EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104852/2017

Held in Glasgow on 20, 21, 22 and 28 August 2018 (Final Hearing); and 17 December 2018 (Members' Meeting)

Employment Judge: Ian McPherson
Members: Kenneth Thomson
Donald Frew

Mr Peter Docherty	**Claimant** **In Person**
Houston Bottling and Co-Pack Ltd	**Respondents** **Represented by:** **Mr Ciaran Robertson**

WRITTEN REASONS FOR JUDGMENT OF THE EMPLOYMENT TRIBUNAL dated 19 December 2018, and entered in the Register and copied to parties on 20 December 2018

Introduction

1. This case called before the full Tribunal on the morning of Monday, 20 August 2018, for a five-day Final Hearing, listed to be heard on 20 to 23 and 28 August 2018, all as previously intimated to parties by the Tribunal by Notice of Final Hearing dated 9 June 2018, setting aside those five days for the case's full disposal, including remedy if appropriate.

Claim and response

2. Following ACAS early conciliation, between 17 and 22 August 2017, the claimant, acting on his own behalf, by ET1 claim form presented to the Tribunal, on 3 October 2017, brought this claim against the respondents.

3. The claimant complained of having been unfairly dismissed, and discriminated against on the grounds of disability, all said to be arising out of the termination of his employment as a Team Leader on 1 August 2017, further to his dismissal from the respondents' employment.

4. In the event that his claim was to be successful, the claimant indicated that he was seeking an award of compensation from the Tribunal, and a recommendation in respect of the discrimination heads of complaint.

5. His ET1 claim form was accepted by the Tribunal on 6 October 2017, and a copy served on the respondents on that date for reply by 3 November 2017. Both parties were also advised, by Notice of Claim and Notice of Preliminary Hearing, issued on 6 October 2017, that there would be a Case Management Preliminary Hearing held, on 8 December 2017, by an Employment Judge sitting alone, conducted in private, to conduct a preliminary consideration of the claim with parties and make case management orders.

6. Thereafter, on 3 November 2017, acting through their solicitor, Mr Laurie Anderson, solicitor, with Jackson Boyd LLP, Glasgow, an ET3 response form was lodged on behalf of the respondents, resisting the claim and submitting that the claimant was not unfairly dismissed, that he was not discriminated against by the respondents on grounds of disability, and denying his claims in their entirety.

7. The respondents' defence also denied that the claimant was a disabled person, as defined in **Section 6 of the Equality Act 2010**, and if the Tribunal were to find that he had been unfairly dismissed, the respondents contended that the claimant's leaving the factory on 24 July 2017 amounted to an immediate resignation of his employment, and that in those circumstances, he had no entitlement to notice pay.

Initial Consideration, and Case Management

8. The respondents' ET3 response was accepted by the Tribunal on 6 November 2017, and a copy sent to the claimant and ACAS. Following Initial Consideration of the claim by Employment Judge Frances Eccles, on 8 November 2017, she ordered that the claim proceed to the listed Case Management Preliminary Hearing on 8 December 2017.

9. On that date, the claimant in person, and the respondents' representative, then a Ms Victoria Rae, trainee solicitor, with Jackson Boyd LLP, having lodged completed Preliminary Hearing agendas, Employment Judge Laura Doherty, sitting alone, in private, made a variety of case management orders, and she fixed a Preliminary Hearing to be held in public to consider the single issue of the claimant's disability status, which was disputed by the respondents.

10. Employment Judge Doherty's written Note and Orders, following that Case Management Preliminary Hearing, dated 12 December 2017, were issued to both parties, under cover of a letter from the Tribunal dated 13 December 2017.

Respondents' Application for Strike Out of the Claim refused by the Tribunal

11. Further to a Notice of Preliminary Hearing (Preliminary Issue), issued by the Tribunal on 14 December 2017, parties were advised that there would be a Preliminary Hearing conducted in public by an Employment Judge sitting alone to consider the Preliminary Issue of the claimant's disability status.

12. Thereafter, on 16 January 2018, Ms Rae, acting for the respondents, made application to the Tribunal, in accordance with **Rule 37 of the Employment Tribunal (Rules of Procedure) 2013**, that the claim should be struck out.

13. Strike Out was sought on the grounds that the claimant had failed to comply with the Tribunal's order of 13 December 2017, by failing to produce additional

information, by 10 January 2018, specifying in what way his impairments of diabetes and depression have a substantial and long-term adverse effect on his ability to carry out day to day activities, etc, and further that the claimant had failed to actively pursue his claim against the respondents and, in the alternative, his claim should be struck out on that basis.

14. Following objection from the claimant, on 19 January 2018, following him being in contact with Renfrewshire Citizens' Advice, the claimant, by email sent to the Tribunal on 25 January 2018, responded more fully to the respondents' application to strike out his case, following a meeting at Renfrewshire CAB.

15. Thereafter, on 6 February 2018, following referral to Employment Judge Laura Doherty, she considered the respondents' application for Strike Out, and the claimant's objection, and she was not satisfied that it was consistent with the overriding objective in the Tribunal Rules to strike out the claim under **Rule 37 (1) (c).**

16. In doing so, Judge Doherty took into account the extent of the default, and that it had been mitigated to a degree by the subsequent production from the claimant of information sought in the Tribunal's earlier direction, and the Judge also took into account that a fair trial remained possible, notwithstanding the claimant's original default and that the prejudice to the claimant in striking out the claim would far exceed the prejudice to the respondent. She accordingly refused the respondents' application for Strike Out.

Claimant's Disability Status

17. Thereafter, by email to the Tribunal, on 30 January 2018, from Ms Rae, acting for the respondents, she advised that the respondents' position in respect of the claimant's disability status remained unchanged. Whilst the respondents conceded that they had knowledge about the claimant's diabetes, it was

stated that they were not expressly told by the claimant, and that their knowledge came from discussions amongst employees, and that the claimant did not ask for a meeting with the respondents to confirm his diabetes or explain how it affected him.

18. Ms Rae's email further stated that there was no indication by the claimant that he needed assistance or adjustments made as a result of his diagnosis, and she submitted that the respondents were unaware as to the extent of the claimant's diabetes, and that, in the four years the claimant had diabetes, there was only one absence recorded that was linked to a hypo.

19. On 31 January 2018, the claimant produced to the Tribunal, with copies to Ms Rae, for the respondents, letter from his GP, and consultant at the Royal Alexandra Hospital, Paisley. The claimant's documents were placed on the case file, in advance of the Preliminary Hearing on 21 February 2018.

20. On 21 February 2018, that Preliminary Hearing on disability status proceeded in front of Employment Judge Mary Kearns (sitting alone). The claimant appeared, in person, and the respondents were represented by Ms Rae. The claimant lodged a small bundle of documents, and gave evidence on his own behalf, while the respondents called their operations manager, Ms Elizabeth Pryde, who gave evidence on their behalf.

21. By written Judgment, with Reasons, dated 26 February 2018, Employment Judge Kearns held that the claimant was a disabled person at all relevant times by reason of diabetes, but not by reason of depression, and her written Judgment, with Reasons, was entered in the public register, and copied to parties, under cover of a letter from the Tribunal dated 6 March 2018.

22. Neither party sought a reconsideration of that Judgment, within fourteen days of its issue, nor appealed to the Employment Appeal Tribunal against that Judgment, within forty-two days of issue of that Judgment. That Judgment was available to this Tribunal, as part of its case papers, for this Final Hearing,

and it was also included at pages 38 to 46 of the Joint Bundle of Productions produced to the Tribunal at the start of this Final Hearing.

Further Case Management Preliminary Hearing

23. As part of Employment Judge Kearns' Judgment, she also issued case management orders, referring to the case management orders issued following the Preliminary Hearing of 8 December 2017, and ordering the claimant to comply with those orders within twenty-eight days from the date of her Judgment, and giving the respondents twenty-one days to answer from the date the claimant sent them his additional information.

24. She also directed a further one hour, Case Management Preliminary Hearing should be fixed to discuss preparation for the Final Hearing. Notice of Preliminary Hearing (Case Management) was issued by the Tribunal to both parties, under cover of a letter dated 8 March 2018, assigning a one-hour Case Management Preliminary Hearing before an Employment Judge sitting alone on 1 June 2018.

25. On 1 May 2018, a Mr Drew McCusker, trainee solicitor at Jackson Boyd LLP, acting for the respondents, made application to the Tribunal, with copies sent to the claimant, in accordance with **Rule 37**, that the Tribunal should make a judgment that the claim be struck out on the grounds that the claimant had failed to comply with the Tribunal's order of 8 December 2017, namely that he had failed to provide a written statement as ordered by Employment Judge Doherty, setting out additional information with documentation in support about his claim, and further that he had failed to actively pursue his claim and, in the alternative, his claim should be struck out on that basis.

26. Thereafter, by email to the Tribunal office, sent on 25 May 2018, and copied to Mr McCusker, acting for the respondents, the claimant attached the requested information, with apologies for the delay. He provided additional information, by way of further and better particulars, in respect of his claims for harassment, on grounds of disability, and failure to make reasonable adjustments.

27. On 1 June 2018, the case called before Employment Judge Laura Doherty, for that Case Management Preliminary Hearing, where the claimant appeared, in person, and the respondents were represented by Mr McCusker. Following discussion with Judge Doherty, further case management orders were made by her, including giving the respondents until 29 June 2018 to answer the information supplied by the claimant, and making arrangements for a Final Hearing, with four days for evidence, and a fifth day for closing submissions.

28. Employment Judge Doherty's written Note, and Orders, dated 4 June 2018, was issued to both parties, under cover of a letter dated 6 June 2018 from the Tribunal. In terms of those orders made by Employment Judge Doherty, the respondents' reply to the claimant's additional information was due by 29 June 2018; parties should exchange their final list of witnesses fourteen days prior to the Final Hearing; a Joint Bundle should be produced by 30 July 2018, and the claimant should produce a Schedule of Loss by 15 June 2018, and the respondents to reply, by 29 June 2018, indicating what aspects of the Schedule of Loss, if any, are agreed, and what aspects are not agreed, and why they are not agreed.

29. No reply from the respondents, to the claimant's additional information, by way of further and better particular to his harassment, and failure to make reasonable adjustments, claims, was provided to the Tribunal, by the due date of 29 June 2018, or at all, prior to the start of this Final Hearing.

30. A Joint Bundle of Documents was produced, at the start of this Final Hearing. It included the claimant's Schedule of Loss, intimated to the Tribunal, on 15 June 2018, and copied to Mr McCusker, for the respondents, but the respondents failed by the due date, of 29 June 2018, or at all, to respond to the claimant's Schedule of Loss, before the start of this Final Hearing.

31. At the Case Management Preliminary Hearing, before Employment Judge Doherty, it was agreed, after some discussion, that the claimant would present

his evidence first, giving evidence on his own behalf, and calling evidence from the following witnesses:- Alice Pollock (who accompanied him at the disciplinary hearings); David Simpson (who would speak to treatment of the claimant); Janette Crawford (who would corroborate the alleged harassing behaviour); and Cathleen Docherty (the claimant's wife), who would speak to the effect of the claimant's treatment at work upon him.

32. At that Case Management Preliminary Hearing, the Tribunal was advised by Mr McCusker that the respondents' evidence would be given by the following witnesses: -

(1) Liz Pryde (claimant's line manager);

(2) James Friel (who dealt with the disciplinary procedure);

(3) Joanne Duncan (who would speak to how the claimant was treated);

(4) Janette Crawford (who would speak to how the claimant was treated); and

(5) Kevin Burns, (who would similarly speak to how the claimant was treated).

33. It was unclear, at that stage, as to which party would call Janette Crawford as a witness, and the claimant indicated that he wished to call her, rather than cross examine her, and Mr McCusker also indicated that he wished to call her. Parties were instructed to consider their position, and exchange their final list of witnesses fourteen days prior to the Final Hearing.

Final Hearing before this Tribunal

34. At this Final Hearing, the claimant appeared before us, unrepresented, but accompanied by some family members, for moral support, and as observers. His wife, Mrs Catherine Docherty, was called as a witness on his behalf.

35. The respondents were represented by Mr Ciaran Robertson, solicitor with Jackson Boyd LLP, Glasgow, instructed by Mr James Friel, a director of the

respondents. As Mr Friel was to be a witness for the respondents, as well as instructing Mr Robertson, it was agreed, after discussion, that Mr Friel would not be present in the Tribunal hearing room, while the claimant, and his witnesses gave evidence.

36. The Tribunal was presented with a Joint Bundle of Documents, together with an indexed list of those documents, extending to 100 pages, including Tribunal documentation, documentation relating to the claim, miscellaneous documents relating to the claim; and the claimant's Schedule of Loss.

37. The Joint Bundle was helpfully contained within a large A4 ring binder folder, but, as was to become apparent at the start of the Final Hearing, when issues before the Tribunal were clarified, not all of the relevant and necessary documents for a Final Hearing were included.

38. During the course of this Hearing, additional documents required to be added to the Bundle, being documents 101 through to 106, being the claimant's proposed recommendations from the Tribunal; the respondents' Counter Schedule / comments on the claimant's Schedule of Loss; the claimant's mitigation documents, a statement from Liz Pryde; and photographs of the respondent's factory produced by the respondents, at the request of the Tribunal.

Clarification of Issues

39. Before proceeding to hear any evidence at this Final Hearing, the Judge, sitting with the two lay members, as a full Tribunal, proceeded to have a case management discussion with the claimant, and Mr Robertson as the respondents' representative, arising from the Tribunal's pre-read of the ET1 claim form, with further and better particulars for the claimant, the ET3 response form, and earlier case management orders made by Employment Judge Doherty.

40. In particular, the Judge enquired of Mr Robertson why, within the Joint Bundle of Documents, there was no reply from the respondents to the claimant's

Schedule of Loss dated 15 June 2018, which Employment Judge Doherty had, in her written Note and Orders dated 4 June 2018, required the respondents to respond to by 29 June 2018, indicating what aspects of the schedule, if any, were agreed, and what aspects were not agreed, and why they were not agreed.

41. Similarly, on account of the claimant's further and better particulars, furnished on 25 May 2018, Employment Judge Doherty had agreed that the respondents would be given the opportunity of answering that information by 29 June 2018. Further, Employment Judge Doherty had stated that parties should exchange their final list of witnesses fourteen days prior to this Final Hearing.

42. The Judge therefore enquired, of both the claimant, and Mr Robertson for the respondents, about the witnesses that both parties intended to lead before this Final Hearing, noting that, as per Employment Judge Doherty's Note dated 4 June 2018, the claimant was to present his evidence first for the Tribunal, followed by evidence from the respondents.

43. In reply to the Judge's enquiry, Mr Robertson, solicitor for the respondents, stated that there was no reply by the respondents to the claimant's Schedule of Loss, and he explained that was because he had only inherited this case in the middle of the previous week, from the previous case handler, Ms Rae.

44. Mr Roberson agreed that the failure to comply with Employment Judge Doherty's Order was unprofessional, and unacceptable, and he suggested that the respondents should be given the opportunity to answer the Order now. Mr Friel, the respondents' director, who was in attendance at this stage of the proceedings, stated that he was unaware that there was ever any Order on the respondents to reply to the Tribunal.

45. As regards witnesses for the respondents, Mr Robertson advised that he would be leading evidence from Jim Friel (the dismissing manager); Liz Pryde (the claimant's line manager); Gail McAlpine (the investigating officer) and

Michael Toal (the appeal decision maker). He further clarified that, contrary to earlier indications to Employment Judge Doherty, at the Case Management Preliminary Hearing held on 1 June 2018, when the respondents had been represented by Mr McCusker, the respondents would not now be leading evidence from Joanne Duncan, Janette Crawford or Kevin Burns.

46. We pause here to note and record that, for reasons unexplained, the Joint Bundle of Documents lodged with the Tribunal did not include, as part of the Tribunal documentation, Employment Judge Doherty's Note and Orders dated 4 June 2018. These were, however, available to the Tribunal, in our case papers, as they were held on the case file.

47. When the claimant came to advise the Tribunal as to his likely witnesses to be led before us at this Final Hearing, he started by stating that he had never been involved with anything like this before, and he would be giving his own evidence to the Tribunal, and he had agreed with the respondents' lawyer that Janette Crawford would be a witness for him.

48. The claimant further advised us that he did not now intend to call David Simpson, who had been mentioned at the Case Management Preliminary Hearing before Employment Judge Doherty, nor Alice Pollock, the latter because she was too unwell to attend at the Tribunal. He was, however, still intending to call evidence from his wife, Mrs Catherine Docherty.

49. The claimant further confirmed to the Tribunal that he was still adhering to all four heads of claim set forth in his ET1 claim form against the respondents. As regards his preferred remedy, in the event of success before the Tribunal, the claimant confirmed that his preferred remedy was still an award of compensation from the Tribunal. He confirmed that he was not seeking to get his old job back and compensation (reinstatement), nor to get another job with the respondents and compensation (re-engagement) and that the sums set forth for compensation in his Schedule of Loss had been based on advice from the Citizens Advice Bureau.

50. When the Judge referred to the fact that, on his ET1 claim form, at section 9.1, the claimant had ticked the box, in relation to his discrimination claims, that he was seeking a recommendation from the Tribunal, the claimant stated that he did not want others to go through what he had been put through, and he further stated that there would always be a problem while Liz Pryde was working at the respondents' business.

51. When the Judge enquired of the claimant whether he was aware of the precise terms of **Section 124 of the Equality Act 2010**, from which the Tribunal derived its power to make an action recommendation, in an appropriate case, the claimant stated that he was not aware, and so the Judge indicated that it would be helpful for him, if he was seeking such a recommendation from the Tribunal, to set it forth in writing, for the assistance of the Tribunal, and for the respondents. A copy of **Section 124** was thereafter provided by the Judge for the assistance of both the claimant, in person, and Mr Robertson, solicitor for the respondents.

52. The Judge advised the claimant that, in terms of **Section 124**, the Tribunal might make a declaration as to the rights of the parties in relation to the matters to which the Tribunal proceedings relate; order the respondents to pay compensation to the claimant; and make an appropriate recommendation which, in terms of **Section 124 (3)** "***is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate."***

53. The Judge also had discussion with both the claimant, and Mr Robertson, as regards likely duration of evidence in chief, and cross examination, for each of the identified witnesses to be led before the Tribunal. As previously directed by Employment Judge Doherty, it was noted that four days were listed for the hearing of evidence, and the fifth day, Tuesday 28 August 2018, for a Hearing on Submissions for closing submissions from both parties.

54. For the assistance of the claimant, as an unrepresented party litigant, and to ensure parties were on an equal footing, in terms of **Rule 2,** the Judge indicated that he would set forth written case management orders, and directions, for that Hearing on Submissions, and these were duly intimated to both parties dated 21 August 2018.

55. Further, the Judge indicated that, as he would be unavailable on the afternoon of Thursday, 23 August 2018, the Tribunal would not be sitting that afternoon. Finally, Mr Robertson stated that, as per Employment Judge Doherty's previous directions, the respondents were prepared for the claimant to go first in leading evidence at this Final Hearing, and he was not proposing to change that running order.

56. Having heard from the claimant in person, and Mr Robertson for the respondents, the Tribunal agreed that it was appropriate to adjourn proceedings for half an hour, to allow the claimant to consider what recommendation, if any, he would be seeking from the Tribunal, in the event of success.

57. We also agreed to adjourn for Mr Robertson to consider further, with the claimant's evidence going first, whether Mr Friel, a witness for the respondents, but in attendance to instruct him as their solicitor, would be staying out during the claimant's evidence, or remaining within the Tribunal hearing, in which case, comment might be made about his later evidence being influenced by what he had heard from other witnesses in the Tribunal.

58. It was also agreed that, during this adjournment, Mr Robertson should take instructions from his clients, as regards the respondent's comments, by way of a Counter Schedule, on the claimant's Schedule of Loss.

59. When proceedings resumed, after that adjournment, Mr Robertson, solicitor for the respondents, advised that Mr Friel would step out during the claimant's evidence, and the claimant should continue to go first in giving evidence at this Final Hearing.

60. As regards the claimant's Schedule of Loss, he advised that the respondents accepted the figures contained within the claimant's Schedule of Loss for basic award, and he made comments as regards the sum sought for a compensatory award, advising that the respondents rejected the figures claimed on the basis that the claimant has indicated he is not able to work due to sickness therefore, had he not been dismissed, the claimant would only have been earning Employment Support Allowance or Statutory Sick Pay.

61. Further, Mr Robertson advised us, the claimant's net monthly income was £1,356.33, and not £1,594.67 as stated, and if the claimant had obtained any temporary work, then his earnings would need to be disclosed. He submitted that there had been a failure to mitigate his losses on the part of the claimant, and a lack of evidence from the claimant about his attempts to find new employment. There was nothing contained in the Joint Bundle of Documents about mitigation.

62. Further, as regards the future award sought by the claimant, Mr Robertson stated that the respondents were happy to accept the period of seven weeks future loss claimed by the claimant, subject to their principal argument that no compensation should be payable to the claimant, and likewise happy to accept the sum of £1,307.07 for loss of statutory rights, if the claim was successful.

63. As regards the various sums sought for injury to feelings, for the three discreet types of alleged unlawful disability discrimination, rather than the £12,000 sought by the claimant, for compensation for discrimination arising from disability, the respondents felt, if the **Section 15** claim was successful, that an award of £4,000, at the middle of the lower band of **Vento** would be more appropriate.

64. As regards the sum of £8,000, sought for injury to feelings for the **Section 20** failure to make reasonable adjustments complaint, if upheld, the respondents felt that should be at the lower end of the lower band, say at £2,000, while, as

regards the total of £5,000, sought in the event that the **Section 26** harassment claim was upheld, the respondent sought clarification of whether the sum of £5,000 was sought by the claimant for each of the three instances, or this was a combined sum.

65. He further added that the respondents would accept £5,000, on the basis of £1,700 per allegation of harassment, but emphasised that the respondents disputed all liability, and therefore his primary submission on their behalf was that all sums sought by the claimant should not be awarded by the Tribunal.

66. Asked about the sums identified by the claimant, in the ET1 claim form, at section 6.2, where he stated he was paid £368 per week gross pay before tax, and £313 per week net normal take home pay, Mr Robertson stated that the respondents accepted the sum of £368 per week in gross shown by the claimant in the Schedule of Loss, but as regards his net earnings, shown in the Schedule of Loss at £1,594.67 per month, that equated to £368 per week, which was the gross amount of the claimant's weekly earnings, whereas they accepted that his net weekly earnings were £313, as stated in the ET1 claim form.

