done in that situation **(*Grundy (Teddington) Ltd v Willis [1976] ICR 323 QBD*).** Rather it must decide if the Respondent acted in a way a reasonable employer might have acted. If the Tribunal determines that a reasonable employer might reasonably have dismissed the employee, then the dismissal was fair, regardless if another reasonable might have taken a different view.

Short Term Absences – Reasonableness

3.12 The EAT in ***Post Office v Jones (1977) IRLR 422*** acknowledged that, in cases involving persistent short term absences, there comes a time when a reasonable employer is entitled to say "enough is enough". So long as warnings have been given, treating the frequent absences as sufficient reason for dismissing is likely to fall within the band of reasonable responses.

3.13 In ***International Sports Co Ltd v Thomson [1980] IRLR 340***, the EAT found that the Tribunal had erred in holding that the appellants had acted unreasonably in dismissing the employee for persistent sickness absence without carrying out the procedure of investigation and consultation required in cases of incapability due to ill health. They stated

that the principles related to dismissals on the grounds of incapability are not applicable in these circumstances and it would place too heavy a burden on the employer to require him to carry out formal medical investigations in these circumstances, as they would rarely be fruitful given the transient nature of the employee's symptoms and complaints. They stated at paragraph 15 that what is required where there is an unacceptable level of intermittent absence is:

"…firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings, after the employee has been given an opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee."

3.14 This is the case regardless of whether the reason for dismissal is classified as capability or some other substantial reason.

3.15 Therefore, an employer should:

– Carry out a fair review of the attendance record and the reasons for absence;

– Give the employee an opportunity to make representations; and

– Give appropriate warnings of dismissal if things do not improve.

3.16 In ***International Sports Co Ltd v Thomson*** the EAT found that that the reasonableness of the employer's decision to dismiss was reinforced by the fact that the union had agreed the employer's policy on absence control.

3.17 The EAT confirmed in ***Davis v Tibbett and Britten Group plc EAT/460/99*** that it was possible for absences to be unreasonable, even if genuine. The EAT found that "*An employer is perfectly entitled to dismiss an employee who has been frequently absent for medical reasons over a significant period of time, whether or not the employee is in any way at fault because of the absences*" (para 14) and that employers are entitled to look at the whole history, the warnings and decide whether or not they were prepared to continue to shoulder the burden of an employee who had been absent on so many occasions (para 16).

3.18 It was noted in ***Lynock v Cereal Packaging Ltd [1988] IRLR 510*** by the EAT at paragraph that the purpose of a "warning" was to give a caution that the stage has been reached where continued employment may become impossible to continue with the employment.

3.19 The case of ***Lynock*** also confirmed that every case must be considered on its own facts. Delivering the judgement of the EAT, Mr Justice Wood stated at paragraph 14:

"*There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision,*

include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching."

3.20 It should be noted that this was not framed by the EAT as being a list of all the factors which *must* be taken into account in every case. Rather, it was stated that factors which *may* prove important might *"perhaps include*" some of these.

3.21 Finally, in cases where the employee alleges that the persistent short-term absences were caused by an underlying medical condition and/or were absences related to a disability under the Equality Act 2010, the EAT in ***Royal Liverpool Children's NHS Trust v Dunsby 2006 IRLR 351*** confirmed at paragraph 21 that "*there is no absolute rule that an employer acts unreasonably in treating disability related absences as part of a totting up review process or as part of a reason for dismissal on grounds of repeated short term absence*" and again at paragraph 22 that there is no rule that an employer, in operating a sickness absence procedure, must leave out of account her disability related absences.