67. Next, when the Judge enquired of the claimant as regards the recommendations that he was seeking from the Tribunal, in the event of success for his discrimination heads of complaint, the claimant referred to the handwritten document which he had written, during the adjournment, and which the clerk to the Tribunal had copied for the full Tribunal, and both parties, reading as follows: -

> ***"1. I would like the Tribunal to recommend that Houston B+CP to take the necessary to ensure that this type of behaviour cannot happen to anyone else.***
>
> ***2. The company to have in place a proper Human Resources Department so that in future people can ask for time off for appointments without harassment or ridicule.***

3. More in-depth back to work or supervision interviews carried out by immediate supervisor.

4. That the company gives me a clean reference."

68. By way of further explanation, the claimant stated that he would like the Tribunal to recommend that the respondents take those necessary steps to ensure this type of behaviour does not happen to anybody else, and that they put in place a proper HR department, and revised policies and practices as suggested by him in his handwritten document.

69. As the claimant was an unrepresented, party litigant, it was agreed, after discussion with him, and Mr Robertson for the respondents, that the claimant would be asked a series of structured and focused questions by the Judge, to elicit his evidence in chief, and then given the opportunity to add anything else that he considered relevant and necessary to his claims before the Tribunal, and that, in conducting the claimant's examination in chief, the Judge would do so having regard to his ET1 claim form, his further and better particulars, and the Schedule of Loss lodged with the Tribunal.

70. We pause to note and record here that, prior to this Final Hearing, the Tribunal had never issued any standard case management orders for mitigation evidence to be provided by the claimant, nor had the respondents' solicitors ever sought such mitigation evidence from the claimant, without recourse to the Tribunal.

71. Arising from the claimant's evidence in chief, and the fact that no standard orders had previously been issued, the Judge prepared, and issued to both parties, a case management order, on the afternoon of Monday, 20 August 2018.

72. That Order of the Tribunal required the claimant to prepare and lodge with the Tribunal, by no later than 10am the following morning, Tuesday 21 August

2018, a written statement with supporting documentation, and any vouching documents to be relied upon and added to the Joint Bundle.

73. The claimant was ordered to set out (a) details of any State benefits received from 1 August 2017 to date, including those relating to the claimant's appeal against a capability assessment for ESA (JSA); (b) a summary of jobs applied for, details of any interviews attended or jobs obtained and details of any income whether from temporary, casual or permanent employment or self-employed work from 1 August 2017 to date; and (c) details of any other efforts made by the claimant to minimise his loss from 1 August 2017 to date.

74. Further, in terms of that same case management order, dated 20 August 2018, the Judge ordered the respondents to indicate, by no later than 1.00pm on Tuesday, 21 August 2018, to the claimant and to the Tribunal, whether they say that the claimant had failed to mitigate his loss and if so what further steps they say the claimant should have taken in that regard.

75. During the lunchtime adjournment, on that first day, Monday, 20 August 2018, Mr Robertson had prepared, and typed up for the Tribunal, the respondents' comments on the claimant's Schedule of Loss, and we allowed that to be received, and added to the Joint Bundle, as document 102 /1 & 2.

76. The following morning, Tuesday, 21 August 2018, the claimant produced, and the clerk to the Tribunal copied, for all parties, as well as the Tribunal, the claimant's mitigation evidence, comprising a handwritten statement, dated 20 August 2018, together with copy documents extending to some 22 pages, which we similarly allowed to be added to the Joint Bundle, as document 104/1-23.

Interlocutory Ruling by the Tribunal

77. On Tuesday, 21 August 2018, during the claimant's leading of evidence from his witness, Miss Janet Crawford, an issue arose, where the witness accused Ms Elizabeth Pryde, the respondents' Operations Manager, from whom the Tribunal was scheduled to hear evidence on behalf of the respondents, of having intimidated her prior to her attending to give evidence at this Tribunal.

78. While Mr Robertson, solicitor for the respondents, cross examined Miss Crawford, on aspects of her evidence in chief, he did not cross examine her on the alleged witness intimidation by Ms Pryde, nor did he make any application to the Tribunal, for an adjournment, in order that he might take instructions, or seek a postponement, or whatever.

79. Thereafter, once the Tribunal had heard, and concluded evidence from the claimant's final witness, his wife, Mrs Catherine Docherty, and so the claimant's evidence to the Tribunal was closed, the Judge indicated to both parties that the Tribunal had decided to adjourn, for private deliberation, and would resume at around 12.05pm.

80. In the event, the Tribunal's adjournment lasted longer than anticipated and when the Tribunal resumed, in public hearing, at 12.25pm, the presiding Employment Judge read *verbatim* from an interlocutory ruling drafted in chambers, and agreed with the lay members of the Tribunal, as follows: -

> ***"The Tribunal has given consideration to this morning's proceedings and, in particular, the evidence given by the claimant's witness, Ms Janet Crawford, including the allegations of intimidation by Liz Pryde, one of the respondents' witnesses in this case.***
>
> ***Had this allegation been raised by the claimant before the start of this Final Hearing, then the Tribunal would have had to consider whether or not it was appropriate to consider issuing a Strike Out Warning under Rule 37 to strike out the response on the basis of the respondents' alleged unreasonable conduct of the proceedings.***
>
> ***However, as the respondents' solicitor did not cross examine Ms Crawford to challenge her evidence about that alleged intimidation, the Tribunal, in deciding to proceed***

and hear the respondents' evidence in this case, wishes to raise the following three matters with both parties: -

(1) When Ms Pryde comes to gives her evidence to the Tribunal, Ms Crawford's evidence, having gone unchallenged by the respondents' solicitor, neither party, nor the Tribunal, shall ask her any questions about alleged intimidation of the witness, Ms Crawford.

(2) Ms Pryde requires to be advised by the respondents' solicitor that this allegation has been made, and she has the right not to incriminate herself in giving her evidence to the Tribunal. She may wish to seek independent, legal advice as regards her position, and potential for criminal proceedings against her for witness intimidation.

(3) Given witness intimidation is undoubtedly unreasonable conduct of proceedings by a party, it would be disproportionate to Strike Out the respondents' response, but the Tribunal gives notice that, at closing submissions, it will wish the respondents' solicitor to address whether or not the Tribunal should make any award of costs / expenses against the respondents, in particular a Preparation Time Order to the claimant as an unrepresented party litigant."

81. Following delivery of that oral interlocutory ruling, there was no request for clarification, from either the claimant in person, nor Mr Robertson for the respondents, and, at the request of Mr Robertson, the Tribunal granted a five-

minute adjournment, before the respondents led their first witness before the Tribunal, being Mr Friel.

82. In the event, the five minutes adjournment lasted around ten minutes, and when proceedings resumed, in public Hearing, Mr Robertson advised the Tribunal that he had advised Ms Pryde on developments in the proceedings that morning, and that she would give evidence about the harassment allegation, as the alleged perpetrator, when she came to give her own evidence to the Tribunal.

83. Thereafter, Mr Robertson proceeded to take evidence in chief from Mr Friel. When, at around 1.15pm, proceedings adjourned for the usual lunch break, to resume at 2.00pm prompt, in the event, proceedings did not resume until shortly before 2.05pm, when, before proceeding with Mr Friel's further evidence in chief, Mr Robertson raised what he referred to as a preliminary matter with the Tribunal.

84. In the absence of Mr Friel, who was sent out to the respondents' waiting room, Mr Robertson advised that he had spoken to Liz Pryde, and she no longer wished to give evidence to the Tribunal, and he advised us that he could not force her to give evidence when she did not feel comfortable in giving evidence.

85. On behalf of the Tribunal, the Judge enquired whether the respondents appreciated the consequences of Ms Pryde not giving evidence about the allegation that she is the alleged harasser of the claimant. In reply, Mr Robertson stated that, having spoken to Mr Friel, while he would prefer Ms Pryde to give evidence, he did not want to prejudice her, and Mr Robertson further advised us that he would leave matters to his closing submissions, and hope to convince the Tribunal not to find against the respondents on those points.

86. Mr Robertson further stated that his two other witnesses, Ms McAlpine, and Mr Toal, were still to be led on behalf of the respondents, but they were not in attendance at the Tribunal, as, after the conclusion of Mr Friel's evidence, it

had been anticipated that evidence would be led from Ms Pryde, before coming later to those two other witnesses for the respondents. As such, Mr Robertson advised that, with apologies for the inconvenience caused, after the conclusion of Mr Friel's evidence, there would be no further witnesses for the respondents to be heard that sitting day.

87. Having heard Mr Robertson, the Judge enquired of him whether his clients realised the consequences of this, given the allegation of witness intimidation, and the possibility of expenses for unreasonable conduct of the proceedings, and the Judge suggested to Mr Robertson that he needed to take clear and definitive instructions from his clients, and, on that basis, the Tribunal, acting on its own initiative, granted Mr Robertson, a further ten minute adjournment for him to discuss matters with Mr Friel.

88. When proceedings resumed, in public Hearing, after that ten-minute adjournment, Mr Robertson advised the Tribunal that, unfortunately, Ms Pryde would not give evidence, he had advised Mr Friel of the implications of that decision, and he again apologised for the inconvenience to the claimant, and the Tribunal as a whole, and further stated that the respondents would have to take the consequences. Thereafter, he proceeded to take his further evidence in chief from Mr Friel.

Additional Document produced by the Respondents

89. Following conclusion of that evidence in chief, Mr Friel was then cross examined by the claimant. In the course of that cross examination, Mr Friel stated that, prior to the disciplinary hearing on 1 August 2017, he felt he had to get Gail McAlpine to speak to Liz Pryde, and he was sure that there was, within his personal papers, a statement from Liz Pryde, which he accepted was not in the Joint Bundle of Documents before the Tribunal, but in his own black folder, sitting on the parties' representatives table in front of the Tribunal, next to Mr Robertson's place.

90. In those circumstances, and in the absence of any application by Mr Robertson, on behalf of the respondents, for an adjournment, to consider matters, the Judge, acting on his own initiative, advised that the Tribunal would grant a five-minute adjournment for Mr Robertson to take instructions from Mr Friel, before any further cross examination by the claimant continued.

91. Mr Robertson stated that he had received this document from Mr Friel at the lunchtime break, and when the Judge asked him why, in those circumstances, no application had been made then to allow it to be lodged, albeit late, Mr Robertson admitted, frankly and candidly, that he thought it was too late, to which the Judge responded that a party can apply, at any stage, for a case management application, and it is then for a matter for the Tribunal to consider, in light of any comment or objection by the other party.

92. When, after that short adjournment, proceedings resumed, in the absence of Mr Friel, who was left in the respondents' waiting room, pending the Tribunal's decision on any further document being added to the Joint Bundle, Mr Robertson advised that the existence of the statement had only come to light shortly before returning to the Tribunal, after the lunchbreak, and he had, through the Tribunal clerk, arranged for copies to be made, and he asked the Tribunal that the document be allowed in, albeit late, so the witness, Mr Friel, could talk to its relevancy.

93. Further, Mr Robertson apologised to the Tribunal, and explained that he had inherited matters at the end of the previous week, and that he had been given what he referred to as a ***"hospital pass***" from his colleague, and he apologised for the way he had conducted these proceedings and acknowledged that he should be held accountable.

94. Having heard from Mr Robertson, we invited a reply from the claimant in person. The claimant stated that he objected to this document being lodged, as it should have been lodged before the start of the Final Hearing, and there was nothing in the document, produced to the Tribunal, to say that it had been signed, or dated, by Ms Pryde.

95. The claimant then stated that if the respondents wanted to put it in, they could, but he would be noting nothing in it incriminated him in any way, and so he would not be objecting to its lodging. On the basis of no objection by the claimant, the Tribunal then allowed the document to be received late, and added to the Joint Bundle, as document 105.

Tribunal's request for Documents showing the Respondents' Premises

96. In the event, as Mr Friel's evidence did not conclude that afternoon, there was no disruption caused, by the non-availability of the respondents two further witnesses, Ms McAlpine, and Mr Toal. At the close of proceedings on Tuesday, 21 August 2018, the Judge stated that, in resuming evidence the following morning, Wednesday 22 August 2018, it would be of assistance to the Tribunal if the respondents, through Mr Robertson, could arrange for the Tribunal to get some plan, photos or videos, of the claimant's workplace at the respondents' factory in Renfrew.

97. In reply, Mr Robertson advised that he would consider, with Mr Friel, whether he, or another witness for the respondents, could speak in their evidence to the working environment at the respondents' factory in Renfrew. The following morning, Wednesday, 22 August 2018, at the start of proceedings, the Tribunal received, and added to the Joint Bundle, as document 106, site plans A and B, together with a set of colour photographs lodged by the respondents.

98. Mr Friel was then allowed to give further evidence in chief, restricted to those additional plans/photographs, and further cross examination by the claimant, before questions from the Tribunal, but Mr Friel was not re-examined by Mr Robertson on behalf of the respondents.

Close of Evidence

99. Thereafter, evidence was taken, and concluded, from the respondents' two remaining witnesses, being Ms McAlpine, and Mr Toal, both of whom were

examined in chief by Mr Robertson, cross examined by the claimant, and asked questions or clarification by the Tribunal, but neither of whom were re-examined by Mr Robertson, solicitor for the respondents.

100. The evidence for the respondents having concluded, at around 2.35pm, that afternoon, the Tribunal discharged the following day's sitting, on Thursday, 23 August 2018, as being unnecessary, both parties' evidence having been led, and concluded, and the case was continued to the scheduled Hearing on Submissions arranged for Tuesday, 28 August 2018.

Findings in Fact

101. 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 the Tribunal.

102. Mr Robertson, the respondents' solicitor, in his written closing submissions for the Tribunal, at paragraph 50 of his full written submissions, invited the Tribunal to make 12 specific findings in fact, as follows: -

- *The Claimant walked off from his work premises without permission or disclosing to anyone at management that he was doing so.*
- *The Respondent conducted an investigation.*
- *The Respondent took the decision to elevate the matter to a disciplinary hearing.*
- *The Respondent held a disciplinary hearing.*
- *The Respondent allowed the Claimant the right to appeal the decision.*
- *The Claimant attended an appeal hearing on [no date given]*

- *The Claimant has been signed off sick from work since 8 August 2018 (sic).*
- *The Claimant has failed to find alternative employment.*
- *The Claimant has failed to apply for any new employment.*
- *The Claimant has at no stage during his employment invoked the grievance procedure*
- *The Claimant failed to provide any documentation at the disciplinary hearing confirming his medical diagnosis.*
- *The Claimant failed to provide any documentation at the appeal hearing confirming his medical diagnosis.*

103. While we have had regard to Mr Robertson's suggested findings in fact, we have not considered ourselves bound by only them, given their very skeletal nature, and we have had regard to the whole evidence led before us by both parties, and our own findings in fact, in the following paragraph of these Reasons are far more extensive in scope and extent, and often more detailed than Mr Robertson's suggested findings. Further, in our findings in fact below, relevant documents from the Joint Bundle are referenced, in bold, by page number from that Bundle for ease of reference.

104. On the basis of the sworn evidence heard from the various witnesses led before us over the course of this 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: -

Introduction

1. The respondents are a private limited company, engaged in bottling and packing, with two factories, one in Renfrew, where the claimant worked, and another in Dumbarton.

2. According to the respondents' ET3 response, there were 80 people employed at the place where the claimant worked at Renfrew, but from

the evidence we heard, the workforce at Renfrew was 30 to 35 permanent staff, with temporary and agency staff as required.

3. The claimant's employment with the respondents commenced on 21 February 2011, when he was employed as a Team Leader in the respondents' Renfrew factory.

4. The Renfrew factory was managed by Ms Elizabeth, known as Liz, Pryde, the respondents' Operations Manager, but otherwise known as Production Manager, and the responsible Director at that site was Mr James, known as Jim, Friel, who was her line manager.

5. A Team Leader is in charge of an assigned team of workers on a factory line, and the respondents' staff at the Renfrew factory consist of a team of core (or permanent) employees, and agency workers.

6. The respondents had no dedicated HR department, or function, so that almost everything had to go through Liz Pryde, with some admin assistance from the Accounts staff, including Kath Cryans, and Elizabeth Smith, the quality control Team Leader.

<u>Claimant's Terms and Conditions of Employment, Earnings and Benefits</u>

7. A copy of the claimant's contract of employment with the respondents, dated 28 February 2011, was produced to the Tribunal, at pages **51-53** of the Joint Bundle.

8. It was agreed between the parties, in connection with the Tribunal, that the claimant had a normal working week of 40 hours per week, for which he received remuneration from the respondents, at the rate of **£368** per week **gross**, and **£313** per week **net**.

9. While, at section 6.4 of his ET1 claim form, the claimant stated that he was in the respondents' pension scheme, this was neither confirmed nor

denied by the respondents in their ET3 response form, or in evidence before this Tribunal.

10. Similarly, at section 6.5 of the ET1 claim form, the claimant did not indicate that he had received any other benefits from his employer, and the respondents, at section 5.4 of their ET3 response, did not detail any other benefits given to the claimant, and no evidence of any such employment benefits was provided to the Tribunal.

11. It was agreed between the parties that the claimant's employment with the respondents terminated on 1 August 2017, when he was summarily dismissed for gross misconduct, that being the effective date of termination of his employment with the respondents.

12. In terms of the claimant's written statement of employment particulars, copy produced to the Tribunal at pages **51 to 53** of the Joint Bundle, his place of work was the Renfrew factory, and he might be asked to carry out such reasonable duties as the company may from time to time direct.

13. In the event of absence from work, on account of sickness or injury, he was entitled to statutory sick pay ("SSP") in respect of such absences on provision of self-certification and /or medical certificates. There was no enhanced contractual sick pay scheme in operation with the respondents.

14. Further, and again in terms of his written statement of employment particulars, the respondents' disciplinary rules and procedures applicable to him, and his rights of appeal, were stated to be contained in the Company Handbook, which also stated that breaches of the disciplinary rules might render him liable to disciplinary action and, in the case of gross misconduct, to summary dismissal.

15. The procedure to be followed in the event that the claimant had an unresolved grievance was also contained in the Company Handbook.

Respondents' Disciplinary and Grievance Procedures

16. A copy of the respondents' disciplinary and grievance procedures, set forth at parts 2 and 3, respectively, of the Company Handbook, was produced to the Tribunal at pages **54 to 57** of the Joint Bundle.

17. The Grievance Procedure was set out to allow an employee of the company to raise issues with management about their work, or about their employers, clients' or fellow workers actions that affect the employee. The grievance procedure has four stages.

18. Stage 1 (informal) requires an employee to first raise their complaint or grievance informally with their immediate supervisor who will make every effort to resolve the matter in a confidential, friendly and speedy manner.

19. Stage 2 (formal) provides that, if the grievance has not been dealt with to the employee's satisfaction at stage 1, or the employee prefers to put their complaint on a more formal basis, they should write to their supervisor and request a meeting and, if the grievance is against the supervisor, the matter should be raised with their supervisor.

20. In terms of stage 3 (formal), if an employee is not happy with the decision, they should ask for a written decision, together with a copy of their written complaint, to be sent to the next available Manager.

21. Stage 4 (formal) relates to where a grievance cannot be resolved at stage 3, and the employee may raise the grievance in writing with a director of the company who will arrange a hearing to allow the employee to present their case.

22. At no stage during the claimant's employment with the respondents did he invoke the Grievance Procedure, whether informal, or formal.

23. In terms of the respondents' Disciplinary Procedure, the company aims to encourage acceptable conduct, and the Disciplinary Procedure states: - ***"No disciplinary action will be taken until any disciplinary matter is fully investigated. At every stage, you will have an opportunity to hear the case against you, state your case and (with the exception of informal warnings) be accompanied by a fellow employee. Where possible and where appropriate, the Company will make use of informal warnings outwith this disciplinary procedure in an attempt to improve conduct or performance. However, the instigation of the formal disciplinary procedure is at the Company's discretion. Depending on the seriousness of the matter and all the circumstances, any stages outlined below may be omitted."***

24. In the introduction to their Disciplinary Procedure, it is stated as follows***: "It is designed to ensure that you are dealt with fairly and consistently in disciplinary matters. It is a statement of the Company's policy and does not form part of your contract of employment and may be changed at any time by the Company in its absolute discretion. If you act at any time in a manner which, in the opinion of the Company's management, is contrary to normal acceptable standards of conduct, or contrary to the Company's standard terms of employment, the policy and procedure set out below will be followed."***

25. In particular, the respondents' Disciplinary Procedure sets out four stages: - stage 1 (verbal warning); stage 2 (written warning); stage 3 (final written warning); and stage 4 (dismissal), as follows: -

Stage 1 – Verbal Warning

If conduct does not meet acceptable standards, you will be asked to attend a disciplinary hearing and be interviewed by your immediate supervisor or

another member of the management team. You will be told why the interview is necessary and will be allowed to state your case. If appropriate, you will be given an oral warning that continued misconduct may result in further disciplinary action, including, in extreme cases, your dismissal. A note of the warning will be made on your personal file but will be disregarded for disciplinary purposes after 6 months if conduct is satisfactory.

Stage 2 – Written Warning

If the offence is a serious one or if misconduct continues or is repeated or there is a further offence of a different nature, you will be asked to attend a disciplinary hearing. You will be interviewed again and the exact nature of the Company's complaint against you will be explained in full. If the member of management believes it to be justified, you will be given a written warning that if your performance or conduct does not improve during the period stated in the warning you may be dismissed. A copy of this warning will be placed in your personal file but will be disregarded after 6 months if conduct is satisfactory.

Stage 3 – Final Written Warning

If misconduct is sufficiently serious, or if following a written warning, there is further misconduct (whether or not of the same nature) within the period stated, you will be asked to attend a disciplinary hearing and will be interviewed by a member of the management team who will decide on the action to be taken. You may be given a final written warning that will give details of the complaint and that you will be dismissed if there is no satisfactory improvement. A copy of this warning will be placed in your personal file but will be disregarded for disciplinary purposes after 12 months (although in exceptional cases the period may be longer) if conduct is unsatisfactory.

Stage 4 – Dismissal

If your misconduct is sufficiently serious or if conduct is still unsatisfactory following a final written warning and you still fail to reach the required standards, you will normally be dismissed. The decision to dismiss will be taken by a Senior Manager. If you are dismissed, you will be provided, as soon as reasonably practical, with written confirmation of the dismissal. The Company may consider alternative action including (but not limited to) demotion, transfer or suspension without pay.

For the avoidance of doubt, this procedure may also be used if acceptable levels of performance are not achieved.

Disciplinary Hearings

Before any warning is given or disciplinary action or decision to dismiss is taken by the Company, a disciplinary hearing will be held at which you will have every opportunity to comment on the complaints against you. You may be accompanied by another employee of the Company, or a trade union representative if you wish, at all disciplinary interviews. Similarly, the Company will have another person present.

Suspension

You may be suspended from work on full pay while further investigations are made. The suspension will last no longer than the time it will reasonably take management to investigate the facts of the case. Normally, only a senior member of the Company's management may take the decision to suspend you, however there may be occasions where no senior member of management is present and the decision may be taken by the most senior member of management present.

Appeals

You may appeal to the Director of the Company in writing within 2 working days of the dismissal or other disciplinary action against you. The Director

will hear all appeals (usually within 10 working days of receiving your grounds for appeal) and his/her decision will be final. The form of the appeal will be at the discretion of the Director and will depend on the disciplinary penalty that is the subject of the appeal. You may be accompanied by another employee of the Company, or by a trade union representative if you wish, at all Appeal Hearings. An appeal against any disciplinary penalty other than dismissal will usually involve a review of all the relevant documentation including your grounds for appeal and may involve a further hearing. An appeal against dismissal will normally involve a further hearing to be attended by you and by the person who made the decision to dismiss. At the appeal any disciplinary penalty made will be reviewed but it cannot be increased. The outcome of the appeal will be set out in writing as soon as possible after the appeal has been held. Any decision on the appeal will be final.

Gross Misconduct

Gross misconduct includes (but is not limited to):

- *consuming, or being under the influence of, or performance impaired by, drink, drugs or other proscribed substance while on Company premises*
- *serious act of insubordination*
- *refusal to carry out reasonable instructions*
- *unauthorised absence from work or from the Company's premises*

Expunged Written Warning: December 2015

26. There was included within the Joint Bundle, at pages 54 to 63, copy documentation relating to the labelling of "***Old Pulteney bottles***" in October 2015, which had resulted in a disciplinary meeting on 4 December 2015, where the claimant's line manager, Liz Pryde, issued

the claimant with a written warning for a period of six months, to be added to the claimant's personnel file, and kept for future reference.

27. The claimant appealed against that written warning. Following a written appeal to James Friel, the respondents' Operations Director, and following a meeting with the claimant on 14 December 2015, Mr Friel confirmed his decision to uphold the written warning given by Liz Pryde on 4 December 2015.

28. Notwithstanding documentation relating to that expunged written warning remained on the claimant's personnel file, Mr Friel, the respondents' Operations Director advised the Tribunal that that earlier (expunged) written warning had been disregarded for disciplinary purposes when dealing with the matters leading to the claimant's summary dismissal from employment on 1 August 2017.

Incidents of Alleged Harassment on 12 March 2017, and 3 and 24 July 2017

29. As per the claimant's further and better particulars supplied to the Tribunal, on 25 May 2018, he provided further details of his alleged incidents of harassment, which the Tribunal finds, on balance of probability, occurred as the claimant alleges, as follows: -

12/3/2017 – Following a period when I had been struggling with tiredness related to my diabetes, I had requested to be considered for a different task on the Line for a period to allow me some recovery time. I had a meeting with my line manager, Liz Pryde. During this meeting, I advised of the difficulties I was having carrying out my work, and why I was frustrated. My line manager was unhelpful, and started the discussion by stating: "I am f**king sick of you. I'm making it my mission to get you sacked". This act confirmed an impression formed from numerous lesser incidents up to that date that this manager actively disliked me, and purposefully sought to create an

intimidating and hostile environment for me at work. (The other incidents had been occasions where I felt I was singled out for a dressing down in a way other team leaders were not.) The connection with my disability is that this response came as a direct result of me conveying the difficulties I was experiencing at work arising from symptoms of my diabetes (irascibility and tiredness).

3/7/2017 – I had been off sick as suffering from depression (emanating from my diabetes). I returned to work under my line manager, Liz Pryde, and despite having made her aware of my illness (and without discussion or formal return to work interview), I was assigned lone working tasks for the next three days. This felt like I was singled out for punishment for being ill, and I am not aware of this practice ever having been used for other workers returning following absence. The work was no less onerous, and the lack of contact with my colleagues was, I felt, detrimental to my recovery.

24/7/2017 – I returned to work following an absence on the last day of the previous week, again connected to symptoms caused by diabetes. Although absent herself, Liz Pryde had left instruction that I be assigned to a new line of work to supervise. I was assigned a team 75% comprised of new staff, and for whom English was not their first language. I believe, with justification based on prior events, that this was done deliberately to humiliate me, and that my line manager knew that she was setting me up to return under pressure to hostile conditions. I panicked and left. The harassment I experienced directly led to this incident for which I was dismissed.

Claimant's suspension from work

30. In his evidence to the Tribunal, and as foreshadowed in his ET1 claim form, at section 8.2, the claimant stated that, on 24 July 2017, he suffered a panic attack, and left the premises, although he phoned the respondents later that day and apologised for his actions, and agreed to attend before his shift the following day, 25 July 2017. He duly attended work the following day, when he was suspended.

31. On 25 July 2017, upon returning to work, and seeking to start his shift, the claimant was invited to a meeting with Jim Friel, the respondents' Operations Director, when the claimant was advised that he was being suspended from work, on full pay, for alleged gross misconduct, whilst an investigation was carried out into his leaving the factory without informing his manager, the previous day.

32. There was produced to the Tribunal, at pages **64 and 65** of the Joint Bundle, a copy of Mr Friel's letter to the claimant, dated "***25.01.17***", but issued on 25 July 2017, confirming that, following the claimant's meeting that morning with Mr Friel, he was suspended on basic pay whilst an investigation was carried out into the incident where he walked off site on Monday morning, 24 July 2017, without informing his manager.

33. In that notice of suspension, the claimant was informed as follows: -

> ***"You have been suspended for the following reason.***
>
> ***GROSS MISCONDUCT – LEAVING PREMISES WITHOUT AUTHORISED PERMISSION***
>
> ***We reserve the right to change or add to these allegations as appropriate in light of our investigations."***

34. In that letter from Mr Friel, the claimant was advised to note that the decision to suspend him did not constitute disciplinary action and did not

imply that the respondents had made any decision in relation to the matters for which he had been suspended nor did it imply that they had made an assumption that he was guilty of misconduct.

35. The claimant was advised that the respondents would send him a letter stating the time and place of the investigation and he would have the opportunity to explain his actions at an investigation meeting, and that any findings of the investigation might lead to disciplinary actions.

36. There was produced to the Tribunal, at page **85** of the Joint Bundle, a type written, incident report, signed by Mr Friel, but undated, relating to events on 24 and 25 July 2017. It narrated that, on the morning of Monday, 24 July 2017, Elizabeth Smyth, the quality control team leader, was running the production area, because Elizabeth Pryde and Gail McAlpine were on holiday.

37. Mr Friel's incident report further recorded that, on Tuesday morning, 25 July 2017, when he met the claimant at the gatehouse, and took him to the reception area, he told him he was being suspended on full pay whilst their investigation was carried out, and he further stated to the claimant that the findings of the investigation could lead to disciplinary action.

Respondents' investigations

38. On Monday, 24 July 2017, the claimant's line manager, Liz Pryde, was absent from the workplace, on account of being at the start of two weeks' annual leave. In Ms Pryde's absence, Mr Friel, Operations Director, requested Ms Elizabeth Smyth, to obtain statements.

39. There were produced to the Tribunal, at pages **66 to 69**, statements from Joanne Duncan, Kevin Burns, Janet Crawford, and Elizabeth Smyth, taken on or around 25 July 2017 in relation to matters on Monday, 24 July 2017.

Investigation Meeting

40. On 25 July 2017, as per copy letter produced to the Tribunal at page **70** of the Joint Bundle, Mr Friel wrote to the claimant, inviting him to an investigation meeting to be held with Gail McAlpine, on site at Renfrew, on Friday, 28 July 2017 at 10am, to discuss the alleged allegation made against the claimant that he had left the premises without authorised permission.

41. The claimant duly attended that investigation meeting with Ms McAlpine, on Friday 28 July 2017, when he was accompanied by a colleague, Alice Pollock. Ms McAlpine was unaccompanied, but a Kath Cryans, Assistant Accountant, was in attendance, to take the respondents' notes of that investigation meeting. A copy of the respondents' investigation meeting notes was produced to the Tribunal at page **71** of the Joint Bundle.

42. Further, at page **72** of the Joint Bundle, there was produced a typed statement prepared by Ms Cryans, following an adjournment of the investigation meeting, when she typed up and returned for the claimant to read and sign, his responses to Ms McAlpine at that investigation meeting.

43. At that investigation meeting, Ms McAlpine informed the claimant that she thought his actions of leaving site without permission was subject to disciplinary, and he was invited to attend a Disciplinary Meeting on Tuesday, 1 August 2017, with Jim Friel, and that a letter would be sent to him confirming this disciplinary meeting.

Disciplinary Meeting

44. By letter dated 28 July 2017, a copy of which was produced to the Tribunal at page **73** of the Joint Bundle, Mr Friel wrote to the claimant, inviting him to attend a Disciplinary Meeting on Tuesday, 1 August 2017,

in the conference room at Renfrew, to discuss the investigation by Ms McAlpine into him leaving site on Monday 24 July 2017 without informing his immediate supervisors.

45. The claimant was advised that he might be accompanied, if he wished, by a fellow worker, and that Mr Friel would be accompanied by a company representative who would ensure that the correct procedures were adhered to and, depending on the outcome of this meeting, the claimant was further advised that disciplinary action may occur which could lead to dismissal.

46. The claimant duly attended that Disciplinary Meeting with Mr Friel, on 1 August 2017, at which he was accompanied by Alice Pollock. Mr Friel was accompanied by Kath Cryans, who took notes of the Disciplinary Meeting, a copy of which were produced to the Tribunal at pages **74 and 75** of the Joint Bundle.

47. Having heard from the claimant, and without the need for any adjournment, to consider matters, Mr Friel advised the claimant, verbally, that he was being dismissed for gross misconduct, and that a letter would follow confirming his dismissal, and that the claimant had a right of appeal to Ed Graham, whom failing Michael Toal, Directors of the respondents.

48. Thereafter, by letter to the claimant, dated 1 August 2017, a copy of which was produced to the Tribunal at page **76** of the Joint Bundle, Mr Friel wrote as follows: -

"Following our Disciplinary Meeting this morning I write to confirm that you have been dismissed from employment with HBCP with immediate effect for the following reasons:

1. ***Serious act of insubordination (leaving site without the permission of your immediate Supervisor).***

2. Refusal to carry out reasonable instructions.

This act was carried out on Monday 24th July 2017.

Under company regulations in the company handbook, this act constitutes Gross Misconduct.

Any monies due to you will be forwarded as soon as is possible.

I would remind you of your right to appeal against this decision which must be forwarded to Mr Ed Graham in writing within 2 working days."

Claimant's internal appeal against the dismissal

49. By handwritten letter, dated 3 August 2017, the claimant submitted an internal appeal against dismissal to Mr Graham, the respondents' Managing Director.

50. A copy of that letter of appeal was produced to the Tribunal at page **77** of the Joint Bundle, reads as follows:

"***Further to my disciplinary hearing on the 1st August 2017, I would like to lodge an appeal against my dismissal. I feel the decision was unfair as my health issues have not been taken into consideration and previously I was warned by Liz Pryde that, in her words "I am fuckin sick of you, I am going to make it my mission to make sure you get sacked." I look forward to hearing from you regarding this matter."***

51. By letter to the claimant, dated 7 August 2017, a copy of which was produced to the Tribunal at page **78** of the Joint Bundle, Kath Cryans

acknowledged his appeal letter, and confirmed that his appeal would be heard as soon as possible.

52. By further letter to the claimant, dated 9 August 2017, from Ms Cryans, a copy of which was produced to the Tribunal at page **79** of the Joint Bundle, the claimant was advised that his appeal had been arranged for Tuesday, 15 August 2017, at the Renfrew site, and that his appeal would be heard by Michael Toal, and the claimant was further advised that he had a right, if he so wished, to be accompanied by another work colleague.

Appeal Meeting

53. The claimant duly attended his appeal meeting with Mr Toal on Tuesday, 15 August 2017. The claimant was again accompanied by Alice Pollock, as at previous meetings. Mr Toal was accompanied by Kath Cryans, who took the respondents' notes of that appeal meeting, and a copy of which were produced to the Tribunal at pages **80 and 81** of the Joint Bundle.

54. Jim Friel, the respondents' Operations Director, who had dismissed the claimant from the respondents' employment, was not in attendance at the appeal meeting, contrary to the procedure set forth in the Company Handbook.

55. As per the signature page, produced to the Tribunal at page **82** of the Joint Bundle, Kath Cryans' notes of that appeal meeting were signed by each of Mr Toal, Ms Cryans, and Alice Pollock, on 18 August 2017, and stating that they each confirmed their agreement with the record of the appeal meeting. They were not signed as an agreed record by the claimant.

Outcome of Appeal Meeting

56. At the conclusion of the appeal meeting, on 15 August 2017, and without the need for any adjournment, Mr Toal advised the claimant that he agreed and upheld the decision made by Mr Friel regarding the claimant's dismissal, and that a letter would be sent to the claimant confirming his decision, which was final.

57. A copy of the respondents' outcome letter to the claimant, dated 18 August 2017, from Mr Toal, was produced to the Tribunal at pages **83 and 84** of the Joint Bundle.

58. In that appeal outcome letter, Mr Toal advised the claimant as follows: -

> ***"At the hearing, you informed us that:***
>
> ***1. You feel the decision to dismiss you was unfair as your health issues were not being taken into consideration.***
>
> ***2. And that on a previous occasion you were warned by the Operations Manager that she was going to make it her mission to make sure you got sacked.***
>
> ***After considering the facts and considering the above, my findings are as follows: -***
>
> ***1. We received no informal or formal notification of any underlying health issues, either previously or on the day in question.***
>
> ***(a) You also didn't take the opportunity to discuss anything with your immediate supervisor or another member off (sic) staff before leaving site.***

2. We have received no informal or formal notification of a grievance as stated in the company handbook.

(a) Elizabeth Pryde was in the middle of two weeks' annual leave and played no part in the investigation, disciplinary or dismissal.

Therefore, the decision made at your disciplinary hearing on 1st August to dismiss you by Jim Friel is upheld.

The decision of this appeal hearing is final and there is no further right of appeal."

59. In forwarding that letter to the claimant, accompanied by a copy of the appeal meeting notes, the claimant was requested to return one copy, in an enclosed stamped addressed envelope, confirming that he had received Mr Toal's letter and that he had read and understood its contents.

60. The claimant was also asked to sign and date after reading, the respondents appeal meeting notes, confirming his agreement with that record of the appeal meeting. The claimant did not return a signed copy of the notes of that appeal hearing.

Claimant's medical conditions / disability

61. There was produced to the Tribunal, at pages **92 to 97**, a letter dated 22 November 2017 from Dr Brandon, the claimant's GP, regarding the claimant's depression, and also letters of 30 November and 1 December 2017, from Dr Christopher Smith, consultant physician at the Royal Alexandra Hospital, Paisley, concerning the claimant's clinical summary, and his diabetes.

62. This medical documentation relating to the claimant all post-dated his summary dismissal, and rejection of his internal appeal, against dismissal, by Mr Friel, and Mr Toal.

63. In the course of the investigation, disciplinary and appeal meetings, the claimant raised issues relating to his medical conditions of depression, and diabetes. He was not asked by the respondents to produce any medical information, or vouching.

64. In any event, from evidence heard by the Tribunal, following the claimant being diagnosed with depression by his GP, on 26 June 2017, and put on medication, namely the anti-depressant, Citalopram, the claimant telephoned and advised his line manager, Liz Pryde, of this fact.

65. Further, and in any event, the claimant, as a known diabetic, injected himself, on the respondents' premises, during working hours, and kept his insulin in a fridge in Ms Pryde's office.

66. As such, the Tribunal is satisfied that the respondents were aware, without any formal medical certification from the claimant, or those engaged in his clinical care, that the claimant suffered from diabetes, and the respondents were aware, or at least ought to have been aware, of the medical conditions, including depression, affecting the claimant prior to the incident on 24 July 2017 leading to his summary dismissal from the respondents' employment on 1 August 2017.

Claimant's Schedule of Loss

67. For the purposes of this Final Hearing, the claimant produced a schedule of loss, on 15 June 2018, in the following terms:-

SCHEDULE OF LOSS (as at 14/06/2018)

UNFAIR DISMISSAL

BASIC AWARD

Effective Date of Termination (EDT)	*01/08/17*
Age at EDT	*41*
Number of years' service at EDT	*6*
Statutory week's pay	*£368.00*
6 weeks x £368.00 per week	*£ 2,208*

COMPENSATORY AWARD

I am still seeking work but have been unable to find a permanent job.

PAST LOSSES

Loss of earnings

Net pay: £1,594.67 per month
Length of time out of work out of work: 45 weeks

TOTAL £16,560

LESS income received

26 weeks of JSA + 13 weeks of assessment phase of ESA = 39 weeks.
39 weeks x £73.10= £2850.9

TOTAL £13,709.1

FUTURE LOSSES

I have an ongoing loss of £1,594.67 per month. This consists of my net loss of earnings. I estimate that this loss will continue for a period of 7 weeks. Although I am a skilled worker, the local job market is difficult. Additionally, as I was sacked for gross misconduct, I submit it is likely to take me longer to find work than the average worker.

TOTAL FUTURE LOSS (7 weeks x £368) £2,576.00

LOSS OF SATUTORY (sic) *RIGHTS*

I will have to work two years to regain protection from unfair dismissal and I submit it would be appropriate to award one week's pay at £368 to reflect my loss of statutory rights.

In addition to this, (as per Daley v Dorsett (Almar Dolls) [1981] IRLR 385, EAT. And Arthur Guinness Son & Co v Green [1989] IRLR 288, EAT.), as I have built up statutory minimum notice pay I can also claim for the fact that I will have to start again in a new job. This award is valued at half of my statutory notice pay of 3 weeks which comes to £939 to reflect my loss of statutory rights.

TOTAL £1,307.00

TOTAL COMPENSATORY AWARD £17,592.1.

DISABILITY DISCRIMINATION

(S15) COMPENSATION FOR A DISCRIMINATION CLAIM ARISING FROM A DISABILITY

PECUNIARY LOSS

As per unfair dismissal losses if the award is made under discrimination, as figure above: £17,592.1.

INJURY TO FEELINGS

My unfair dismissal was as a direct result of a panic attack suffered in consequence to my disability (diabetes) and it's affect on my mental health.
I therefore believe I am entitled to compensation for injury to feelings.

TOTAL SOUGHT £12,000.

(S20) FAILURE TO MAKE REASONABLE ADJUSTMENTS

Should it not be found that there is to be an award related to the discrimination arising from disability aspect of the case then I believe I should be entitled to compensation for injury to feelings for the failure of my employer to make reasonable adjustments in the workplace.

TOTAL SOUGHT £8,000.

S28(6) HARASSMENT

Should you not find that there should be an award either under Sections 15 or 20 of the Equality Act case then I believe I should be entitled to compensation for injury of feelings related to the harassment suffered.

TOTAL SOUGHT £5,000

Respondents' Counter Schedule

68. The respondents, on 20 August 2018, responded to the claimant's Schedule of Loss, with their comments, in terms of the type written Counter-Schedule produced by Mr Robertson to the Tribunal on that date, a copy of which was added to the Joint Bundle, at pages **102 and 103.**

Mitigation Evidence

69. Further, and in terms of the Tribunal's case management order, dated 20 August 2018, on 21 August 2018, the claimant produced, and the Tribunal allowed to be added to the Joint Bundle, as document **104**, the claimant's mitigation evidence, as follows: -

a) In his handwritten statement, dated 20 August 2018, copy produced to the Tribunal at page **104/1**, the claimant stated as follows: -

> ***"In the past year since my dismissal from Houston Bottling And Co-Pack, I have been unable to find work as my GP signed me off as unfit for work due to my depression. My GP has stated at a previous appointment that he feels I am not able to control my blood sugar levels properly or to a sufficient level to send me back to work while I am still going through the tribunal. I have provided all documents available to me at this time with regards to my receival of benefits to this point. Due to my ongoing depression and anxiety, I have been unable to make efforts to minimise my loss. I have also been dealing with the sudden death of my sister which has also been a factor in relation to my depression."***

b) Attached to that handwritten statement from the claimant, he produced the following documents: copy Med 3 statements of

fitness for work from his GP, dated 14 and 29 May 2018, and 12 July 2018, certifying that because of depression, the clamant is unfit to work; correspondence from Jobcentre Plus, relating to the claimant's claims for Employment and Support Allowance, from 26 May 2018, at the rate of £73.10 a week; correspondence from the HM Courts and Tribunal Service, First Tier Tribunal (Social Entitlement Chamber), concerning the claimant's appeal against a decision made by the Secretary of State on 15 November 2017 regarding his Employment and Support Allowance; and correspondence from Clydebank Benefit Centre concerning his claim for Jobseeker's Allowance.

c) As at the date of this Final Hearing, the claimant was unemployed, and in receipt of State benefits through ESA. The claimant advised the Tribunal that, while currently signed off as unfit to work, still suffering from depression, he aimed to get a job, and his life back into some semblance of order, after this whole Tribunal process is finished.

d) In his evidence to the Tribunal, under cross-examination, the claimant stated that if he had remained in the respondents' employment, he would have been unable to work. He described losing his job as having sent him into a "***deep depression***", and he advised us that he struggled to even get out of bed, seeing no point to doing so.

e) In her evidence to the Tribunal, the claimant's wife stated that her husband, a type 1 diabetic for some 4 years, takes insulin 4 times per day, and, when employed by the respondents, he had had to use holidays for medical appointments.

f) Speaking of 24 July 2017, she spoke of the claimant walking out of work, and coming home, in a state, clearly visibly upset, and she described it as a process having built up over the previous weeks.

g) She spoke of calming him down, and telling him to phone his work, and apologise, as his behaviour had been unacceptable in walking off, and she thought that he had had a panic attack.

h) During the respondents' internal proceedings, from suspension to appeal, she spoke of the claimant really struggling, as it was a shock to him not to be listened to, and them not giving him a chance. While he was referring to mitigating circumstances, she felt the respondents saw it as the claimant making an excuse.

i) Life at home, over the last year, has been "***awful",*** according to the claimant's wife, the family having been threatened with eviction, and while the claimant is unemployed, they were all relying on her own job to make ends meet.

j) She also spoke of the claimant having "***lost his manhood***", and his ability to support them, and spoke of how he suffers anxiety, and how he is now only one-half of the man he was, describing him as "***totally broke***".