3.22 The EAT in ***Dunsby*** overturned a Tribunal's decision that it had not been reasonable for the employer to treat disability-related absences as part of the as part of the "totting up" process. The EAT stated at paragraph 17 that "*It is common ground that the Procedure operated by the trust did not require the employer to disregard disability related absences. In the experience of this Tribunal, it is rare for a sickness absence procedure to require disability related absences to be disregarded.*"

Consistency – Reasonableness

3.23 In ***Paul v East Surrey District Health Authority [1995] IRLR 305***, the Court of Appeal there must be considerable latitude in the way in which an individual employer deals with particular cases. They stated that it was rare for two separate incidents to be exactly the same and it is necessary to look carefully at the extent to which the facts differed. It is only where they are truly similar or sufficiently similar incidents that there would be the basis of an argument of inconsistent treatment. The Court of Appeal also endorsed the finding of the EAT in the case of ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352***, stating that where arguments based on disparity are raised, tribunals should heed the warning in that case and scrutinise them care. In that case the EAT stated that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances: -

3.23.1 Where employees have been led by an employer to believe that certain conduct will not lead to dismissal;

3.23.2 Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason; or

3.23.3 Where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

4.. THE APPLICATION OF THE LAW IN RELATION TO UNFAIR DISMISSAL TO THE FACTS OF THE CASE

Reason

4.1 The Respondent submits that the Claimant was dismissed for a potentially fair reason.

4.2 The Claimant had sporadic, persistent absences from work from January 2015 until her dismissal in February 2017, as evidenced by the return to work forms signed by her and included in the Joint Bundle.

4.3 The dismissal letter is set out at pages 229 to 230 of the Joint Bundle. This confirms that the reason for dismissal was the Claimant's sickness absence record. The Respondent reasonably concluded that it could not sustain and accommodate the Claimant's excessive sickness absence any longer.

4.4 The Respondent acknowledges that the legal "label" for this dismissal is a matter for the Tribunal to determine. However, the Respondent's primary submission is that the potentially fair reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of the Claimant on the basis of her persistent short-term absences. In the alternative, it was capability. The Respondent submits that whichever reason is relied upon does not change the facts and the fairness of the dismissal.

Whether the employer acted reasonably

4.5 The Respondent submits that the decision to dismiss the Claimant was fair under section 98(4) of the ERA.

4.6 In particular, the Respondent's position in relation to the factors set out in ***Thomson*** are as follows:

A fair review of the attendance record and the reasons for absence

4.7 The Procedure involved a return to work form being completed each time the Claimant was absent. Each return to work form confirming the reason for each absence was signed by the Claimant. Each absence was then discussed in detail at the Stage 3 Hearing. She did not attribute her absences to her underlying medical conditions.

4.8 There is no evidence to support a finding that the Claimant's absences were caused by her working environment. On the contrary, the Claimant indicated on numerous occasions that she could have picked up a bug anywhere, including on public transport. There is no

medical evidence to link feeling cold to sickness bugs or diarrhoea. There is contradictory evidence in relation to the Claimant's COPD. AT the Stage 3 Hearing, the Claimant attributed the development of her COPD to the existence of paint fumes in her home environment. The Claimant also indicated that her doctor felt it developed as a result of her smoking (which she was advised to stop doing on diagnosis). The Claimant has now produced a report from her GP to indicate that cold air or cold weather could affect her COPD. There is no evidence that it did, or that the one absence for a 'chest infection' in the period when the Claimant indicates that she felt cold in the office caused that infection, as opposed to fumes, including as a result of the Claimant continuing to smoke, or simply an infection.

4.9 There was an isolated problem with the office temperature in November 2016. At that point employees were sent home and given a day of 'Special Paid Leave'. The Claimant was afforded 3 days special paid leave at that time, as opposed to the one day granted to her colleagues. There were no other general concerns raised about the temperature in the office. It was however recognised that some people may find the environment colder than others and desk location could be a factor. The location in the office that the Claimant worked was changed on several occasions as a result – whenever she requested this. Despite her evidence that she continued to feel cold in the office, she did not request a further move. Similarly she did not request a work station assessment in any of her return to work meetings, despite questions on the form asking what support the Claimant felt could be offered.

4.10 The Respondent sought medical evidence to verify if there were any adjustments that could be made to support an improvement in the Claimant's attendance. The Occupational Health report from January 2016 reported that the Claimant had specified no work place issues or limitations at the point of assessment. The Occupational Health report from July 2016 said that the paint fumes were not a major risk and merely suggested breaks 'should her symptoms be influenced'. All adjustments made by the Occupational Health reports in respect of the Claimant were implemented by the Respondent.

Opportunity to make representations

4.11 The **[Claimant]** was invited to attend a meeting to discuss her attendance at each stage of the Sickness Absence Procedure. The Claimant was afforded the right to be accompanied to each meeting. She was given the opportunity to make representations at each meeting regarding her absences, as evidenced by the minutes of them.

Appropriate warnings of dismissal if things do not improve

4.12 At each stage of the process, the Claimant was warned that a failure to improve her attendance could result in the next stage of the Procedure being implemented (up to and including dismissal). It is submitted that the Claimant was warned in unequivocal terms of the consequences of a failure to improve her attendance levels. Despite that, her attendance levels did not improve.

4.13 In advance of the Stage 3 meeting, the Claimant was given 5 days' notice in writing in advance in accordance with the Sickness Absence Procedure. The Claimant had access to all of the relevant documents ahead of that meeting. She accepts she was able to view her oracle record in preparing for the Stage 3 Hearing and was allowed time away from her duties to do so. In relation to the Procedure, the Claimant accepts that she was clearly directed to the Procedure and its terms on many occasions and was aware of its existence, but she failed to request or seek out a copy of the Procedure. The Procedure was readily available to her on the Respondent's intranet and would have been provided had she at any stage indicated that she was unaware of the terms of the Procedure.

4.14 Additionally, the Respondent submits hat it did take account of the various other relevant factors set out in ***Lynock*** when making the decision to dismiss the Claimant. In her evidence, Ms Kane confirmed that, when taking the decision to dismiss she considered:

4.14.1 the Claimant's absence levels;

4.14.2 the differing nature of the causes the absences. The Claimant herself attributed the majority of her absences to "bugs" and that she had just been "prone to bugs". In any event, the **[Respondent]** had done all it could to support the Claimant and there were no further measures that the Claimant could suggest that the Respondent take to improve her attendance;

4.14.3 the previous cautions issued to the Claimant and the Claimant's failure to improve;

4.14.4 the support previously given to the Claimant and the adjustments made to her working practices;

4.14.5 the lenient approach to the operation of the Sickness Absence Procedure. The Respondent had amended its trigger points on numerous occasions. The Claimant first hit the trigger point for progressing to Stage 3 in January 2016 (see page 166). From that point onwards, the Claimant could have progressed to a Stage 3 meeting in relation to absences commencing 25 April 2016, 16 May 2016, 29 June 2016, 13 September 2016, 10 October 2016, 16 November 2016 and 12 December 2016. However, on each occasion the Stage 2 monitoring periods were extended and the Respondent's trigger points were amended;

4.14.6 that the Claimant was not able to suggest anything else the Respondent could do to support her;

4.14.7 the advice from Occupational Health reports;

4.14.8 the likelihood of absences recurring in the future. The Respondent reasonably considered that there seemed little prospect of the Claimant's absence improving. The Claimant confirmed that she had not given up smoking despite the doctor

attributing her COPD to smoking. She accepted that there was nothing further the Respondent could do to assist her;

4.14.9 the impact on that her absences were having on her Team Manager, the Claimant herself and the effective operation of the business. The Respondent had reached the stage where it could no longer support the Claimant's absence levels.

4.15 The Respondent submits that the resulting decision to dismiss the Claimant fell within the band of reasonable responses open to the Respondent in the circumstances. They had agreed trigger points with the recognised trade union in relation to when an individual should move to the next stage of the Procedure. These reflected the absence levels which are deemed to be unacceptable in their particular business, as agreed with the trade union. They had reached the point where they were entitled to say 'enough was enough'. The Respondent considered that there was nothing more that it could do to effect an improvement in the Claimant's attendance, based on the information the Claimant provided to them.

4.16 The Respondent submits that not only was its decision to dismiss the Claimant substantively fair, but it was also procedurally fair. The Respondent followed a fair procedure, as outlined above. Whilst there may be some issues the Respondent can learn from and potentially amend going forward, these were not fundamental and did not undermine the overall fairness of the dismissal, when considering the complete picture.