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

105. 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 Joint Bundle of Documents lodged and used at this Final Hearing, which evidence and our assessment we now set out in the following sub paragraphs: -

(1) Mr Peter Docherty: Claimant

(a) The claimant was the first witness to be heard by the Tribunal. Aged 42, and with six years' service with the respondents, we

heard his evidence on the first day, continued to the second day, being Monday and Tuesday, 20 and 21 August 2018.

(b) His evidence in chief was elicited by structured and focused questions asked by the Employment Judge. This was a process agreed by both the claimant, and Mr Robertson for the respondents, and the claimant was given an opportunity to add anything further that he felt was relevant to his case, before proceeding to cross examination by Mr Robertson.

(c) In taking the claimant's evidence in chief, the Employment Judge made it clear that he was not acting as the claimant's representative, nor advising him, simply seeking to ensure, in terms of **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, being the Tribunal's overriding objective that cases should be dealt with fairly and justly, that parties were on an equal footing, and that it was for the claimant himself to flag up to the Tribunal all and any issues that he felt were relevant to his claim.

(d) In giving his evidence in chief, the claimant did so in a straightforward, matter of fact way, replying to questions asked of him by the presiding Employment Judge, and referring us, from time to time, to various documents included in the Joint Bundle of Documents lodged with the Tribunal for use at this Final Hearing.

(e) The claimant came across, in giving his evidence in chief, as comfortable in recalling events related to his claim before the Tribunal and, when cross examined by the respondents' solicitor, Mr Robertson, the claimant's evidence remained consistent with what he had previously stated to the Tribunal in his evidence in chief.

(f) The claimant stood up well to cross examination, and freely admitted shortcomings on his part, for example, him not raising a formal grievance with his employers, and him accepting that

he went absent without leave on Monday, 24 July 2017, but he was equally clear and unequivocal that the respondents, in dealing with his disciplinary and appeal hearings, had not considered the mitigating circumstances relating to that day.

(g) We felt the claimant was a credible and reliable witness, who gave a consistent recollection of events, and there was no conflict between his evidence in chief, and answers in cross examination, or in reply to questions of clarification from the Tribunal, and certainly no confusion on his part as to events leading to his dismissal from the respondents' employment, and his employment with them more generally.

(h) It was of note, we felt, that in Mr Robertson's written closing submissions for the respondents, at paragraph 48 of the full submissions, Mr Robertson had stated that, whilst he accepted the claimant was credible on the whole, he referred to the claimant's evidence being "***clearly framed to suit his claim"***, and Mr Robertson wished to remind the Tribunal that the claimant accepted that, from his point of view, a reasonable procedure was followed by the respondents.

(i) While the respondents' solicitor founded upon the claimant's acceptance of a reasonable procedure being followed, that acceptance needs to be qualified by Mr Robertson's use of the words "***from his point of view***", which must be seen in the context of the claimant's knowledge at the relevant time and prior to the respondents' witnesses being led before the Tribunal, cross examined by him, and questioned by the Tribunal as regards clarification of their evidence to the Tribunal.

(j) Further, it was of particular note to us that, in giving his evidence to the Tribunal, and in answering questions raised of him during cross examination by Mr Robertson, there was no sign of any exaggeration by the claimant.

(k) His evidence was consistent with the facts as set forth in his ET1 claim form, and his further and better particulars, and while the claimant clearly sees his diabetes and depression being linked, he accepted that Employment Judge Kearns's Judgment was to the effect that only his diabetes was proven, at the "disability status" Preliminary Hearing, as being a disability within the meaning of **Section 6 of the Equality Act 2010.**

(2) Mrs Janet Crawford: Respondents' Team Leader

(a) Mrs Crawford was the first of two witnesses led on the claimant's behalf. Aged 55, we heard from her on the morning of the second day of the Final Hearing, Tuesday, 21 August 2018, when, in giving her evidence in chief, she spoke in response to questions asked of her by the claimant himself.

(b) In giving her evidence in chief to the Tribunal, Mrs Crawford identified herself as being a team leader, and the first aider at the respondents' Renfrew factory, with eight years' service with the respondents. She spoke of currently being off on sick leave from the respondents, for work related stress, and, in giving her evidence, her demeanour was such that she was in a distressed state.

(c) Despite an opportunity offered by the presiding Employment Judge, for an adjournment, for her to compose herself, she declined that invitation, and insisted on proceeding to give her evidence in chief to the Tribunal, without interruption.

(d) Generally, we found Mrs Crawford to be a poor soul, clearly very emotional, but notwithstanding what she referred to as "***witness intimidation***" by her line manager, Liz Pryde, one of the respondent's proposed witnesses at this Final Hearing,

Mrs Crawford came to give her evidence on the claimant's behalf, and that without the necessity of any Witness Order.

(e) Notwithstanding her allegation of witness intimidation by Ms Pryde, Mrs Crawford appeared at the Tribunal, and gave evidence on the claimant's behalf. Generally, we found her to be a credible witness, but there were some questions over the reliability of parts of her evidence, in relation to what had happened, and who was on the line on the material date of 24 July 2017.

(f) In giving evidence, and in making the accusation of witness intimidation against Liz Pryde, we bore in mind that Mrs Crawford not only came along voluntarily to give evidence on the claimant's behalf, in what was clearly a very difficult situation for her, where she was clearly at the end of her tether, and looking to the Tribunal, very much as a ***"cri de coeur"***, to allow the respondents to be informed and to take some action against Ms Pryde, whom the witness described as "***uncontrollable***", and who described Liz Pryde's behaviour as "***ridiculous***". We took her evidence at face value, as we did not have the benefit of hearing directly from Liz Pryde in reply, as ultimately she was not led as a witness for the respondents.

(g) While Jim Friel, the respondents' Operations Director at Renfrew, was not present during Mrs Crawford's evidence to the Tribunal, (nor, for the other witnesses for the claimant), we pause here to note and record that Mrs Crawford gave her evidence, on oath, in a public Hearing, and she did so without flinching, and without showing any ***animus*** towards the respondents, as her employer, although she was clearly critical of Ms Pryde.

(h) Mrs Crawford's evidence was of assistance to the Tribunal in being from a work colleague of the claimant, who was in a

position to speak, from first-hand experience, of working conditions in the Renfrew factory, and of the arrangements made for the claimant's diabetes, and his insulin, while at work.

(i) Her evidence in that regard was of particular assistance to the Tribunal as, in the respondents' evidence, frequent reference was made to the fact that there was no "***official"*** knowledge of the claimant's diabetes, or depression, although, from the evidence we heard at this Final Hearing, it is clear to us that there was actual knowledge of the claimant's colleagues, peers, and line management, at Renfrew, notwithstanding the position adopted in evidence before us by both Mr Friel, and thereafter Mr Toal.

(3) <u>Mrs Catherine Docherty: Claimant's Wife</u>

(a) Mrs Docherty was the second, and final witness, led on the claimant's behalf. Again, as with Mrs Crawford, immediately before her, she was asked questions, in evidence in chief, by her husband, as the claimant.

(b) Aged 38, she gave her evidence on the morning of the second day of the Final Hearing, Tuesday 21 August 2018, when she advised the Tribunal that she is a full-time carer employed by Renfrewshire Council (in respect of whom a Witness Order had previously been granted by Employment Judge Kearns).

(c) While married to the claimant for some six years, she advised us that they had a twenty-two-year relationship together, and she was able to speak from first hand, personal knowledge, of the claimant, his employment, and issues arising from his employment, and how they had impacted on him, her, and the wider family.

(d) We found Mrs Docherty to be a wholly credible and reliable witness. She spoke with confidence about the impact of the claimant's workplace on his health, and how his treatment at work, in particular from Liz Pryde, his line manager, had affected the claimant.

(e) Mrs Docherty was not cross examined at all by Mr Robertson, the respondents' solicitor. His oral submissions on her evidence (which we narrate later in the Reasons) were ill founded, and they are rejected by us.

(f) There was nothing whatsoever to suggest that this witness, giving evidence on oath, was doing anything but telling the truth of matters directly within her own knowledge, or as relayed to her by her husband.

(g) Of all the witnesses heard at this Final Hearing, Mrs Docherty was the most impressive, who spoke, with confidence, and a genuine evident care and compassion for her husband, his difficulties, and the impact on her, and the wider family.

(4) <u>Mr James Friel: Respondents' Operations Director, Renfrew (Dismissing Manager)</u>

(a) The respondents' first witness led before the Tribunal was Mr Friel, aged 64, and with twenty-two years' service with the respondents. He gave his evidence to the Tribunal on the second day, Tuesday 21 August 2018, and continued until the morning of the next day, Wednesday 22 August 2018.

(b) In giving his evidence in chief, Mr Friel spoke to his own personal involvement in the claimant's case, including attendance at the disciplinary hearing with him, and in doing so, he did so under reference to the relevant contemporary documents included in the Joint Bundle of Documents lodged

with the Tribunal for use at this Final Hearing. He was cross examined by the claimant, and asked questions of clarification by the Tribunal.

(c) Generally, we found Mr Friel to be a shifty witness. We did not consider him to be credible or reliable and, where there was a dispute in fact between his recollection, and that of the claimant, we preferred that of the claimant, which, on balance of probability, was more likely, and which had the ring of truth to it.

(d) By way of example, in giving evidence, Mr Friel referred to the claimant's medication, when he did not need to do so, in the context of him raising, on his own initiative, a third possible ground for dismissal of the claimant, namely the claimant consuming or being under the influence of, or performance impaired by drugs, for his diabetes, but not one of the two grounds expressed in the letter of dismissal, that led to the Tribunal having a real and significant issue as to Mr Friel's general credibility and reliability.

(e) It also led to an immediate verbal reaction from the claimant's son, who was in the Hearing room, shouting at the witness and leaving the Hearing, clearly upset by the unexpected accusation being made there and then against his father.

(f) It seemed to us, in light of the way that the evidence was developing, Mr Friel sought to raise matters which, from his perspective, he perhaps felt assisted the respondents defence to these proceedings, but, from the whole evidence we heard, we are satisfied that he set up a very cursory investigation, to pull together some statements, and he decided to go to a disciplinary hearing, without any investigating officer's report from Ms McAlpine, whom we were advised was the investigating manager in this case. At best, we felt that she

was a collator of written statements, rather than an investigator.

(g) Given his position as Operations Director at Renfrew, the Tribunal had an expectation that Mr Friel would be able to speak with some degree of authority, and certainty, as to the number of employees there, the working practices, etc, and his knowledge of the claimant, as an employee of several years standing.

(h) We found it strange that with a sufficiently small number of employees, Mr Friel insisted that there was no "official" notification of the claimant's diabetes, notwithstanding the claimant's, and other evidence we heard, that the claimant was diabetic, and that he used the office fridge to store his insulin, which he injected while at work, yet Mr Friel continued to reiterate a position where he stated he did not officially know of the claimant's diabetes.

(i) His evidence in that regard was both disingenuous, and unbelievable, given the evidence we heard, and accepted, that the claimant's diabetes was common knowledge in the Renfrew factory among his work colleagues, peers, supervisors and management.

(j) While Mr Friel was clear of what he had done, in relation to the claimant's disciplinary hearing, he insisted that he only knew of the claimant's disabilities after his employment with the respondents had ended, and these Tribunal proceedings were instituted, proceeding to the disability status Preliminary Hearing before Employment Judge Kearns.

(k) We do not accept that his evidence in that regard is either credible, or reliable. We are of the view that Mr Friel had a case of selective memory here, and that he did not recall

knowledge of the claimant's disability because it was not in his view in the company's interests for him to make such an acknowledgement.

(l) His oft repeated reference to "***we didn't officially know***" suggests to us that he did know, and that while it was not in the claimant's personnel file, it was common knowledge to other staff and managers at Renfrew, including, we are sure, him too.

(m) Given the evidence which we have accepted from the claimant, about what he told Mr Friel about his mitigating circumstances, it is strange, to say the least, that Mr Friel did not at least ask the claimant, or his line manager, Liz Pryde, for information about the claimant's absence record, but nothing in Mr Friel's evidence to us suggests that he ever saw that, if it existed in the personnel file, nor requested it, and he certainly instituted no inquiry into the claimant's mitigating circumstances.

(n) By carrying on regardless of the mitigating circumstances put forward by the claimant, that reinforces our view that Mr Friel had a pre-determined outcome here, to dismiss the claimant from the respondents' employment, as Mr Friel did not stop for reflection by adjourning the disciplinary hearing, before reconvening, and giving his oral decision about summary dismissal.

(o) Nor did he call for any further information from the claimant, or another manager, with more familiar knowledge of the claimant's working conditions, and his medical conditions in particular, and how they were being accommodated while he was at work.

(p) The obvious person to make such further enquiries would have been Ms Pryde. Although, as we understand it, she was on two weeks' annual leave, we were advised, by Ms McAlpine, that Ms Pryde was not away on holiday, but at home.

(q) It seems to us that it would have been reasonable, in all the circumstances, for either Mr Friel to have adjourned the disciplinary meeting, and reconvened it, after making appropriate enquiry of Ms Pryde, during her holiday, or on her return, but he did neither. In that regard, we do not believe that the respondents, acting through Mr Friel, acted as a reasonable employer would have done.

(r) Instead, Mr Friel, there and then, summarily dismissed the claimant for alleged gross misconduct. Further, his letter of dismissal founds upon two matters, when the claimant was only invited to the disciplinary hearing on one allegation.

(s) Finally, while Mr Friel says he considered alternatives to summary dismissal, there is nothing in the notes of the disciplinary hearing taken by the respondents, nor in the dismissal letter issued by Mr Friel to the claimant, to state that he had considered any alternative disposals.

(t) That is significant, in our view, and reinforces why we do not believe him that he considered alternatives, as there was no time for him to reflect, proceeding straight from hearing the claimant, into delivering his oral outcome. Instead, Mr Friel proceeded to his decision forthwith, thus leading us to believe, and hold, that his decision to summarily dismiss the claimant was indeed predetermined, and outwith the band of reasonable responses of the reasonable employer.

(5) <u>Miss Gail McAlpine: Respondents' Customer Services Manager (Investigations Manager)</u>

(a) In giving her evidence to the Tribunal, she was questioned by Mr Robertson, the respondents' solicitor, and asked questions of clarification by the Tribunal. In doing so, she referred, from time to time, to some of the documents in the Joint Bundle of Documents lodged with the Tribunal for use at this Final Hearing.

(b) Of particular note, we record that Miss McAlpine told us that she had never before done any investigation into a disciplinary matter, and further, she advised that she had been given no guidance about her role as investigation manager by Mr Friel, the respondents' Operations Director at Renfrew.

(c) The claimant described this witness as "***a victim***", and he stated that he had no questions for her in cross examination. Mr Robertson, the respondents' solicitor, at paragraph 46 of his full written submissions, refers to Miss McAlpine having given her evidence "***to the best of her recollection. She explained coherently the process she followed and how she arrived at her decision."***

(d) We cannot accept that is an appropriate description of her evidence to this Tribunal. She had very poor recollection of events, she was very evasive in giving her evidence, and she was also inconsistent in her evidence in chief, and in her answers in clarification to the Tribunal, about when and how she obtained a statement from Liz Pryde.

(e) That, of course, was the statement, which we allowed to be added to the Joint Bundle, late, on 21 August 2018, at page 105, following its production during the course of Mr Friel's evidence to the Tribunal.

(f) We recognise that Miss McAlpine was in a difficult place, given her ongoing employment with the respondents, but in giving evidence on oath, we felt she was toeing the respondents' party line, and not saying anything that she thought might cause difficulty to the respondents as her employer.

(g) By adopting that approach, she did no credit to herself, and we find her evidence to be woeful, and she was not a credible or reliable witness.

(h) While the claimant, in his oral closing submissions to the Tribunal, referred to her stuttering and stammering, and laughing, we consider that was more due to her nerves in appearing, and giving evidence before the Tribunal, and we did not attribute her demeanour in that regard to anything else.

(i) In particular, we did not regard her as being untruthful, or dishonest, but her evidence did not generally assist the Tribunal.

(6) <u>Mr Michael Toal: Respondents' Operations Director, Dumbarton (Appeals Manager)</u>

(a) The final witness, led on the respondents' behalf, was Mr Toal, the Operations Director at the respondents' Dumbarton factory. Aged 48, and with twenty years' service with the respondents, we heard his evidence on the afternoon of the third day of the Final Hearing, Wednesday 22 August 2018.

(b) In giving his evidence in chief, Mr Toal did so in reply to questions asked by the respondents' solicitor, Mr Robertson, followed by cross examination from the claimant, and questions of clarification from the Tribunal. In doing so, and as with other witnesses, he referred, from time to time, to some

of the documents included in the Joint Bundle of Documents lodged for use by the Tribunal at this Final Hearing.

(c) While Mr Toal insisted that he did not speak to Liz Pryde, in connection with his consideration of the claimant's internal appeal against dismissal, we conclude, on the evidence available to us, that he must have done so, and that is evident from the respondents own notes of the appeal hearing, and that he did not want to get involved with any issues relating to Liz Pryde, as he referred to that being a "***grievance",*** and he insisted that he was only there at the appeal as "***an impartial party".***

(d) While Mr Toal told us that he was familiar with the disciplinary and appeal procedures, in the company's own Handbook, and with the ACAS Code of Practice on Discipline and Grievance, we did not believe his evidence in that regard, because, on the evidence we have found established at this Final Hearing, he was ignorant in putting those procedures and codes into practice, even if he had read them, which we doubt.

(e) While the claimant did not bring to Mr Toal's attention any procedural failings, in the earlier investigation and disciplinary hearing stages of his case, the Tribunal finds that, as an independent and objective appeal hearer, Mr Toal should, on his own initiative, have identified from the papers before him, which he advised us he had pre-read, and from what the claimant said at the appeal hearing, and in his appeal letter, which again he said he had pre-read, that there were matters the claimant had been saying consistently at the investigatory meeting, and disciplinary meeting, that there were issues to consider as regards mitigating circumstances, and the conduct of Liz Pryde.

(f) Overall, in giving his evidence to the Tribunal, we found Mr Toal to be a cavalier and arrogant witness. It appeared to us, from his demeanour when giving evidence, that he resented being asked questions in cross examination by the claimant, or clarification from the Tribunal, and whether that was arrogance, or disrespect to the Tribunal, or he was genuinely peeved that he had to come along to this Tribunal and explain why he had upheld Mr Friel's decision to dismiss the claimant, we did not find Mr Toal to be a credible or reliable witness.

(g) At best, from the evidence we have accepted at this Final Hearing, he was doing no more than going through the motions, and he did not provide to the claimant a fair and impartial appeal hearing.

(h) He simply, without any time for reflection, or adjournment to reflect, "***rubberstamped"*** the decision taken by his counterpart at Renfrew, Mr Friel. In that regard, we do not believe that the respondents, acting through Mr Toal, at the appeal stage, acted as a reasonable employer would have done.

(7) <u>Witnesses not called by Parties</u>

(a) Mr Robertson, the respondents' solicitor, advised the Tribunal, at the start of this Final Hearing, that the respondents were not leading any of the three witnesses previously identified by them, namely Joanne Duncan, Janet Crawford, or Kevin Burns, who previously they had intimated were going to speak to witnessing the claimant's behaviour on 24 July 2017, the day of the incident leading to his summary dismissal by the respondents.

(b) The claimant advised the Tribunal, at the start of this Final Hearing, that he was not leading evidence from David

Simpson, who he had previously advised Employment Judge Doherty, at the Case Management Preliminary Hearing on 1 June 2018, would be led as a witness on his behalf to speak to the claimant's treatment at work.

(c) The claimant similarly advised us, at the start of this Final Hearing, that he was going to lead, and he did lead, evidence from Mrs Crawford.

(d) At an earlier stage of the proceedings, in December 2017, the claimant, in a date listings stencil, had intimated that he intended to lead evidence from an Angela MacDonald, described as a colleague with long term illness, who was to attend and speak to the respondents' management practices, and lack of support, but she too was not led on the claimant's behalf at this Final Hearing.

(e) At the start of this Final Hearing, the claimant advised the Tribunal that he was not leading evidence from Alice Pollock, whom he advised was too unwell to attend. We heard later, in evidence from Janet Crawford, a witness called by the claimant, that Mrs Pollock was in hospital.

(f) We note and record here that the claimant made no application for us to postpone this Final Hearing, to allow Mrs Pollock's evidence to be taken, at a later date, or for her to provide a written witness statement in lieu of oral evidence.

(g) As it turns out, we do not consider that the claimant was prejudiced by not having Mrs Pollock's evidence as it was not in dispute that she was his companion at various meetings held with the respondents, and her involvement in those meetings is reflected in the respondents' notes of those meetings, as produced to us at this Final Hearing in the Joint Bundle of Documents.

(h) Of far greater significance to the Tribunal was the fact that the respondents did not lead any evidence from Ms Liz Pryde, their Operations Manager at Renfrew, and the claimant's line manager.

(i) After she was alleged to have intimidated the claimant's witness, Miss Janet Crawford, Mr Robertson, the respondents' solicitor, first of all told the Tribunal that Ms Pryde would still be being led for the respondents but, after a further adjournment and his discussion with Mr Friel, we were later on advised that Ms Pryde was not being led on the respondents' behalf.

(j) It was clear to us that Ms Pryde is a central figure in this case, and her absence as a witness for the respondents was unfortunate, in the sense that we did not get the opportunity to hear directly from her, either in relation to the claimant's employment generally, her knowledge of the claimant's medical conditions, and how it affected his work, matters which the respondents' previous representative, Mr McCusker, had specifically advised the Tribunal Ms Pryde would speak to in evidence.

(k) Further, her absence as a witness for the respondents meant, in fairness to her, she was not in a position to respond, in person, to the allegations of harassment made by the claimant, identifying her as the alleged perpetrator. Further, her position was not explained to us, in writing, as the respondents never provided any written reply to the claimant's further and better particulars, despite being ordered to do so by Employment Judge Doherty.

(l) Also, while Miss Janet Crawford made allegations of witness intimidation against Liz Pryde, we pause here to note and record that they were allegations of witness intimidation.

(m) Mr Robertson, solicitor for the respondents, did not seek to cross examine Mrs Crawford on her evidence on that regard, although he did cross examine her on other aspects of her evidence in chief.

(n) In closing submissions to the Tribunal, Mr Robertson explained that was because the statement cited by the claimant, allegedly made by Liz Pryde, was not linked to the claimant's diabetes, and therefore there was not a valid complaint of harassment before the Tribunal, even if the alleged statement was said by Ms Pryde, which the respondents denied in closing submissions.