4.17 The Claimant has also alleged that she was treated inconsistently compared with the three named comparators. In this regard, it is submitted that it will be a rare case indeed where patterns of absence and reasons for those of any two employees will be truly similar. The Respondent denies any alleged disparity of treatment for the following reasons.

4.17.1 Comparator 1: It is accepted that this individual had a Stage 3 meeting under the Procedure in the same week as the Claimant and was not dismissed. However, this individual's circumstances were materially different from the Claimant's case and in any event the Claimant was not treated less favourably than him:

(a) Comparator 1 had fewer instances of absences than the Claimant. Comparator 1 had 5 instances of absence in the previous 12 months in February 2017, while the Claimant had 12;

(b) Comparator 1 had a number of absences due to a lower back problem. Specialist equipment had been recommended for him, but there was a delay in sourcing this, which had only been resolved shortly before February 2017. He had seen a recent improvement in his condition and was awaiting physio which he hoped would assist further. He therefore expected his attendance to improve in the near future;

(c) He had a number of absences directly attributable to depression, and the Respondent was keen that some allowance be given for this;

(d) The Claimant had been given a number of extensions to Stage 2 of the procedure by February 2017. Comparator 1 had not been given the same level of adjustments (prior to the Stage 3 meeting).

4.17.2 Comparator 2: This individual was disciplined and ultimately dismissed for turning up to work consistently late. She was not absent from work due to sickness absence, and was not subject to the Procedure at Stage 3 at about the time of the Claimant's dismissal. There is no meaningful comparison between them that can be made.

4.17.3 Comparator 3: The only individual with the name specified by the Claimant was a receptionist at the Respondent's Hillington office. However, she was absent from work long term sick from December 2016 to around July 2017. She was therefore not undergoing Stage 3 of the Procedure in February 2017 and was not in a situation similar to the Claimant. There is no meaningful comparison between them that can be made.

4.18 In light of the above, it is submitted that the Claimant was not treated inconsistently with any of the three colleagues she identified. She was however treated consistently with the further comparator identified by the Respondent. That individual had a formal stage 3 hearing in the same week as the Claimant's dismissal. The outcome of the Stage 3 hearing in respect of this individual was that the individual was also dismissed. The Claimant was plainly not treated less favourably in comparison to that individual: they were treated the same. In fact the Claimant had been granted greater latitude than that individual and had actually been treated more favourably in comparison.

4.19 It is submitted therefore that the reason for the Claimant's dismissal was due to persistent short-term absences, and that the decision to dismiss was, in the circumstances, within the reasonable band of responses open to the Respondent having warned the Claimant about her attendance levels, made clear what improvements were required, consulted with the Claimant regarding her absences and having sought medical advice. Having followed a fair procedure, the decision to dismiss the Claimant was both substantively and procedurally fair. The claim should accordingly be dismissed.

5.. THE LAW ON DIRECT AGE DISCRIMINATION

5.1 In relation to the Claimant's claim for direct discrimination on the grounds of age, section 13 of the Equality Act 2010 ('**EA 2010'**) states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

5.2 To establish direct discrimination, **[the Tribunal must be satisfied that]** a claimant must show that they have been treated less favourably in some way than a real or hypothetical

comparator has, or would be. Merely treating two people differently does not of itself mean that one has been treated less favourably than the other.

5.3 The Respondent does not rely on section 13(2) of the EA 2010 in that it does not seek to show that the alleged treatment of the Claimant was a proportionate means of achieving a legitimate aim.