(o) We have noted Mr Robertson's submission, but we take the view that the best evidence of Ms Pryde's denial of the alleged harassment would have been for her to give evidence to us, in person, at this Hearing, and be open to cross-examination by the claimant, and any questions of clarification from the Tribunal panel.

(p) She was clearly available to give evidence, as she attended the Tribunal, until Mr Robertson advised us she was not being called as a witness for the respondents after all.

Parties closing submissions to the Tribunal

106. In the Tribunal's detailed case management order, dated 21 August 2018, for the assistance of the claimant, as an unrepresented party litigant, and for the efficient and effective conduct of closing submissions to the Tribunal in this Final Hearing, on Tuesday, 28 August 2018, specific directions, and orders of the Tribunal, were made by the Judge on behalf of the Tribunal.

107. With the claimant being unrepresented, and having no previous experience of Employment Tribunals, other than his attendance at earlier Preliminary Hearings, nor any knowledge of all the relevant statutory provisions applicable

to the claim, or the legal issues before the Tribunal, the Tribunal decided it was not appropriate to expect from the claimant, full legal submissions, and we invited him to address the Tribunal as he felt appropriate in his closing submissions.

108. In exercise of our general powers to manage the proceedings, we ordered that each party would be allocated no more than one hour to deliver their submissions, and address the Tribunal, and that, as a Timetabling Order, under **Rule 45 of the Employment Tribunal Rules of Procedure 2013**, we might prevent parties from proceeding beyond the time so allocated.

109. The respondents' solicitor, Mr Robertson, was ordered to prepare and intimate, by no later than 4pm on Friday, 24 August 2018, an outline skeleton argument of his closing submissions to the Tribunal, identifying relevant statutory provisions and case law to be relied upon in argument, so as to give the claimant, as an unrepresented party litigant, advance fair notice of the legal arguments being presented to the Tribunal.

110. As part of that Order by the Tribunal, Mr Robertson had to intimate, by way of a hyperlinked list of authorities, his list of case law authorities so as to allow an opportunity for the claimant to consider the relevant case law authorities being cited by the respondents and decide whether or not he wished to refer us to any additional authorities.

111. We further ordered that we would hear oral submissions from each party. Mr Robertson, solicitor for the respondents, first, then from the claimant, and that members of the Tribunal might have questions to put to either or both parties' representatives.

112. In the event, we received three versions of written closing submissions on behalf of the respondents from Mr Robertson, being his skeleton submissions, his executive summary, and his full written submissions. The claimant chose to address us orally but, helpfully, prepared a typewritten, A4 sheet, setting forth his five principal points in argument. We refer to those written

submissions, and further oral submissions we heard from both parties, later on in these Reasons.

Written closing submissions for the Respondents

113. In accordance with the Tribunal's case management orders, made on 21 August 2018, that the respondents' solicitor should prepare an outline skeleton argument of their closing submissions to the Tribunal, and email it to the claimant, and the Tribunal, prior to the start of the Hearing of Submissions, Mr Robertson, the respondents' solicitor, duly did so, by email sent to the Glasgow Tribunal office, and copied at the same time to the claimant at 15:54 on Friday, 24 August 2018.

114. Mr Robertson forwarded an executive summary of the respondents' case; the respondents' skeletal submissions; a list of authorities (including hyperlinks to online versions of the Judgments cited by the respondents); copies of the authorities for the claimant's ease of reference, and a copy of the respondents' full submissions. In doing so, he noted that the Tribunal did not ask for full submissions, however, in the interests of fair notice, he attached a copy of the respondents' full submissions for the claimant, and he brought along hard copies for the Tribunal panel and the claimant at the Hearing of Submissions on Tuesday, 28 August 2018.

115. The Tribunal wishes to place on record here that we are obliged to Mr Robertson, the respondents' solicitor, and the claimant himself, for their respective closing submissions, which we have found most helpful in addressing the competing arguments presented to us for determination by this Tribunal.

116. It is not usually appropriate, or proportionate, to reproduce in full any parties' closing submissions to the Tribunal, but for the Tribunal to seek to summarise them. In the circumstances of the present case, where Mr Robertson has, as per our case management orders, produced an executive summary, we

have decided that it is appropriate to note and record here the full terms of that executive summary for the respondents, *verbatim*, as follows: -

> *"The Claimant in this matter claims that his dismissal was unfair, and that he has suffered discrimination arising from disability, harassment and that there has been a failure on the part of the Respondents to make reasonable adjustments in relation to his disability.*
>
> *The relevant statutory provisions the Claimant seeks to rely on are, in relation to unfair dismissal, section 98 of the Employment Rights Act 1996, and in relation to the discrimination and harassment claims, various sections of the Equality Act 2010 (those being sections 15, 20 and 26).*
>
> *The Respondents refute the claims raised on the following grounds:*
>
> *Unfair dismissal*
>
> - *Conduct is a potentially fair reason for dismissal*
> - *The dismissal was within the range of reasonable responses per Iceland Frozen Foods Ltd v Jones 1982 IRLR 439.*
> - *The tests set out in British Home Stores Ltd v Burchell 1978.00 IRLR 379 have been met*
> - *The Respondents were unconvinced by the Claimant's representations and accordingly it was reasonable for them to dismiss in all the circumstances*
> - *The Tribunal should not substitute its own opinion for that of the employer*
> - *An appeal was permitted which rectified any defects, those defects being denied by the Respondent, in the original dismissal.*

- *In terms of remedy, the Respondents position is that the Claimant's compensation should be limited due to his inability to work due to sickness*
- *Any award should take account of a Polkey deduction, which in the Respondents' view should be 100%, and the Claimant's contributory conduct, again which should result in a 100% deduction.*

Discrimination arising from disability

- *The Respondent's position is that they did not believe the Claimant's decision to walk off site was related to his medical condition and there was no evidence to support his assertion that his panic attack was related to his disability.*
- *The Claimant has failed to discharge the burden of proof to causally link his panic attack to his diabetes.*
- *The Claimant's evidence was that his panic attack was caused by anticipating he would have been unable to fulfil the order which he had been tasked to undertake.*
- *In terms of remedy, the Respondents position is that the Claimants claim must fail and therefore no remedy is due*
- *Esto, if an award is made, this is an isolated incident and as such should attract only an award in the lower end of the low band of Vento.*

Harassment

- *The Claimant relies on three instances of alleged harassment, on 12/03/18, 03/07/18 and 24/07/18*
- *The Respondents principal position is that the incidents did not take place, and even then there is no link between the comments and the Claimant's disability.*
- *The Respondents further assert that even if the comments are related to the Claimant's disability (which is denied) the*

harassment claims constitute trivial acts causing minor upset, and not harassment under the definition of the Equality Act 2010.

- *Esto, if an award is made, then an award should be made in relation to the figures previously agreed by parties.*

Reasonable adjustments

- *The Respondents position is that the Claimant has not identified a valid PCP under which to succeed with this head of claim.*
- *The Respondents carry out Return to Work interviews and the only reason one did not take place in this instance was because the claimant walked out shortly after his shift commenced.*
- *It is further not reasonable to expect the Respondent to hold a return to work interview before the Claimant commenced his shift, there is no statutory or other obligation to do so and indeed it is common practice for return to work interviews to take place within 2-3 days of an employee's return from absence.*
- *Esto, if an award is made; this is an isolated incident and as such should attract only an award in the lower end of the low band of Vento.*

Witness evidence

- *The evidence of the Respondents witnesses was more credible and reliable than that of the Claimant and his witnesses and should be preferred.*

The [Respondents] submit that the Tribunal should find in their favour, and if not then any compensation for unfair dismissal should be limited as above, and for discrimination any awards should be restricted to the lower end of the low Vento bands.

Costs

In terms of costs, it would be prejudicial for costs to be awarded against the Respondent. The Respondent was not given fair notice of

allegations of intimidation which affected their witnesses' ability to give evidence and they should not be penalised in this regard."

117. In coming to our reserved Judgment on this case, we have had regard to the terms of that executive summary, extending to two typewritten pages, and in reproducing it above, in the immediately preceding paragraph, we have, as discussed with Mr Robertson, corrected the obvious typographical error, in the penultimate paragraph of the executive summary, where reference is made to the claimant's, rather than the respondents' submission.

118. When asked to make his oral submissions to the Tribunal, Mr Robertson stated that he intended only to answer questions from the Tribunal. When the presiding Employment Judge referred him to the terms of the previous case management orders, and that the Tribunal was expecting oral submissions by way of an address to the Tribunal, and then any questions from the Tribunal, Mr Robertson indicated that he would make his oral submissions based on his skeletal submissions, rather than the full submissions, and these skeletal submissions ran to 9 typewritten pages, extending to 49 numbered paragraphs.

119. Further, we have had regard to, and indeed, in the course of his oral submissions, we had cause specifically to read from certain excerpts of the respondents' full submissions, extending to 16 typewritten pages, running to 67 numbered paragraphs.

120. These skeletal and full submissions are held on the Tribunal's case file, and a full copy was produced to us, by Mr Robertson, along with his submissions Bundle, together with the executive summary at pages 1 and 2, his skeletal submissions at pages 3 to 12, and his full submissions, at pages 12 to 30, followed by copied Judgments in his cited authorities, running from pages 31 through to 182.

121. It is disappointing to have to note that, in the course of his oral submissions, Mr Robertson required to apologise for a number of matters, included in his written submissions, which were neither appropriate, nor relevant, to the facts

and circumstances of the present case, and related to events, and / or personalities, not linked to the present case.

122. It was clear to us that Mr Robertson had copied and pasted submissions from some other case, and while he had adapted his submissions to this case, he had clearly failed in proof reading the final product, before submitting it to the Tribunal, and indeed appeared surprised when the Judge raised various matters with him, which patently did not relate to the present case.

Authorities referred to / relied upon by the Respondents

123. As part of Mr Robertson's written closing submissions for the respondents, he included in the email sent to the claimant, and copied to the Tribunal, on 24 August 2018, and in the Submissions Bundle presented to us at the start of the Hearing on Submissions, a list of authorities for the respondents, which we have annotated, where needed, to give the correct law report citations, and copy Judgments were produced as part of his Bundle, as follows:-

Respondent's List of Authorities

1. **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2015] UKEAT/0397/14; [2016] ICR 305**

2. **British Home Stores Ltd v Burchell [1978] UKEAT 108/78; [1978] IRLR 379; [1980] ICR 303**

3. **General Dynamics Information Technology Ltd v Carranza [2014] UKEAT 0107/14; [2015] IRLR 43; [2015] ICR 169**

4. **HSBC Bank plc v Madden and Post Office v Foley [2000] EWCA Civ 3030; [2000] ICR 1283**

5. **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; [1983] ICR 17**

6. **Land Registry v Grant [2011] EWCA Civ 769; [2011] ICR 1390**

7. **Nelson v Clapham Solicitors [2012] UKEATS/0037/11/BI**

8. **Polkey v A E Dayton Services Ltd [1987] UKHL 8; [1987] IRLR 503; [1988] ICR 142; [1988] AC 344**

9. **Taylor v OCS Group [2006] EWCA Civ 702; [2006] ICR 1602; [2006] IRLR 613**

10. **Task Force (Finishing and Handling) Ltd v Love [2005] UKEATS 0001/05**

11. **Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA Civ 1871; [2003] IRLR 102; [2003] ICR 318**

12. **Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; [1982] ICR 156**

13. **Richmond Pharmacology Ltd v Dhaliwal [2009] UKEAT/0458/08/CEA; [2009] IRLR 336; [2009] ICR 336**

Written Closing Statement from the Claimant

124. At the Hearing on Submissions, on Tuesday, 28 August 2018, the claimant presented to us, and we had the clerk make appropriate copies for Mr Robertson, and for the full Tribunal panel, his own one page, typewritten, closing statement, extending to five paragraphs, but, perfectly understandably as he is an unrepresented, party litigant, he did not refer to, or rely upon, any case law authorities.

125. While two case law authorities were cited in his Schedule of Loss, reproduced earlier in these Reasons, at paragraph 104(65) above, copies of those Judgments were not produced to us: **Daley v Dorsett (Almar Dolls) [1981] IRLR 385, EAT,** and Arthur **Guinness Son & Co v Green [1989] IRLR 288, EAT.** Mr Robertson, solicitor for the respondents, did not address us upon them, but we comment upon them later in these Reasons, when we address compensation for unfair dismissal.

126. As an unrepresented, party litigant, we had no expectation that the claimant would address us on the relevant law, and it was explained to him that, while it was Mr Robertson's professional duty to the Tribunal, as a solicitor, to draw to our attention what he considered to be the relevant law, it was ultimately a matter for the Judge to ensure that the full Tribunal was instructed on the terms of the relevant law, and applied the relevant law to the facts of the case as established from the evidence led before us at this Final Hearing.

127. As the claimant's closing statement is fairly short, rather than summarise it, we have considered it appropriate to reproduce it here, *verbatim*, as follows: -

> ***"This case is simple in its merit and I believe the simple facts have been established. This is clearly illustrated in the proceeding*** *(sic)* ***steps:***
>
> ***(1) I have a disability which has already been proven to exist.***
>
> ***(2) The reason I left on the day in question was because I had a panic attack. This panic attack derives directly from the disability.***
>
> ***(3) The dismissal was solely down to the panic attack I took on the day in question.***

(4) Whilst the reason I have panic attacks is due to my medical condition, the actions of the employer have exacerbated the situation.

(5) It has also been established that the company failed to follow the ACAS code of practice. This included no adjournment before sacking, statements that were typed and handwritten were not dated, the disciplinary invite listed one disciplinary matter yet the dismissal letter included a second matter and I as the claimant was not given a right to reply. I would suggest that any compensatory award reflects this."

128. In short, the claimant invited the Tribunal to find in his favour, and award him compensation payable by the respondents in accordance with his Schedule of Loss.

129. Further, in his oral submissions, he asked for his compensation to be uplifted, on the basis that he submitted the respondents failed to follow the ACAS Code of Practice in a number of specified respects. In that regard, as part of his oral submissions to us, he suggested that a **25% uplift** in compensation was appropriate in all the circumstances.

Oral Submissions from both Parties

130. At the Hearing on Submissions, each of Mr Robertson, the respondents' solicitor, and the claimant, spoke to their respective written closing submissions, provided to the Tribunal, so we do not record here *verbatim* the oral submissions made to us on Tuesday, 28 August 2018, for they were, in the main, an oral delivery of the skeleton submissions for the respondents already produced to us, plus the claimant's closing statement, together with an oral reply from Mr Robertson, and the claimant, to the other parties' written submission.

131. Mr Robertson's closing submissions to the Tribunal were, in some material respects, revisions to, or additions to, his oral submissions, to deal with points raised by the claimant, and / or to answer points of clarification raised by the Judge on behalf of the Tribunal.

132. In particular, in talking us through the skeletal submissions for the respondents, Mr Robertson stated that, at paragraph 37, his suggested findings in fact, the missing date at (f) was 15 August 2017, and the date at (g) should be 8 August 2017, and not 2018 as stated. Further, he apologised for the entry, at paragraph 41, where he sought a 100% reduction in compensation to the claimant, on the basis of contributory conduct "***as his refusal to engage at all in discussions in relation to the alternative employed offered",*** which he advised us was to be disregard, as not applicable to the present case. He accepted, later on, that his reference, in paragraph 14 of the full submissions to the appeal being held by the respondents' Chairman, Charles Hammond, was incorrect, and that should, of course, refer to Michael Toal.

133. Having heard from Mr Robertson, we then invited the claimant to speak. He spoke to his own closing statement, and its five paragraphs, as reproduced above, earlier in these Reasons, and, by way of augmenting his closing submissions to the Tribunal, to develop arguments in his own closing statement, or address points raised by Mr Robertson, on behalf of the respondents, in his oral submissions.

134. The claimant advised us that his case is **"*simple, with simple facts*."** He added that he took issue with the respondents' solicitor's skeleton, at paragraphs 32 to 36, about witness evidence, which he could not accept, stating that Miss McAlpine had stuttered and stammered through her evidence, laughing, and unable to remember things a year ago, yet everybody else could remember.

135. He then added that the respondents at no point stuck to any rules or regulations, ACAS, or their own Company Handbook and its rules and

procedures. Further, the claimant stated, they did not take anything to do with an investigation, and the sacking manager, Mr Friel, was not at the appeal hearing, and the claimant commented that he did not believe that there had been any proper investigation, as statements were taken as read, and nobody was spoken to, and the respondents did not take stock at the end of each meeting, and take time to come to an informed decision.

136. As far as the claimant was concerned, he told us that the respondents knew they were going to sack him when they came into the disciplinary meeting, and they added extra disciplinary matters, when there was only one in the disciplinary invite letter, but after the investigation meeting, another offence was added, and, in evidence to the Tribunal, Mr Friel had mentioned a third possible offence which he thought the claimant might have been on medication.

137. The claimant then commented that it was odd that Mr Friel had said he did not know anything about the claimant's illness, yet he had thought he was on medication, and he felt that speaks for itself, because if Mr Friel knew about medication, then he must have known about an illness. Next, the claimant described the appeal process as "***flawed"***. It was said there had been no involvement by Liz Pryde, but Mr Toal spoke of having spoken to her, or having a statement from her.

138. While the respondents were saying he never raised a grievance about her, the claimant stated that he had raised a grievance at the appeal meeting, when he told about Liz Pryde bullying him, and it being her mission to get him sacked. He had mentioned that at the investigation meeting, and the respondents ***"never batted an eyelid"***, and they did not investigate it. In closing, he stated that they knew they were going to sack him before the "***so-called investigation***" was carried out.

Clarifications sought by the Tribunal

139. Having heard from Mr Robertson, and the claimant, the Tribunal decided, on its own initiative, to adjourn into chambers for private deliberation, before resuming the Final Hearing, in public hearing, to raise, through the presiding Judge, questions of clarification of both the claimant, and Mr Robertson for the respondents.

140. In discussion with the claimant, the Judge sought his clarification in relation to the burden of proof, under **Section 136 of the Equality Act 2010**; and other parts of the respondents' skeletal submissions. He drew the claimant's attention to the relevant statutory provisions, in Mr Robertson's submissions, and asked him to look at them, as the Tribunal would consider any further submissions he wished to make to us about the relevant law. We allowed the claimant an adjournment, of about 20 minutes, to consider matters, before we invited him to address us.

141. In particular, referring to the 3 incidents relied upon by him in his further and better particulars for the Tribunal, the claimant stated that what happened in March 2017 was a "***classic, he said, she said***", but he had flagged it up, at each stage, but at no time was it taken into account by the respondents.

142. He felt the photo produced to the Tribunal by the respondents did not give a proper picture of working alone doing the "***dummy bottles***", and, for a manager to say that people in the factory did not know the claimant's medical condition, the claimant stated that he cannot believe they still say that they did not know about his diabetes, and that it is known to cause changes in behaviour due to blood sugar levels.

143. Further, the claimant added, the respondents never asked him for medical documents at the time, and these had now been produced to Judge Kearns' Tribunal that had ruled in his favour on disability status.

144. Asked about the respondents' skeletal submissions, at paragraph 6, where Mr Robertson had stated that the claimant had no issues in relation to the respondents' procedures, and at paragraph 10 of the full submissions, where it was stated that that was "***conceded"*** by the claimant, the claimant stated that he did have a number of issues with the respondents' procedures, as, if not, he would not be sitting here at the Tribunal.

145. Afterwards, on behalf of the Tribunal, the Judge then raised questions of clarification with Mr Robertson, solicitor for the respondents. In particular, the Judge noted that while Mr Robertson's full submissions, at paragraph 19 (on page 18 of the Submissions Bundle) referred to the EAT's judgment in **Basildon & Thurrock NHS Foundation Trust**, he had not referred to that case law authority in either his executive summary, or skeletal submissions.

146. Mr Robertson confirmed he was relying upon it, and, he submitted that the claimant's diabetes did not result in the panic attack, on 24 July 2017, and therefore, he submitted, the discrimination arising from disability claim fails, as there is no documentary evidence to support the claimant's position that his panic attack was a consequence of his diabetes.

147. As regards the EAT's judgment in **Nelson v Clapham Solicitors**, cited at paragraph 41 of his skeletal submission, Mr Robertson accepted that the familiar authority on contributory conduct was to be found, as cited by Lady Smith at paragraph 22, in the Court of Appeal's judgment by Lord Justice Brandon, at paragraph 44 in **Nelson v BBC (No.2) [1979] IRLR 346**, about culpable or blameworthy conduct.

148. Further, Mr Robertson stated that there was "***material and blameworthy conduct"*** by the claimant, as per paragraph 27 of his full submissions, and he advised us that specifically that was the claimant walking off, and not disclosing to anybody in management prior to doing so. He sought a **100% reduction.**

149. When asked by the Judge about the usual familiar Court of Appeal authority of **Hollier v Plysu Ltd [1983] IRLR 260**, which suggests contribution should be assessed broadly, and should generally fall within 1 of the 4 defined 25% bands, Mr Robertson at first insisted it should be **100%**, and not anything less, as the claimant was "***wholly at fault***" in walking off, but then pled an *esto* case, that if not 100%, then it should be at least **75%** reduction.

150. Next, the Judge asked Mr Robertson about the statement, at the end of paragraph 29 of his full submission (at page 21 of the Submissions Bundle), where referring to page 48 of the Joint Bundle, the claimant had referred to "***this manager actively disliked me***"". Mr Robertson stated that it is quite conceivable that Ms Pryde actively disliked the claimant for some reason unrelated to his diabetes.

151. He added that the statement allegedly made by Ms Pryde to the claimant (namely: ***"I am f**king sick of you. I'm making it my mission to get you sacked"***) was not linked to diabetes, and therefore it is not a valid complaint of harassment, even if the statement was said by her, which he advised us the respondents deny.

152. Further, the Judge also raised with Mr Robertson the fact that his closing submissions for the respondents did not address the proposed recommendations sought by the claimant, under **Section 124 of the Equality Act 2010**, as recorded earlier in these Reasons, at paragraph 67 above, and at page 101 of the Joint Bundle.

153. In reply to the request for clarification of the respondents' position, Mr Robertson stated that the claimant's first proposed recommendation was too vague and not clear. As regards the second, he added that Mr Friel had said that he would consider such a recommendation, while, as regards the third proposed recommendation, the respondents' position was that back to work interviews are carried out and are sufficient.

154. Finally, as regards the fourth proposed recommendation, Mr Robertson stated that here was no issue in the respondents giving the claimant a clean, factual reference, limited to the start and end dates of his employment with the respondents. While he stated he did not consider it within the Tribunal's powers to order a clear reference, Mr Robertson stated that the respondents had agreed to do so, and that there was nothing further he wished to say about these four proposed recommendations sought by the claimant.