5.4 For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person (known as the comparator). A comparator can be real or hypothetical. In relation to the choice of any comparator for a claim under section 13, section 23(1) of the EA 2010 states:

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

5.5 In ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285***, Lord Scott confirmed that *'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she is not a member of the protected class'*

5.6 In relation to the burden of proof for the purposes of claims under these provisions, section 136 of the EA 2010 states:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

5.7 The most recent guidance on section 136 of the EA 2010 was provided in the EAT in ***Efobi v Royal Mail Group Limited UKEAT/0203/16***. In this case Mrs Justice Laing at paragraph 78:

"*Section 136(2) does not put any burden on a Claimant. It requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not "there are facts etc" (cf paragraph 65 of Madarassy). Its effect is that if there are such facts, and no explanation from A, the ET must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the ET cannot find the contravention proved…Section 136…requires the ET to consider all the evidence, not just the Claimant's…it is explicit in not placing any initial burden on a Claimant. The word "facts" in section 136(2) rather than "evidence" shows, in my judgment, that Parliament requires the ET to apply section 136 at the end of the hearing, when making its findings of fact. It may therefore be misleading to refer to a shifting of the burden of proof, as this implies, contrary to the language of section 136(2) that Parliament has required a Claimant to prove something. It does not appear to me that it has done.*"

5.8 The ***Efobi*** guidance therefore envisages a two-stage approach to the burden of proof:

5.8.1 Stage 1: are there facts that demonstrate a prima facie case? (as per s136(2) EA 2010)

5.8.2 Stage 2: is the respondent's explanation sufficient to show that it did not discriminate? i.e. is there sufficient evidence on the Respondent's side to discharge the burden of proving, on the balance of probabilities that there has been no discrimination as the treatment of the employee was in no sense whatsoever based on the protected ground.

5.9 To amount to discrimination, less favourable treatment must be "because of" a protected characteristic.

5.10 The fact that a claimant has been treated less favourably than an actual or hypothetical comparator will therefore not be sufficient to establish a prima facie case that direct discrimination has occurred unless there is "something more" from which the tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic (***Madarassy v Nomura International plc [2007] IRLR 246 (CA)***).

6.. THE APPLICATION OF THE LAW IN RELATION TO DISCRIMINATION TO THE FACTS OF THE CASE

6.1 The Claimant was 61 at the date of her dismissal. She claims she was discriminated against as a result of being in the age group of people aged over 55. In terms of comparators, the Claimant relies upon 3 name individuals, identified as James, Lauren and Nicola who were employed at the Respondent's Hillington premises and were subject to the Respondent Sickness Absence Procedure at Stage 3 at about the time of the Claimant's dismissal.

6.2 The Respondent's position is that they did not discriminate against the Claimant as a result of her age. Given the evidence, my submission is that this claim should be dismissed for the following reasons.

Circumstances of Comparators

6.3 None of the individuals identified by the Claimant as comparators were appropriate comparators. There were material differences in the circumstances of the comparators as follows

- Comparator 1 – whilst comparator 1 was also progressing through the short term absence procedure set out in the Procedure, his medical conditions were entirely different. The Respondent took account of psychological / mental health impairments affecting Comparator 1. In addition specialist equipment had been identified as being required by him, but there was a delay in obtaining this. That led to his final absence and was seen to be the cause of this. It was envisaged that his attendance would improve as soon as that equipment was provided.

- Comparator 2 – the individual identified by the Claimant was being disciplined by the Respondent for lateness. She was not subject to the process for managing short term absence under the Procedure.

- Comparator 3 – the individual identified by the Claimant was absent from work due to long term sickness absence from December 2016 to around July 2017.

Less Favourable Treatment

6.4 If it is not accepted that comparator 1 is not an appropriate comparator, the Respondent submits that that comparator was not treated less favourably than the Claimant. Comparator 1 had considerably few instances of absence than the Claimant and less instances where the triggers were not enforced. The Claimant was on 6 occasions permitted a period of 'grace' with respect to adjustments made to absence trigger points at Formal Stage 2 of the Absence Procedure, which were not afforded to Comparator 1. Instead he progressed quickly through the stages.

Reason for less favourable treatment

6.5 The Claimant has therefore failed to identify any comparator which demonstrated that, when comparing their treatment, the Claimant was treated more unfavourably than them. Given that, the question of the reason for the less favourable treatment does not arise.