155. When, having heard Mr Robertson's further oral submissions, on the proposed recommendations, he did not address the specific terms of **Section 124 (3) of the Equality Act 2010,** as regards specified steps, and specified period, Mr Robertson apologised to the Tribunal that he had not addressed that matter in his submissions, and he argued that how could these recommendations help the claimant, when he was no longer in the employment of the respondents.

156. He added that it was not appropriate for the Tribunal to make any recommendation, as the claim against the respondents should be dismissed by the Tribunal, and if upheld, these proposed recommendations were in any event not appropriate for the Tribunal to make, on the basis that the claimant was no longer an employee of the respondents.

157. Next, the Judge asked Mr Robertson to comment on the evidence heard by the Tribunal from the claimant's wife, Mrs Catherine Docherty, as it was not addressed in either his skeletal, or full submissions, on behalf of the respondents.

158. In reply, Mr Robertson stated that the claimant's wife's evidence was credible, but she had framed her answers to suit the claimant's position, and that is why she was not cross examined by him. He added that ***"a wife is not going to give contradictory evidence against their husband"***, and so Mrs Docherty's evidence has to be "***taken with a pinch of salt".***

159. Mr Robertson further stated that he felt it very unlikely he would get her to give any contradictory evidence against her husband, and on that basis he explained he had not cross examined her on behalf of the respondents.

160. Thereafter, the Judge asked Mr Robertson for the respondents' position, in reply, to point (5) in the claimant's closing remarks, and the submission that it had been established that the respondents had failed to follow the ACAS Code of Practice. In reply, Mr Robertson submitted that there had been no breach of the ACAS Code of Practice, and that the respondents had felt no need to adjourn meetings as they felt that they had sufficient evidence.

161. He added that the respondents accept that some statements are typewritten and handwritten, but that is not a breach of the ACAS Code, and he then accepted that there had been a breach of the Code, as the claimant had been dismissed for two disciplinary offences, rather than one, but he submitted that, rather than the 25% uplift sought by the claimant, any uplift should be limited to a **5% uplift**, on the basis that, on his submissions, there had been one isolated breach of the ACAS Code by the respondents.

162. While, in his closing submissions, Mr Robertson had referred to ***"the offering of an appeal"*** as curing any earlier procedural defects, he clarified that what he meant was that it was not just the holding of the appeal, but the conduct of the appeal, that had cured any previous irregularities.

163. As regards the alleged breach of the company's own Handbook, in relation to appeal hearings, Mr Robertson admitted that Mr Friel was not there, at the claimant's appeal meeting with Mr Toal, and he argued that it would have been a "***biased appeal***" if Mr Friel had been there, as he was involved in the original decision to dismiss. That said, Mr Robertson added that he would take this point up with his clients.

164. Further, Mr Robertson accepted that the respondents did not follow that part of the company Handbook, but he submitted that it would have been prejudicial to the claimant to do so. In particular, he stated that Mr Friel could

have prejudiced the appeal, and pressured Mr Toal, as the chair of the appeal meeting, in his decision, although he remarked that Mr Toal had accepted, in evidence, that he could have overturned Mr Friel's decision to summarily dismiss the claimant.

165. Finally, as regards paragraph 27 of the ACAS Code, which provides that an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case, Mr Robertson submitted, on the respondents' behalf, that Mr Toal had dealt with the claimant's appeal impartially, and that he had not previously been involved.

166. The Judge then asked Mr Robertson to clarify, on the respondents' behalf, their position about the remarks attributed to Liz Pryde that: "***I am fucking sick of you. I am making it my mission to get you sacked."*** as referred to at paragraph 17 of his skeletal submissions to the Tribunal, where he had stated that this statement could not reasonably be considered as having the effect of violating the claimant's dignity.

167. On reflection, having further considered that part of his closing submissions for the respondents, Mr Robertson advised us that the respondents withdrew the statement that those remarks attributed to Ms Pryde could not reasonably be considered as having the effect of violating the claimant's dignity as, if they had been said to him by his boss, he accepted that his dignity as an employee would be violated.

168. That said, Mr Robertson adhered to the latter part of that paragraph 17, that insufficient evidence had been heard which linked those alleged remarks by Ms Pryde to the claimant's diabetes. The Tribunal noted his position and, as regards his withdrawal of the first part of that paragraph 17, commented that was a sensible concession by the respondents.

169. Thereafter, referring to his skeletal submissions, at paragraphs 46 to 49, relating to '***costs***', the Judge asked Mr Robertson to comment more fully on that matter, as per paragraph 67 of his full submissions, reading as follows:

"***In my submission it would be prejudicial to the Respondent to award costs against them on the basis of alleged witness intimidation and wasted Tribunal time. I make this submission on the basis that the Respondent was not given fair notice of these allegations and on that basis it would not be just and equitable to award costs against the Respondent. Furthermore in my submission it would not be within the Tribunal's overriding objective to award costs as it would not be dealing with the matter fairly and parties were not on an equal footing with regards this evidence."***

170. In particular, the Judge asked Mr Robertson to distinguish the respondents' position as between costs against them on the basis of alleged witness intimidation, as spoken to by the claimant's witness, Mrs Crawford, and wasted Tribunal time, in respect of the respondents' legal representative's failure to comply with case management orders previously made by Employment Judge Doherty where, on the first day of this Final Hearing, Mr Robertson had conceded that there had been a failure to comply by the respondents' legal representatives.

171. By way of seeking further clarification of the respondents' position, the Judge invited Mr Robertson to address the Tribunal on the relevant aspects of **Rule 74 to 84 of the Employment Tribunals Rules of Procedure 2013,** which apply in the matter of costs / expenses.

172. In reply, Mr Robertson stated that the claimant could not deal with the respondents' comments on his Schedule of Loss, until the respondents had produced those comments, and therefore he accepted that there had been a delay in proceedings getting underway on the first day of the Final Hearing, and that therefore there was a question of wasted time, if not Wasted Costs.

173. He further accepted that, therefore, whether or not the claimant wins his case against the respondents, wasted time can sound in costs against the respondents, and he then clarified that any such costs should flow to the respondents' representative, namely Jackson Boyd LLP, rather than the respondents themselves, and that any order to be made by the Tribunal should be against that legal firm, and not against the respondents as their clients.

174. When asked if he had any submission to make, in terms of **Rule 84**, about the potential paying party's ability to pay, if any costs / expenses were to be awarded by the Tribunal, Mr Robertson stated that he could not comment on whether or not his firm could pay any costs / expenses, if awarded by the Tribunal, but he did accept that this was within the Tribunal's powers, and that it could award costs for wasted Tribunal time.

175. As regards any award of costs against the respondents, on the basis of alleged witness intimidation, Mr Robertson submitted that parties were not on an equal footing with regards that matter, and it would not be within the Tribunal's overriding objective (in terms of **Rule 2**) to award costs on that matter as it would not then be dealing with the matter fairly.

176. He submitted that the first the respondents had heard of any witness intimidation was when Mrs Crawford made the allegation in her evidence in chief, and while he accepted he did not cross examine her, and he further accepted he did not ask for any adjournment to take instructions, or make investigation, he insisted on his submission that the respondents were not given fair notice of the alleged witness intimidation, and on that basis it would not be just and equitable to award costs against them.

Claimant's Reply

177. Having heard Mr Robertson's clarifications, to the various points raised by the Judge, on behalf of the Tribunal, the Judge invited the claimant to reply. As regards breach of the ACAS Code, the claimant referred to his Schedule of

Loss, at pages 98 to 100 of the Joint Bundle, and stated that he had spoken to his Citizens Advice Bureau representative last Thursday, 23 August 2018, and that he did not know until that time that he could get a percentage uplift on any compensation from the Tribunal.

178. Further, the claimant stated that he did seek a statutory uplift, and while Mr Robertson has suggested **5%** for the respondents' admitted failures to comply with the ACAS Code, the claimant suggested that the Tribunal make a full award of a **25% uplift**.

179. Also, as regards his Schedule of Loss, and noting the Judge's comment that it had been prepared up to 14 June 2018, and not the last day of this Final Hearing, the claimant stated that he sought past losses up to the date of this Hearing on Submissions, and that he was still in receipt of State benefits as before.

180. He added that he still sought seven weeks' future loss, from the date of the Hearing on Submissions, albeit he was not currently fit to work. He then further commented that his doctor had told him, around March 2018, to get him back to work, but his GP did not sign him off at that time, as he did not have his diabetes under control due to all the stresses connected with the Tribunal process.

181. As regards injury to feelings, the claimant confirmed that he sought the figures, as per the Schedule of Loss intimated to the respondents, and he did not accept the respondents' suggested lower figures. In closing, the claimant stated that he aimed to get a job, and his life back into some semblance of order, after this whole process is finished.

182. Finally, arising from that discussion about the claimant's Schedule of Loss, the Judge raised with Mr Robertson, the respondents' solicitor, a submission made by him, at paragraph 43 of his skeletal submissions, stating that: "***no discrimination and therefore no award of compensation should be***

made. Alternatively, low band <u>Vento</u> award on the basis it was isolated incident."

183. This submission, in respect of the claimant's complaint of discrimination arising from disability, was queried by the Judge, as regards what Mr Robertson meant by the phrase ***"isolated incident".*** In reply, Mr Robertson stated that the decision to dismiss the claimant was the isolated incident, and the allegations of harassment were denied, as also the complaint of failure to make reasonable adjustments.

<u>Reserved Judgment</u>

184. In concluding proceedings, on the afternoon of Tuesday, 28 August 2018, we reserved our Judgment, and the Employment Judge advised both the claimant and Mr Robertson that we would issue our full, written Judgment, with Reasons, in due course, after private deliberation at a Member's Meeting to follow on that afternoon.

185. By letter from the Tribunal, sent to both parties, dated 31 August 2018, they were updated as to our progress, in chambers for private deliberation, and while good progress was made, we did not conclude our private deliberations. They were further advised that the Judge would seek to progress a draft Judgment and Reasons, within the following four weeks, for issue within that period to both lay members for comment and, hopefully, early agreement, possibly by correspondence, rather than by reconvening again in chambers.

186. Due to a combination of other judicial commitments, and some annual leave, it did not prove possible for the Judge to progress the draft as quickly as he would have liked. Updates were provided to both parties, by correspondence from the Tribunal on 31 October, and 3 and 7 December 2018, and the Judge apologised for the delay.

187. In the event, it was necessary to schedule a further Members' Meeting, to discuss points arising from the Judge's draft, and for the full Tribunal panel to

come to a final decision. Monday, 17 December 2018, was the earliest, mutually convenient data for that to be held.

188. Our written Judgment only, dated 19 December 2018, was issued on 20 December 2018, with these our Reasons to follow. Our written Judgment and these Reasons represents the final product from our private deliberation, on the evidence led, and closing submissions made to us, by both parties, 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. It represents our unanimous view, as a specialist Tribunal acting as an industrial jury, with our membership coming from disparate employment backgrounds and experience. We apologise to parties for the delay in preparing and issuing these Reasons, which delay has been caused by other judicial commitments for the Judge in the period since our Judgment only was issued.

Issues for the Tribunal

189. We did not have before us, any agreed list of issues, adjusted between the parties. In reviewing the case file, we noted that, at the time when the respondents' Preliminary Hearing agenda was intimated to the Tribunal, on 13 November 2017, by Victoria Rae, trainee solicitor at Jackson Boyd LLP, she had identified four issues that she considered the Tribunal would have to decide to deal with this case, as follows: -

> ***(1) Was the claimant unfairly dismissed?***
>
> ***(2) Is the claimant disabled under the definitions set out in section 6 of the Equality Act 2010?***
>
> ***(3) as the claimant discriminated against on the grounds of disability?***
>
> ***(4) Esto if, which is denied, the Tribunal finds that the Claimant was unfairly dismissed, does the claimant's leaving the factory amount to immediate resignation?***

190. We pause to note and record here that fourth proposed issue seems to flow directly from paragraph 17 of the respondents' defence, set forth in the paper apart to the ET3 response, lodged on 3 November 2017, stating that: "***Esto***, ***if, which is denied, the Tribunal finds that the Claimant was unfairly dismissed, the Respondent contends that the Claimant's leaving the factory amounted to an immediate resignation of his employment and that in those circumstances the Claimant had no entitlement to notice pay."***

191. That was not an argument which was advanced before this Tribunal by Mr Robertson in his closing submissions. Further, and in any event, as it was an admitted fact that the claimant was summarily dismissed from employment, it is difficult for us to understand why the respondents' solicitors would have been running an alternative argument that the claimant leaving the factory amounted to an immediate resignation of his employment.

192. We have rejected that argument, as not well-founded, on the basis that later that same afternoon, the claimant phoned the respondents, advising that he would return to work the next day, which he did, when he was then suspended on full pay whilst a disciplinary investigation was instructed, leading to his summary dismissal from employment by the respondents on 1 August 2017. It is patently clear to us from that that the respondents regarded him as still being employed, until they then summarily dismissed him.

193. When the claimant lodged his Case Management Preliminary Hearing agenda, on 7 December 2017, as he did not have a legal representative, he did not complete the relevant section about what he considered were the issues that the Tribunal would have to determine. The issues for determination by the Tribunal were subsequently fleshed out, and developed, at subsequent Case Management Preliminary Hearings conducted by Employment Judge Doherty, on 8 December 2017, and more recently, 1 June 2018.

194. That latter Hearing followed upon the disability status Judgment in the claimant's favour, issued by Employment Judge Mary Kearns, following the Preliminary Hearing on that matter, held on 21 February 2018, when Employment Judge Kearns held that the claimant was a disabled person at all relevant times by reason of diabetes but not by reason of depression. That matter having been determined by that Judgment, which was not the subject of reconsideration, or appeal, by either party, that matter was not before us for determination at this Final Hearing.

195. Accordingly, in coming to this our final decision, we have decided that the live issues before us for determination at this Final Hearing were:

(1) Was the claimant unfairly dismissed by the respondents and, if so, what compensation should be awarded to him for any unfair dismissal?

(2) Separately, in relation to each of the three separate heads of complaint of discrimination arising from disability, harassment, and failure to make reasonable adjustments, contrary to Sections 15, 26, and 20 of the Equality Act 2010, has the claimant established these heads of claim and, if so, what remedy should be awarded to the claimant, as regards compensation and / or recommendation made by the Tribunal?

(3) Finally, and emerging from the respondents' failure to comply with certain of the earlier case management orders, and the matter of alleged witness intimidation, there is a further issue of whether or not it is appropriate for the Tribunal to make any order of costs / expenses, against either party, and, if so, on what basis, and in what amount?

Relevant Law

196. The relevant law was addressed, in some aspects, by Mr Robertson's written closing submissions on behalf of the respondents, as provided to the Tribunal, and in the case law authorities produced by him to us. As such, it is not necessary, or proportionate, that we should refer here in any detail to his written submissions under relevant law, or the case law authorities cited by him, as those submissions are on the case file, and we have referred to them in preparing this our Judgment and Reasons.

197. Accordingly, and as per **Rule 62 (5) of the Employment Tribunals Rules of Procedure 2013**, it will suffice to identify here concisely the relevant statutory provisions, as set forth in the **Employment Rights Act 1996**, in particular **Part IX, Chapter I** (Unfair Dismissal, specifically **Sections 94 to 98**), as well as **Part IX, Chapter 2** (Remedies for Unfair Dismissal, at **Sections 111 to 126**), as also the relevant statutory provisions in the **Equality Act 2010**, specifically at **Sections 15, 20 and 26**, as also in **Section 124** (remedies), and **Section 136** (burden of proof). That said, we have given ourselves a self-direction on the relevant law as detailed below.

Relevant Law: Unfair Dismissal

198. The law relating to unfair dismissal is contained in **Section 98 of the Employment Rights Act 1996** ("***ERA***"). 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 a set of facts known to the employer, or it may be of beliefs held by the employer, which causes the employer to dismiss the employee: **Abernethy v Mott, Hay & Anderson [1974] ICR 323 (CA).** A reason for dismissal is potentially fair if it relates to the conduct of the employee.

199. The leading case law authority relating to conduct as a reason for dismissal is the Employment Appeal Tribunal's judgment in **British Homes Stores v Burchell** [**1978] IRLR 379 / [1980] ICR 303 (EAT)** which states that in order

for an employer to rely on misconduct as the reason for dismissal there are three questions that the Tribunal must answer in the affirmative, namely, as at the time of the claimant's dismissal: -

- ***Did the respondents genuinely believe that the claimant was guilty of the misconduct alleged?***
- ***If so, was that belief based on reasonable grounds?***
- ***At the time it formed that belief, had the respondents carried out as much investigation into the matter as was reasonable in the circumstances?***

200. The respondent employer's investigation does not require to be to the standard of an investigation which might be involved if a crime is thought to have been committed. The investigation must be within the band of investigations which would be carried out by a reasonable employer. It must therefore be a reasonable investigation. This approach was confirmed by the Court of Appeal in the well-known case law authority of **Sainsbury Supermarkets Ltd v Hitt [2003] IRLR 23/ [2003] ICR 111 (CA).** The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

201. Further, in considering the disciplinary sanction imposed by the respondents, the Tribunal must take care not to substitute its own view of what it would have done if in the shoes of the employer. If dismissal lies within the band of reasonable responses of a reasonable employer, it matters not that the Tribunal would have taken a different view as to the sanction which would appropriately be imposed in the circumstances of the case.

202. This band of reasonable responses approach, confirmed by the Employment Appeal Tribunal in the well-known case law authority of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439/ [1983] ICR 17 (EAT),** was also confirmed in further case law authority from the Court of Appeal in **Post Office**

v Foley; HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827/ [2000] ICR 1283 (CA).

203. When considering whether or not dismissal is within the range of reasonable responses, the test is always the objective one of the reasonable employer; it is not a matter of the Tribunal's own subjective views: **London Ambulance Service NHS Trust v Small [2009] IRLR 563 (CA)).**

204. Nor is it a matter of the employer's own views as to the reasonableness of its disciplinary decisions. As was observed by Lord Justice Longmore, at paragraph 18, in the Court of Appeal's judgment in **Bowater v Northwest London Hospitals NHS Trust [2011] IRLR 331**:

> "...***the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the Employment Tribunal to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."***

205. We also bear in mind the judgment of Lady Smith, the then Scottish EAT Judge, in the unreported case of **Strathclyde Joint Police Board v Cusick [2011] UKEATS/0060/10/BI,** as available on the Bailli website, where at paragraph 16 her Ladyship stated that:

> ***"16. If the "Burchell test" is passed and the dismissal is, accordingly, potentially fair, when it comes to considering, under s.98(4) of the 1996 Act, whether it was fair, a tribunal requires to be careful to make an objective assessment. It must avoid falling into what is often referred to as the "substitution mindset": see, for instance, London Ambulance Service NHS Trust v Small [2009] IRLR 563 CA. It is not a matter of the tribunal asking itself whether or not they would have dismissed the claimant. Further,***

the tribunal ought to consider the question of what a reasonable employer would have done in context; that is, by asking themselves not just what any employer, acting reasonably, would have decided but what a reasonable employer whose business/activities were the same as or similar to those of the respondent, would have done in the circumstances: see Ladbrokes Racing Ltd v Arnott [1981] SC159, where the Lord Justice Clerk referred to considering what "would have been considered by a reasonable employer in this line of business in the circumstances which prevailed".

206. Further, following the well-known House of Lords' case law authority of **West Midlands Co-operative Society v Tipton [1986] IRLR 112/ [1996] ICR 192 (HL)**, the respondent employer's actions during the appeal stage of any dismissal procedure fall to be considered in assessing the reasonableness of the dismissal process. It is plain from the House of Lords' Judgment in **Tipton,** applied by the Court of Appeal in **Taylor v OCS Group Ltd [2006] IRLR 613/ [2006] ICR 1602 (CA),** that in determining the reasonableness of an employer's decision to dismiss for a potentially fair reason, the Employment Tribunal must look at the whole of the disciplinary process, including any post-dismissal internal appeal.

207. If the employer succeeds in proving there was a potentially fair reason for the dismissal, then whether the dismissal is to be considered fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. This question has to be determined, under **Section 98(4) of ERA,** in accordance with equity and the substantial merits of the case.

208. What has to be assessed is not whether the dismissal is fair to the employee in the way that is usually understood, but whether, with the knowledge that the employer had at the time (**Devis v Atkins [1977] ICR 662, HL**), the employer acted reasonably in treating the misconduct that they believed had taken place as reason for dismissal. It is not relevant whether in fact the misconduct took place. The question is whether, in terms of **Burchell,** the employer believed it had taken place (with reasonable grounds and having carried out a reasonable investigation) and whether in those circumstances it was reasonable to dismiss.

209. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer that the employer has therefore acted unreasonably. There may be a band of reasonable responses to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent employer's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so the dismissal is fair. If not, the dismissal is unfair.

210. If the Tribunal finds that the claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to the old job, or re-engagement to another job with the same employer, or alternatively award compensation. The claimant has indicated in this case that he seeks an award of compensation only in the event of success before the Tribunal. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

211. **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.

212. **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.

213. 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.

214. 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.

215. 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.

216. 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),** and further principles have since been set out in by the Employment Appeal Tribunal in the case of **Software 2000 Ltd v Andrews [2007] IRLR 568 / [2007 ICR 825 (EAT).** In this event, the Tribunal requires to assess the percentage chance or risk of the claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

217. **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, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer 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 the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

Relevant Law: Disability Discrimination

218. 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.** In terms of **Section 4**, listing the defined protected characteristics, they include "***disability***", which is itself further defined at **Section 6.**

219. **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."***

220. **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 which matter we will return later in these Reasons.

221. 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.

222. As per his Schedule of Loss, the claimant, in the present case, seeks compensation for loss of earnings, and an award for injury to feelings. He does not seek re-instatement, nor re-engagement, by the respondents.

223. The protected characteristics identified in **Section 4** include disability, which is 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***".

224. Under **Section 6(2),** a reference to a "***disabled person***" is a reference to a person who has a disability, and in relation to that protected characteristic of disability, **Section 6(3)(a**) further provides that a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.

225. **Schedule 1** to the Act makes further, supplementary provision as to the statutory definition of disability, and guidance. **Section 6(5)** provides for the making of Ministerial guidance, which was issued in April 2011, and which is to be taken into account by a Tribunal when considering the definition of disability, and **Section 212(1)** defines "***substantial"***, as meaning "***more than minor or trivial***.

226. We have not 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 his claim for unlawful disability discrimination, because Employment Judge Kearns' judgment has already dealt with that matter.

227. Judge Kearns found that ***"the claimant was a disabled person at all relevant times by reason of diabetes but not by reason of depression***".

In particular, she found that the claimant has suffered from type 1 diabetes since February 2014, and that he was diagnosed with depression by his GP on 26 June 2017. Her judgment was not the subject of re-consideration, or appeal to the EAT, by either party.

228. The claimant's claim included a complaint, under **Section 21 of the Equality Act 2010**, that the respondents had failed in their duty to make reasonable adjustments, under **Section 20**. The duty comprises 3 requirements, as specified at **Section 20(3) to (5)**, including that there is a requirement, where a provision, criterion or practice (known as a "***PCP***" of A (the employer) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as a reasonable to have to take to avoid the disadvantage.

229. It also included a complaint, under **Section 26 of the Equality Act 2010**, that the respondents had harassed the claimant, by engaging in unwanted conduct related to his disability protected characteristic, and the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

230. Further, the claimant's claim included a complaint of "***Discrimination arising from disability***", which is dealt with by the definition at **Section 15**, namely: -

> ***"(1) A person (A) discriminates against a disabled person (B) if-***
>
> ***(a) A treats B unfavourably because of something arising in consequence of B's disability, and***
>
> ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."***

231. It therefore needs to be established whether there was a causal connection between the unfavourable treatment and the disability. If there is the burden shifts to the employer to establish justification i.e. a proportionate means of meeting a legitimate aim. This type of discrimination occurs not because the person has a disability, but because of something connected with the disability. It can only occur if the employer knows, or could reasonably be expected to know, that the person is disabled.

232. In the case of **Pnaiser v NHS England and Anor [2016] IRLR 170** at paragraph 31, Mrs Justice Simler, President of the EAT, having considered a number of relevant authorities (including **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14 and **Hall v CC West Yorkshire Police** [2015] IRLR 893 EAT) provided guidance as to the proper approach to determining whether there has been a prima facie breach of **Section 15** such that - absent the employer justifying the treatment under **Section 15(1)(b)** - this form of disability discrimination would be made out. While Mr Robertson referred us to **Basildon**, he did not draw our attention to **Pnaiser.**

233. That guidance, which runs from sub-paragraphs (a) to (i) is most helpful, and we have taken it into account. In summary, the EAT has held that an ET will need to: (1) identify the individual/s responsible for the treatment complained of and enquire into the reason for that treatment, undertaking this exercise as it would when determining the reason for conduct complained of in a direct discrimination claim; and (2) determine - applying a purely objective test - whether there is a connection between the disability and the "***something"*** which provides the reason for the treatment in issue. There is no requirement that the ET determines these questions in any particular order, but the answers to the questions should be apparent from its reasoning.

234. It is recognised that it is unusual for there to be clear evidence of discrimination, and that a Tribunal should expect to consider matters in accordance with the relevant statutory provisions in respect of the "***burden of***

proof", being **Section 136**, While Mr Robertson's full submissions for the respondents reproduced the text of **Section 136**, he did not refer us to any relevant case law authority,

235. 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 disability discrimination.

236. 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.

237. 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 of 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).**

238. 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. 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.

239. 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."*

240. Although **Talbot** was not cited to us, we have taken its guidance into account, without going back to parties, 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.

241. 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 Madarassay**] 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."*

242. 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"'

243. 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."

244. In considering the relevant case law authorities on the burden of proof in a discrimination case, by self-direction as to the applicable law, given Mr Robertson in particular did not address us upon it, we have reminded ourselves that Mrs Justice Elisabeth Laing DBE's EAT judgment in **Efobi v Royal Mail Group [2017] UKEAT/0203/16,** reported at **[2017] IRLR 956,** and **[2017] ICR 359**, was wrongly decided by the EAT, and it should not be followed.

245. Instead, we have 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**, reported at **[2018] IRLR 114,** and **[2018] ICR 748**,

as issued by Mr Justice Singh, 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.

246. Further, the Court of Appeal in **Ayodele** 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.

247. 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 he did not address the relevant law at the Hearing on Submissions before us.

248. 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 Mr Robertson would have had any substantive submissions to make to us either, other than to note that the **Ayodele** judgment is now the most recent, and authoritative judicial guidance available to Tribunals.

Discussion and Deliberation: Unfair Dismissal

249. From the evidence we heard, there is no dispute that what happened on 24 July 2017, when the claimant walked out of the factory, led to a sequence of events culminating in the claimant's summary dismissal by Mr Friel on 1 August 2017.

250. In his ET1 claim form, at section 8.2, on page 8 of the Joint Bundle, the claimant's narrative then was as follows:

> ***"I believe that I have been unfairly dismissed following an incident on the 24th of July, when I suffered a panic attack,***

and left the premises. I phoned my employer later that day and apologized fi my actions, and agreed to attend before my shift the following day.

… On the date of the incident leading to my dismissal, I was returning to work having been ill on the Friday, and, although absent herself, my manager had left instructions that I be assigned me to a new line. I was provided with a team of twelve staff, only three of whom had any experience working there, and none of the other nine new starts spoke English as a first language. I became very upset, and, not willing to be seen crying in front of everyone, and with the overwhelming feeling of being unable to cope, I left the premises. Management were aware at the time that I had left, but I could not face anyone at that time. I contacted my employer as soon as I could."

251. Further, in the respondents' ET3 response, paper apart, at paragraphs 4 to 6, as reproduced at pages 20 to 22 of the Joint Bundle, it was pled then on their behalf that:

"4. On 24 July 2017, at the start of his shift, the Claimant was assigned a new team. This team was made up of five core workers and seven agency workers. The Claimant was unhappy with the amount of agency workers on his team. The Claimant said, "I've had enough, I'm out of here", and left the factory to go home.

5. The Claimant's team was left without a team leader and the factory line was unable to start. The Respondent spent time allocating all of the Claimant's assigned team to different team leaders and factory lines. The Claimant

leaving the factory had an effect on the Respondents being able to complete customer orders.

6. On or around the late afternoon on the 24 July 2017, the Claimant phoned the Respondent advising he would return to work the next day."

252. At the first Case Management Preliminary Hearing, held by Employment Judge Doherty, on 8 December 2017, as per her written Note, paragraph 2, as reproduced at page 30 of the Joint Bundle, it was there recorded that:

"***2. The claimant presents a claim of unfair dismissal under the Employment Rights Act 1996 Act (ERA). It is accepted by the respondents that the claimant was dismissed; their position that he was dismissed fairly, for gross misconduct (leaving the factory without informing his Manager. The fairness of the dismissal is attacked by the claimant on the basis that the decision to dismiss was too harsh, and fell out with the band of reasonable responses."***

253. In Mr Robertson's full written closing submissions for the respondents, at paragraphs 1 to 17, he dealt with the unfair dismissal claim, where after quoting the relevant statutory provision at **Section 98 of the Employment Rights Act 1996**, he stated as follows:

1. *The Claimant maintains that his dismissal was unfair, contrary to Section 98(4) of the Employment Rights Act 1996. The Respondent refutes this position and states that the Claimant's dismissal was not unfair, being for a fair reason (misconduct) and carried out in a way that was reasonable in all the circumstances.*

2. *In order for a dismissal to be fair, an employer must have a potentially fair reason for the dismissal, and, the employer must have acted*

reasonably in treating that reason as sufficient to justify dismissing the employee.

3. *Conduct is a potentially fair reason for dismissal. Whether or not an employer has acted reasonably in treating conduct as a reason for dismissal will depend on all the circumstances, bearing in mind the size and administrative resources of the employer including the equity and the substantial merits of the case.*

4. *This is outlined in Section 98 of the Employment Rights Act 1996. For the purposes of this test, it is irrelevant whether or not the Tribunal would have dismissed the employee had it been in the employer's shoes. The Tribunal must not substitute its view for that of the employer. Rather, a tribunal must be persuaded that the employer's decision fell within the reasonable range of responses and must assess the reasonableness of the employer's conduct. This was established in the case of Iceland Frozen Foods Ltd v Jones 1982 00 IRLR 439.*

5. *To establish that a dismissal was on the grounds of conduct, it must be established, as set out in British Home Stores Ltd v Burchell 1978 00 IRLR 379, that: -*

- *At the time of dismissal, the employer believed the employee to be guilty of misconduct.*
- *At the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct.*
- *At the time that the employer formed that belief on those grounds, it carried out as much investigation as was reasonable in the circumstances.*

6. *In my submission at the time of dismissal the Respondent believed the Claimant to be guilty of the misconduct and had reasonable grounds for believing so. Furthermore it is my submission that the Respondent carried out as much investigation as was reasonable in the circumstances.*

7. *The Respondent's position is that, at the time of dismissal, they were unconvinced by the Claimant's mitigating circumstances based on a lack of documentary evidence to support the Claimant's position. The Respondent, in their principal submission, refutes any assertions made by or on behalf of the Claimant that his dismissal was unfair.*

8. *The procedure followed by the Respondent was sufficient and it is my submission that they have met all of the legal tests applicable to conduct dismissals and it is my submission that they have acted reasonably in dismissing the employee in all of the circumstances in accordance with Section 98(4) of the Employment Rights Act 1996.*

9. *In terms of reasonableness, I would point the Tribunal to the authority of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83 in which the EAT emphasised that Tribunals should not impose their own standards and decide whether had they been the employer they would have acted differently. This is known as adopting the substitution mindset and is similar to the HSBC Bank plc v Madden and Post Office v Foley [2000] EWCA Civ 330 test for unfair dismissal. The Tribunal must ask themselves whether the employer's decision fell within the band of reasonable responses. it is submitted that the Claimant's dismissal was fair in all of the circumstances, that a full and fair procedure was carried out and that the dismissal was fair as the Claimant's role was redundant and in the alternative within the band of reasonable responses open to the employer in respect of conduct dismissals.*

10. *Specifically in relation to the procedure followed I submit that the Claimant conceded he had no issues with the procedure.*

Appeal

11. *I would submit that should the Tribunal find that there are any procedural defects with the disciplinary procedure, that the offering of an appeal rectified any of these irregularities (Taylor v OCS Group 2006 ICR 1602).*

12. *I would submit that the fact that the claimant here was offered an appeal, speaks to the overall fairness of the procedure followed and is, according to The Task Force (Finishing and Handling) Ltd v Love [2005] UKEAT 0001_05_2005 authority, one of the factors to be considered in determining fairness.*

13. *Part of a fair process is that an appeal is permitted against dismissal and that this is also subject to the same objectivity as the initial hearing of matters. The granting of an appeal speaks to the overall procedural fairness of the Respondent's process.*

14. *The appeal was held by the Respondent's Chairman, Charles Hammond, who had no prior involvement in the process and approached matters entirely objectively.*

15. *Mr Toal considered all of the Claimant's points and gave them careful and meticulous consideration.*

16. *Mr Toal, as per Taylor v OCS Group [2006] EWCA Civ 702, assessed the fairness of the disciplinary process as a whole and upheld the original decision. (paragraph 50)*

17. *I would submit that overall the process followed and decisions reached were entirely fair.*

254. We carefully considered his arguments, and noted the factual errors in his closing submissions, where at paragraph 9, he speaks of the claimant's role being "***redundant",*** when the ET3 response refers to this being a conduct related dismissal, and at paragraph 14, where he refers wrongly to the appeal decision maker as a **Mr Hammond**, when, in fact, it was **Mr Toal**, as correctly identified at paragraphs 15 and 16.

255. We agree with the respondents that this is a conduct related dismissal, and, having identified that as the reason for dismissal, we go on to consider the **Burchell** test, and whether, as Mr Robertson argues, the respondents have fully met the requirements of that test.

256. We can and do accept that, as the claimant admitted having left the premises on 24 July 2017, the respondents had a reasonable belief that he may have committed an act of misconduct, but while there was thereafter some process of investigation, it was no more than an ingathering of piecemeal statements. It was not a reasonable investigation by the respondents, and certainly not what would be expected of a reasonable employer acting reasonably. A reasonable employer would, at least, have given Miss McAlpine, as an inexperienced investigator, some guidance about what was required of her as an investigator, and ensured that Liz Pryde, the claimant's line manager, was interviewed.

257. On the matter of the mitigating circumstances referred to by the claimant, a reasonable employer would have ingathered information about the impact of the claimant's departure on the respondents' business, the fact he had telephoned in later that day, and returned to work the next morning, and also what information, about the claimant's reason for leaving, and about his diabetes and depression, was within the knowledge of the claimant's

colleagues, supervisors, and management at the factory, in particular Liz Pryde. She was on holiday, but at home, so they could have asked her to come in for an interview, or they could have interviewed her on her return. Instead, they did neither – they proceeded without taking any statement from her.

258. In the claimant's evidence to us, he stated, by way of explanation for walking off, that his mental health was suffering, and he had just had enough of bullying as it was meted out on an almost daily basis by Liz Pryde.

259. While she was on holiday, on 24 July 2017, the claimant advised us she had left instructions the previous Friday, 21 July, when he was off, that he was to be put on a particular line, which he stated he did not accept as a reasonable management instruction, as he told Elizabeth Smyth that "***this is shit***", as Liz Pryde had "***set me up to fail***." He described Ms Smyth as Ms Pryde's "***messenger and lackey".***

260. In his evidence to us, Mr Friel, the dismissing manager, referred to the claimant's diabetes as "***just a smokescreen***", and stated that he felt the claimant was putting up excuses. Further, he told us, he did not believe a word the claimant was telling him. He frequently referred to there being no "***official"*** history of the claimant's illnesses or health.

261. As regards operational impact, we were told in evidence that Irene Ferguson was moved to run the claimant's line, and, as such, that evidence is at odds with the respondents' ET3 grounds of resistance , at paragraph 5, reproduced above, where the respondents position on record of these proceedings is that the claimant's team was left without a team leader and the factory line was unable to start, and him leaving the factory had an effect on the respondents being able to complete customer orders. No such evidence was led before us at this Final Hearing.

262. We do not accept Mr Robertson's argument that overall the process followed, and decisions reached by the respondents, through Mr Friel's summary

dismissal of the claimant, and Mr Toal's rejection of the internal appeal, were entirely fair. We find that they were unfair, and not the actions of a reasonable employer.

263. While the claimant had expected some form of disciplinary sanction for walking off site, and he told us that he expected a Final Written Warning, he did not anticipate losing his job.

264. The respondents, in dismissing him for gross misconduct, jumped too far, too fast, in circumstances where the speed of the decision-making process, as well as dismissing him on two counts, when the disciplinary invite letter only referred to one disciplinary charge, is all indicative of a pre-determined outcome by the employer's dismissing manager at the disciplinary hearing.

265. The fact that the claimant was dismissed for what the respondents label a serious act of insubordination, leaving site without the permission of his immediate supervisor, and his refusal to carry out a reasonable instruction, which are both illustrative examples of what the respondents classify as gross misconduct, does not necessarily lead to them, even if both established by the employer, resulting in summary dismissal.

266. We note how the respondents' own Company Handbook refers to "***normally"***, so that summary dismissal for gross misconduct is not inevitable in all cases.

267. As per the former EAT President, Mr Justice Langstaff, in **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854** at paragraphs 38 to 41, it would be wrong to simply assume that summary dismissal would have been the only outcome.

268. We bear in mind that mitigating circumstances might take a dismissal outside the range even where there is a finding of gross misconduct. An ET must, of course, not substitute its view for that of the reasonable employer, but it is still entitled to consider how mitigation might fit in, whether it was such that it really

did take the dismissal decision outside the range of reasonable responses in the particular circumstances of the case.

269. We are of the view that this is such a case. There was no proper investigation by the respondents into the claimant's mitigating circumstances, and whether him walking off site was due to a panic attack.

270. In his evidence to the Tribunal, the claimant stated that he had had no panic attacks prior to 24 July 2017, but he has suffered them since his employment with the respondents was terminated, but he linked that to his depression, and not to his diabetes.

271. A reasonable employer would have properly investigated that matter, if necessary by seeking further information, after the disciplinary hearing, adjourning it, to reconvene at a later date, when there could then be further discussion with the claimant about all of the circumstances relevant to him walking off site on 24 July 2017.

272. In the present case, of course, the claimant raised his mitigating circumstances, and his concerns about Liz Pryde, at his investigation meeting and disciplinary hearing, and in his appeal letter, yet Mr Toal, the appeals manager, did not take any steps for those matters to be investigated before, during, or after, the appeal hearing.

273. Mr Toal heard the claimant, and then simply affirmed Mr Friel's decision, and that without the need to adjourn for private reflection: instead, he proceeded straight to giving his final decision there and then.

274. In his evidence to the Tribunal, Mr Friel advised us that he had worked with Liz Pryde for 20 years, and he knows how she works, and how she runs her department. To his knowledge, he advised us there had never been a grievance against her.

275. We gleaned from Mr Toal's evidence to us the distinct impression that he did not consider it worth investigating matters raised by the claimant as he had already determined that the claimant's concerns had no substance. That is not consistent with him acting as an independent and objective appeals manager should act.

276. Further, Mr Toal's procedure did not cure the earlier procedural defects by Mr Friel – if anything, it compounded them by a continuing failure by the employer to act as a reasonable employer.

277. He told us that there was enough in the investigation and disciplinary papers to give him a "***feel"*** for what had happened on 24 July 2017. He stated that he did not speak to Mr Friel, and that if he had been at the appeal hearing, then he wold not have done anything different.

278. As the claimant told us in his evidence, Mr Toal did not listen to his mitigating circumstances, and he described his decision as "***incredible".*** He also accepted, in cross-examination, that he did not give the respondents any information about his illnesses, as they did not ask and "***they just did not care".***

279. Further, on the matter of a reasonable sanction for misconduct, the respondents submitted to us that there were other alternatives considered, but there was no evidence to us that any lesser sanction had ever been considered by Mr Friel or Mr Toal. It is telling, in that regard, that neither of their outcome letters refer to having considered alternative disposals, but then discounted them, for any particular reason.

280. Here, of course, although the claimant's personnel file still had, on file, an expired Written Warning, we are told that it was not taken into account, and Mr Friel's evidence to us was clear that the claimant's record of service was clear of default as at the date of dismissal.

281. In cross-examination, Mr Friel confirmed that there were no issues with the claimant's attendance record, or work ethic. That is another factor that a reasonable employer would have taken into consideration in deciding upon an appropriate disposal through disciplinary procedures, rather than proceeding straight to summary dismissal for gross misconduct.

Compensation for Unfair Dismissal

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

283. 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.

284. 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.

285. In his evidence in chief at this Final Hearing, the claimant spoke of Liz Pryde being a bully, and, in general, of there being a "***bullying culture***" within the Renfrew factory. He spoke of "***gladly going back, if she was not there"***, stating that: "***I can't work with that woman again***." He told us that anytime he asked for help, it was "***constant derision"***, with her shouting and belittling him, in the presence of others, and she told him to "***get out, and get on with it***."

286. Given his description of Ms Pryde as his line manager, and the respondents' failures to investigate his articulated concerns about her, the Tribunal can well

understand why the claimant has not sought re-instatement to his old job. Instead, the claimant has indicated in this case that he seeks an award of compensation only in the event of success before the Tribunal.

287. Compensation, in terms of **Section 118 of the Employment Rights Act 1996** ("***ERA***") is made up of a basic award and a compensatory award.

288. 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 211 above.

289. 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 212 to 214 above.

290. **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".***

291. In their ET3 response, paper apart, the respondents' solicitors denied that the claimant had been unfairly dismissed, but, unusually for professional agents, they made no arguments at that stage about remedy, in the event that the claimant was to be successful in that part of his claim.

292. It was only in Mr Robertson's written closing submissions that arguments were made on behalf of the respondents about compensation, and reductions, for this Tribunal to consider if it found, as we have found, that the claimant was unfairly dismissed by the respondents.

293. Looking now at those arguments, taken from Mr Robertson's full submissions, at paragraphs 51 to 59, it was there stated as follows: -

51. The Respondent's position is that the Claimant's dismissal by reason of gross misconduct was fair in all of the circumstances and accordingly the Claimant should not be awarded compensation.

52. If the Tribunal is not with the Respondent on that point then the Respondent submits that the Claimant has not experienced a loss of earnings relevant to his compensatory award element of his schedule of loss. The Claimant has been receiving both Job Seekers Allowance and Employment Support Allowance due to being unable to work at a rate of £73.10.

53. In the Respondent's submission had he continued in his employment he would have been signed off work and therefore his earnings would have been based on Statutory Sick Pay at £92.50 for the first 28 week following the date of dismissal.

54. After 28 weeks the Claimant would have exhausted his entitlement to statutory sick pay and therefore, in my submission, he would no longer be experiencing a loss therefore his losses should be limited to the difference between what he would have earned on SSP and what he has earned from JSA/ESA.

55. 55 weeks on SSP at a rate of £92.50 = £5,087.50

56. 55 weeks on ESA/JSA at a rate of £73.10 = £4,020.50

57. The Respondent's position is that the Claimant's losses for his unfair dismissal compensatory award claim are therefore £1,067.

58. If there are any procedural failings identified by the Tribunal, on the basis that the Claimant would have been dismissed fairly in any event, if a proper procedure had been followed under the authority of *Polkey v A E Dayton Services Ltd* [1987] 3 W.L.R. 1153 I would submit that a 100% reduction should be applied. There was a 100% chance the Claimant would have been dismissed fairly in any event

and accordingly a percentage reduction of 100% should be implied to any compensation awarded to the Claimant.

59. If the Tribunal is not with me that there should be a *Polkey* deduction, the Claimant should have any compensation awarded reduced by 100% on the basis of contributory conduct as his refusal to engage at all in discussions in relation to the alternative employment offered by his employer was in all of the circumstances entirely unreasonable. In my submission, the authority of *Nelson v Clapham Solicitors UKEATS/0037/11/BI* should be referred to here. It was held in *Nelson* that there must be material and blameworthy conduct on behalf of the Claimant to result in a reduction to compensation. In my submission, the Claimant's conduct can be considered material and blameworthy and his complete and unreasonable refusal to enter into discussions and consultation regarding the new roles contributed entirely to his dismissal.

294. In considering these submissions, we have noted Mr Robertson's clarification to us, when the Judge asked him about this part of his closing submissions, that while paragraph 59, refers to, first, ***"refusal to engage at all in discussions in relation to the alternative employment offered by his employer"*** and then, second, "***complete and unreasonable refusal to enter into discussions and consultation regarding the new roles",*** this is text that should not have been inserted, and does not relate to the facts of the present case.

295. In the present case, the respondents sought reductions in compensation, as set forth in Mr Robertson's closing submissions, but we rejected all of their applications for reductions in compensation payable to the claimant.