Conclusion

6.6 The Claimant does not seek to rely on anything other than the circumstances of her named comparators in support of her claim that her dismissal was motivated by her age. The Tribunal does however require to consider all the evidence to consider if there are facts from which they could conclude, in the absence of any other explanation, that the Respondent dismissed the Claimant for a reason related to her age. In my submission there is no evidence to support any finding that the decision to dismiss the Claimant was influenced by her age. On the contrary, the Respondent's witnesses were absolutely clear that age played absolutely no part in the management of the Claimant's attendance and in the ultimate decision to dismiss her. They were shocked at the allegation. Their evidence was uncontested in this respect.

6.7 In addition, the Respondent identified another individual, who was aged 29, who had a formal stage 3 hearing, as a result of persistent short term absences, in the same week as the Claimant was dismissed. The outcome of the Stage 3 hearing was that the individual was dismissed. The Claimant was plainly not treated less favourably in comparison to this younger individual. In fact the Claimant had been granted greater latitude than this individual and had actually been treated more favourably in comparison. This undermines the Claimant's evidence that no one else was dismissed in the same week as her and that the reason she was dismissed was that she was over 55.

6.8 In light of the above, the Respondent's submission is that there are no facts from which the Tribunal could conclude that the Respondent contravened the provisions of section 13 of the EA 2010.

6.9 The test in section 136(2) of the EA 2010 has not been satisfied. Accordingly, the Respondent invites the Tribunal to dismiss the Claimant's claim.

6.10 In the event that the Tribunal finds that the test in section 136 (2) has been met (which is denied by the Respondent) the Respondent argues that it has shown in evidence that, in terms of Section 136 (3), it did not contravene the provisions of section 13 of the EA 2010 in dismissing the Claimant. The reasons for the Claimant's dismissal are outlined above.

6.11 As the Respondent's evidence has demonstrated that age played absolutely no part in the Claimant's dismissal, the Respondent does not rely on any objective justification.

7.. REMEDY

7.1 If the Tribunal do not accept the Respondent's submissions above and find the dismissal was unfair and/or discriminatory on the grounds of age, it will require to consider remedy. The Claimant has confirmed that she is seeking compensation. Not reinstatement/reengagement.

Unfair Dismissal

7.2 The Respondent's quantification is at pages 275 to 276 of the Bundle. The Respondent accepts that the Claimant would be entitled to a basic award of £2,633.37.

7.3 The Respondent calculates the Claimant's financial loss to hearing (before deductions) as £7,881.07. Taking into account the sums earned and received by the Claimant up to today's date, her total financial loss is £5,688.

7.4 The Claimant has attended a number of interviews and gave evidence that she recently received feedback that she was very close to being offered the position. She expects and hopes to secure alternative employment shortly. There is no reason to believe that that she will not do so. An award in respect of future loss of earnings is accordingly not appropriate.

7.5 If it is found that any compensation due to the Claimant, then I would ask that this is reduced on the basis of the principles laid down in ***Polkey v AE Dayton Services Limited [1987] ICR 142***, if it is found to be a procedural failing only.

Discrimination

7.6 In the event that the Tribunal finds that the Claimant's dismissal was discriminatory on the grounds of age, the Respondent's primary submission is that there is no basis to make any award for injury to feelings. The Claimant gave no evidence whatsoever in relation to any injury to feelings and did not consult her doctor.

7.7 If an award for injury to feelings is deemed appropriate, the award should be at the bottom of the lower bands of potential awards in terms of the case of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102***. The alleged act of discrimination, if proven, was an isolated one off occurrence and did not involve any campaign of harassment or discrimination. The Claimant herself assessed this at the start of the Hearing at £1,000.

She revised this at the end of the Hearing and gave details of her rationale for doing so – none of which related to the alleged discrimination.

7.8 The Respondent also notes that the Claimant is seeking losses for 4 years until her state pension is due. The Respondent submits that this is not a case where the Claimant would be entitled to career losses. The Claimant is not unable to work again through disability. She is actively seeking work, attending interviews and expects to secure alternative employment in the near future.

7.9 In ***Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604*** and the Court of Appeal said that it will only be appropriate to award career-long loss in rare cases where there is no real prospect of an employee ever obtaining an equivalent job. The evidence in this case does not support such a finding.