296. Specifically, as the claimant was not in any way culpable or blameworthy in his conduct, a reduction for contributory fault is not appropriate. Leaving work, on account of a panic attack, cannot reasonably be regarded as blameworthy

or culpable on his part, particularly when viewed in context of him phoning the office later in the day, apologising, and then attending for work the next day.

297. Further, we 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.

298. 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. Specifically, in the absence of knowing what further matters may have emerged, had the respondents properly investigated the claimant's mitigating circumstances, and / or his concerns about Liz Pryde, we simply cannot enter into speculation about what might have happened.

299. The issue which then arose for us was what is the appropriate amount of compensation that we should order the respondents to pay to the claimant for his unfair dismissal.

300. In assessing compensation, we took as our starting point the calculations in the claimant's Schedule of Loss, prepared by him, as an unrepresented, party litigant, and provided by him to the Tribunal and to the respondents, as at 14 June 2018, as detailed more fully at paragraph 104 above, in our finding in fact (67).

301. While, in his Schedule of Loss, the claimant stated: "***I am still seeking work but have been unable to find a permanent job",*** we note that that statement is not factually correct, as per our findings in fact.

302. It is also within our judicial knowledge that the claimant has used much of the template wording provided by the Citizens' Advice Bureau online tool which provides a sample Schedule of Loss for a claimant, for past and future losses,

including the misspelling of the subject headed: "***Loss of Satutory Rights***", rather than Loss of **Statutory** Rights.

303. The issue for this Tribunal was to assess the claimant's basic and compensatory awards. The respondents agreed his basic award at **£2,208,** as per the respondents' Counter Schedule, at pages 102 and 103 of the Joint Bundle.

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

305. As per the calculation schedule in our Judgment, we awarded **£2,208**, on the basis that:

> **A.** Basic Award: 6 weeks @ £386 gross per week = £2,208.
>
> The claimant as employed by the respondents from 21 February 2011 to 1 August 2017. He was aged 41 at the time of his dismissal, and he had 6 years' continuous employment with the respondents as at that effective date of termination. His gross weekly wage was £386 per week with the respondents.

306. On the matter of the compensatory award, however, we have not awarded the claimant the sum of **£17,592.10** that he sought in his Schedule of Loss by way of financial compensation for past and future losses, including loss of statutory rights, and so it is appropriate that we explain why not.

307. 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 claimant's Schedule were confused – he referred to **£368** as a statutory week's pay, which is the gross weekly amount, but he calculated his net earnings from **£1,594.67 per month**,

which the respondents' Counter Schedule challenged, and stated should be **£1,356.33 net per month.**

308. On the basis of the claimant agreeing the respondents' stated gross and net weekly earnings of **£368 gross**, and **£313 net**, we calculated the sums due to the claimant.

309. While the claimant's calculations were up to 14 June 2018, we needed to reassess them up to the close of the Final Hearing before us on 28 August 2018, a period of **56 weeks**, rather than 45 weeks. Further, while he had netted off State benefits income received, that is not appropriate, as that is a matter for Recoupment.

310. Accordingly, as per the calculation schedule in our Judgment, we awarded a compensatory award of **£2,977.40** on the basis that:

B. Compensatory Award:

Past Loss of Earnings:

Net weekly pay with the respondents at **£313** per week.

Date of dismissal to the last day of Final Hearing: 1 August 2017 to 28 August 2018 = 56 weeks: 56 @ £313 = £17,528**,** if the claimant had been at work with the respondents during that period.

But, on account of the claimant not being fit to work during that period, and there being no enhanced contractual sick pay scheme in operation, that amount falls to be reduced, in terms of **Section 123 of the Employment Rights Act 1996**, to 28 weeks of Statutory Sick Pay @ **£92.05** per week = **£2,577.40,** being the "prescribed element".

Future Loss of Earnings:

Nil award by the Tribunal, on the basis that the claimant, as at the last day of the Final Hearing, was still not fit to work, and he had no new employment obtained, or contemplated.

Loss of Statutory Rights: **£400**

Total Compensatory Award = £2,977.40

311. We pause here to note and record that Mr Robertson referred, in his closing submissions, at paragraph 53, as reproduced earlier, to SSP at the rate of **£92.50** per week, but that is incorrect, and we have used the applicable weekly rate of **£92.05**.

312. As we mentioned above, at paragraph 104 (67) of these Reasons, the claimant's Schedule of Loss referred to **Daley v Dorsett (Almar Dolls) [1981] IRLR 385, EAT,** and **Arthur Guinness Son & Co v Green [1989] IRLR 288, EAT.** Mr Robertson, solicitor for the respondents, did not address us upon them, but we comment upon them now.

313. We do so because while Mr Robertson accepted the claimant's suggested figure of **£1,307** for loss of statutory rights, the Schedule of Loss, as reproduced at paragraph 104 (67) contains arithmetical errors. Further, the cases cited by the claimant are not the up to date legal position. Most usually, when a Tribunal is addressed on loss of statutory rights, we are referred to **SH Muffett Ltd v Head [1986] IRLR 488**.

314. In **Superdrug Stores Plc v. Corbett [2006] UKEATS/0013/06,** a Tribunal awarded an obviously excessive sum of £1420 for loss of statutory rights, without explanation of their reasons for doing so. The employer's appeal was allowed by Lady Smith, and the case remitted back to the same Tribunal for reconsideration of the matter. Her judgment considered both **Daley,** and **Muffett**.

315. The **Muffett** judgment was made during the time when the qualifying period for claiming unfair dismissal was raised from one to two years, and the EAT in **Muffett** decided to increase substantially the nominal sum awardable of £20 (at which it had stood since being set by the National Industrial Relations Court in **Norton Tool Co Ltd v Tewson 1972 ICR 501, NIRC**) to £100, on the basis that the pound sterling (£) had undergone considerable devaluation in the interim.

316. Further, it will be recalled that the qualifying period (in terms of **Section 108 of the Employment Rights Act 1996**) for claiming unfair dismissal changed from one to two years' continuous employment as from 6 April 2012, and so two years' is now the qualifying period for claimants complaining of unfair dismissal. While the EAT in **Muffett** noted that the figure of £100 should be reviewed within 3 to 4 years, in fact, the figure awarded by Tribunals has remained fairly static since that time and appears largely unrelated to inflation and the retail prices index.

317. It is now fairly standard, if not common practice, for Tribunals to award nominal sums anywhere between £350 and £500. We are not aware of any judicial uprating of the figure suggested in **Muffett.** On that basis, we do not think it is appropriate to award the claimant the sum sought, as it is more than modest, and so we have awarded him **£400**, being just over one week's gross pay, for loss of statutory rights.

318. Next, as per the calculation schedule in our Judgment, at section C, we awarded a statutory uplift of 15% on the compensatory award, on the basis that **15%** x £2,977.40 = **£446.61.**

319. As per paragraph (5) of our Judgment, we decided a 15% uplift was appropriate because : "The respondents having unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, by the way they conducted the investigation, disciplinary and appeal meetings held with the claimant, and by their repeated failures to investigate the claimant's mitigating circumstances, and his complaint about

Liz Pryde, the Tribunal finds that it is just and equitable in all the circumstances that the claimant's compensatory award from the Tribunal be increased by **15%**, in accordance with the Tribunal's powers under **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.**"

320. As per the calculation schedule in our Judgment, we awarded a total monetary award of **£5,632.01** on the basis that: **Total Monetary Award (A + B+ C) = £5,632.01**. Accordingly, that is the sum we ordered the respondents to pay to the claimant, as per paragraph (6) of our Judgment.

321. As the claimant advised the Tribunal that he had been in receipt of State benefits, namely Jobseekers' Allowance, after termination of his 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 was explained in the Schedule attached to our Judgment, as also at paragraph (8) of our Judgment.

Discussion and Deliberation: Disability Discrimination

322. At the Case Management Preliminary Hearing, held before Employment Judge Doherty, on 8 December 2017, she recorded that disability status was in dispute, for while the respondents accepted the claimant had diabetes, and they had knowledge of his diabetes, they did not accept that they had knowledge of his depression.

323. Further, while they accepted that the claimant was dismissed for leaving the factory premises, they did not accept that he had been dismissed for something arising in consequence of his disability, and therefore the issue for the Tribunal was identified as being to consider whether or not his panic attack was something in consequence of his disability and was the reason he left work without telling his manager.

324. Also, at that same Case Management Preliminary Hearing, held before Employment Judge Doherty, on 8 December 2017, she noted that the claimant was making a complaint of harassment , under **Section 26**, and she ordered the claimant to provide additional information, which he duly did.In our findings in fact, we narrated the claimant's further and better particulars of his harassment complaint, and we refer back to that for ease of reference, at paragraph 104(29) earlier in these Reasons.

325. At that same time, Judge Doherty also ordered the respondents to answer that additional information, and confirm their position, which they failed to do, despite a clear and unequivocal judicial Order issued to them, at that time.

326. Later, in the written Note and Orders by Judge Doherty, issued on 6 June 2018, following a further Case Management Preliminary Hearing, held before her on 1 June 2018, she noted that the claimant, having provided additional information setting out the alleged treatment which he complains of, there was a factual issue for the Tribunal as to whether or not the treatment complained of occurred, and thereafter whether, in the event it did occur, this was treatment related to the claimant's protected characteristic and had the effect prescribed.

327. It is also appropriate that, in discussing the reasonable adjustments part of the claim, we note here the terms of his further and better particulars, in that regard, as follows: -

> *Section 20 claim*
>
> *(1) The practice of placing a worker returning from illness into a potentially stressful situation without conducting a return to work interview, puts a worker with mental health problems connected to their disability at a substantial disadvantage.*
>
> *(2) The disadvantage is that they may be placed in a situation in which they are unable to cope with the demands on them at that time, resulting in worsening health and inability to complete their work to the*

satisfaction of management. A person without heightened anxiety would be able to carry out the work despite the pressure without detriment to their health. When not suffering symptoms of anxiety connected to my disability, I too would have been able to carry out the same tasks as any other colleague. However, operating without any discussion forced me into a situation I was not capable of coping with at that time, and ultimately led to my dismissal.

(3) Two adjustments are proposed as reasonable, and should have been enough to alleviate the disadvantage I suffered. Firstly, ensuring that a return to work interview is carried out in all cases of staff returning to work with symptoms of poor mental health. This would prevent someone like me from being placed in a situation for which they were not ready. Secondly, training of management in understanding the nature of certain disabilities (in my case diabetes), and the symptoms this is likely to cause. I believe such training would have given management a greater understanding of why I was particularly susceptible to tiredness, or irritability, or of suffering episodes of depression and anxiety. Armed with this knowledge I am sure that I would not have been placed in the detrimental situations I was required to deal with.

328. At the Case Management Preliminary Hearing, held before Employment Judge Doherty, on 8 December 2017, she noted that the claimant was making a complaint of failure to make reasonable adjustments, under **Section 20**, and she ordered the claimant to provide additional information, which he duly did, as reproduced above, but she also ordered the respondents to answer that additional information, and confirm their position, which they failed to do, before the start of this Final Hearing, despite Judge Doherty's order, and Judge Kearns' subsequent orders after the disability status Preliminary Hearing Judgment was issued.

329. Later, in the written Note and Orders by Judge Doherty, issued on 6 June 2018, following a further Case Management Preliminary Hearing, held before her on 1 June 2018, she noted that the PCP which the claimant is relying upon

is "***the respondents' failure to carry out return to work interviews for employees returning to work from a period of illness***".

330. Judge Doherty further noted the claimant's disadvantage to be "***that without the opportunity to explain his position and discuss what adjustments may be reasonable at a return to work interview, the claimant was placed in a situation where he was unable to cope with the demands of work at that time, which resulted in a deterioration in his health and inability to complete his work to the satisfaction of management (and ultimately his dismissal), but that a person who did not have the claimant's disability would (have) been able to cope to returning to work, without an interview."***

331. Despite allowing the respondents the opportunity of answering the claimant's additional information, with reference to her earlier December 2017 directions, Judge Doherty allowed the respondents to do so by 29 June 2018, but they failed to do so yet again.

332. Further, in that same Note issued 6 June 2018, Judge Doherty noted the basis of the **Section 15** claim as set out in her December 2017 Note, and, at this Final Hearing, the respondents did not rely on any **Section 15(1)(b)** defence that the claimant's dismissal was a proportionate means of achieving a legitimate aim.

333. In Mr Robertson's full written closing submissions for the respondents, at paragraphs 18 to 23, he dealt with discrimination arising from disability, under **Section 15 of the Equality Act 2010**, where after quoting the relevant statutory provision, he stated as follows: -

> 18. The Claimant's position is that he was unfavourably treated by the Respondent because he suffered a panic attack and left the premises. The Claimant's position is that his suffering a panic attack was "something arising in consequence of his disability" in terms of section 15(1)(a) of the Equality Act 2010.

19. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14, the President of the EAT, Mr Justice Langstaff, sitting alone, held that there were two distinct steps to the test to be applied by tribunals in determining whether discrimination arising from disability has occurred:

    - Did the claimant's disability cause, have the consequence of, or result in, "something"?
    - Did the employer treat the claimant unfavourably because of that "something"?

    (This can be found in the SUMMARY section of the judgement)

20. The Respondent accepts that the claimant was dismissed for leaving the factory premises, but they do not accept that he was dismissed because of something arising in consequence of his disability.

21. The Respondent's position is that, at the time of dismissal, they did not believe that that the decision to walk off the premises was linked to any medical condition of the Claimant. The Respondent's position is that there was no evidence to support the Claimant's assertions that the panic attack was related to his disability.

22. In my submission the Claimant has failed to discharge the burden of proof linking his panic attack to his diabetes as contained within Section 136(2) and (3) of the Equality Act 2010. The Claimant accepted during cross examination that his panic attack was caused by anticipating he would have been unable to fulfil the order which he had been tasked to undertake. There has been no medical evidence submitted to the Tribunal which links the Claimant's diabetes to a panic attack.

23. Esto if the Tribunal finds that the Claimant has satisfied the initial burden of proof then I submit on behalf of the Respondent that Jim Friel was unaware the Claimant suffered from diabetes and given the lack of supporting documentation could not be reasonably expected to know that the Claimant had a disability.

334. We have carefully considered his arguments, and while we reject, as not established by the evidence, that the respondents were unaware that the claimant suffered from diabetes, we do accept Mr Robertson's argument that the claimant has provided no evidence, only assertion, that the panic attack was linked to his disability.

335. This is reinforced, in our opinion, by the claimant's own evidence, in cross-examination, that his panic attack was caused by anticipating he would have been unable to fulfil the order which he had been tasked to undertake. As such, we find that the claimant has not proven this head of claim against the respondents, and so we dismissed it as not well-founded.

336. In coming to that view, we do not accept the respondents' contention that Jim Friel was unaware the claimant suffered from diabetes, because from the evidence before us, it was common knowledge at the Renfrew factory, and he should have been aware if he was adequately briefed by Liz Pryde.

337. Further, in Mr Robertson's full written closing submissions for the respondents, at paragraphs 24 to 35, he then dealt with harassment, under **Section 26 of the Equality Act 2010**, where after quoting the relevant statutory provision, he stated as follows: -

> 24. The Claimant's complaint of harassment is brought under Section 26(1)(a) and (b) (i) and (ii) of the Equality Act 2010. The Claimant's claim is that Liz Pryde, the Claimant's line manager, engaged in unwanted conduct related to his disability, and that conduct had the purpose of (1) violating his dignity and (2) creating an intimidating, hostile, degrading, humiliating, or offensive environment for him.
>
> 25. I would refer the Tribunal to the case of Land Registry v Grant [2011] EWCA Civ 769 in which Lord Justice Elias stated at paragraph 47 that harassment must "…creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of

harassment". I would submit here that the harassment allegations made by the Claimant are in our submission trivial acts which would at the time have caused minor upset and it's the Respondents position that the Claimant is now attempting to convince the Tribunal that these incidents constitute harassment when they are in our submission patently trivial acts.

26. The Respondents position is that the test the Tribunal must assess the conduct as meeting is whether the conduct could reasonably be considered as having the effect of violating the Claimant's dignity. The Tribunal is directed to the authority of Richmond Pharmacology Ltd v Dhaliwal UKEAT/0458/08/CEA in which it was held that the test for harassment is not subjective (at paragraph 15). Conduct is not to be treated as violating a Claimant's dignity or creating a hostile or intimidating environment merely because the Claimant thinks it does. The Respondent would reiterate again it must be conduct which could reasonable be considered as having that effect.

12/03/2018

27. The first allegation is that Liz Pryde allegedly made the remark *"I am fucking sick of you. I'm making it my mission to get you sacked"*. The Respondent submits that this statement could not reasonably be considered as having the effect of violating the Claimant's dignity.

28. It is submitted that the incident did not take place. If the Tribunal is not with me on that point then I submit that even if the incident did take place then there has been insufficient evidence heard which links the comments to the Claimant's diabetes.

29. In my submission the Claimant has failed to satisfy the initial burden of proof (Section 136(2) and (3)) placed upon him and that, on the balance of probabilities, insufficient evidence has been presented from

the Claimant which could entitle the Tribunal to find that discrimination has taken place. It is quite conceivable, based on the evidence submitted, that Ms Pryde simply 'actively disliked' (page 48 of the joint bundle) the Claimant due to an issue unrelated to his diabetes.

03/07/2018

30. In relation to the second allegation of harassment relating to the Claimant being assigned a lone working task for three days I submit that this incident does not constitute harassment on the basis that it is in relation to the Claimant's depression which has not been found to qualify as a disability.

31. Assigning an employee to fill the dummy bottles is a regular occurrence. Mr Friel alluded to the fact in evidence that he did not find it unusual that the Claimant was given the job. The area in which the task took place was not isolated and was on the contrary an area in which the Claimant would have had interaction with other workers due to its close proximity to the ticket office and the dry goods warehouse. This position is supported by the evidence given by Jim Friel.

32. The Claimant has failed to satisfy the initial burden of proof (Section 136(2) and (3)) placed upon him and that, on the balance of probabilities, insufficient evidence has been presented from the Claimant which could entitle the Tribunal to find that discrimination has taken place.

24/07/2018

33. The last incident of harassment related to the Claimant being assigned a new line comprising of new staff. It is in dispute as to the precise formation of the new staff, but leaving that point aside, in my submission the task he was assigned was within his job remit.

34. Furthermore Liz Pryde was on annual leave during the day in question, the Claimant had been off the Friday before with a chest infection and therefore it was conceivable that the Claimant would not have been present in work on the Monday when the new line was assigned. Ms Crawford stated in evidence that the new line would have gone to Peter or whoever was effectively covering his shift. Therefore I submit the task was not created specifically for the Claimant.

35. The Claimant has failed to satisfy the initial burden of proof (Section 136(2) and (3)) placed upon him and that, on the balance of probabilities, insufficient evidence has been presented from the Claimant which could entitle the Tribunal to find that discrimination has taken place. In my submission there has been insufficient evidence presented to the Tribunal which links the assigning of the task to the Claimant's diabetes.

338. We have carefully considered Mr Robertson's arguments for the respondents, and recall how, in his evidence in chief, the claimant spoke of Liz Pryde as "***being a bully***", and in general of there being a "***bullying culture"*** in the Renfrew factory. He spoke of "***gladly go back",*** if Liz Pryde was not there, and: "***I can't work with that woman again."*** He told us that anytime he asked for help, it was "***constant derision***", and he was "***laughed out of the office***" by Liz Pryde, who told him "***to get out and get on with it***." He spoke of her shouting at him, and belittling him in the front of others.

339. Of course, we recognise that we did not hear Ms Pryde in reply to these allegations, as she did not give evidence to the Tribunal. From the claimant's clear and compelling evidence as to how he was treated at work by her, we were satisfied that he has established her course of behaviour as complained of in his evidence before us on the civil standard of proof on the balance of probability.

340. We are clear that her conduct towards him was unwanted, and that it had the purpose of violating his dignity. If we are wrong as to its purpose, it is clear that it undoubtedly had the effect of creating an intimidating, hostile, degrading, humiliating, or offensive working environment for him. Ms Pryde's behaviour was not trivial acts causing minor upsets, as submitted in the respondents' written closing submissions, but cold, calculated acts designed to create an intimidating and hostile working environment for the claimant, further to her comment to him that she would make it "***her mission to get him sacked".***

341. Unreasonable conduct by a line manager or supervisor does not, however, automatically amount to establishing harassment in law, as in that regard the claimant employee requires to be able to show that the treatment meted out was because of their protected characteristic, in this case the proven disability of diabetes. It is here that the harassment claim fails, as there is insufficient evidence heard by the Tribunal which links Ms Pryde's acts to the claimant's diabetes.

342. We agree that as only diabetes has been found by Judge Kearns' Tribunal to be a disability, the claimant's allegation about being assigned a lone working task and that contributing to his depression, is not well-founded, although as regards the claimant's description of "***lone working",*** from the evidence we heard, and the photographs we were shown, we do not accept that the claimant was truly a lone worker, for he was working within the factory, while others were working there to, and he was working under supervision, on a task that was clearly part of his job remit.

343. While we accept he may have felt isolated, the dummy bottle area where he was working was in an area of the factory close to the ticket office and dry goods warehouse, where the claimant could have interaction with other workers. If his isolation contributed to his depression, his depression is not the disability established for the purposes of these Tribunal proceedings.

344. From our judicial experience, we are aware that the Health & Safety Executive gives health and safety guidance on working alone, and the risks of lone working. Employers have legal duties towards their employees, including lone workers, but working alone is not necessarily in itself against the law, and it will often be safe to do so.

345. The law requires employers, who are responsible for the health, safety and welfare at work of all their workers, to put in place risk assessment and other controls, to adequately control the risks of lone working and particular problems that might affect lone workers, and to monitor those controls, and workers of course have responsibilities to take reasonable care of themselves and others affected by their work activities.

346. In the present case, there was no complaint by the claimant that his dismissal was, in any way, related to health and safety concerns, and so we need say nothing further here.

347. The last incident of harassment related to the claimant being assigned a new line on 24 July 2017, but that task was within his job remit. When he left, the task was allocated to another, and his allocation to that line was part and parcel of his job, to run the lines allocated to him from time to time. There was no evidence presented to us that his allocation to that line on that day was in any way linked to his diabetes, and so that part of the claim inevitably failed too.

348. Finally, in Mr Robertson's full written closing submissions for the respondents, at paragraphs 36 to 42, he dealt with reasonable adjustments, under **Section 20 of the Equality Act 2010**, where after quoting the relevant statutory provision, he stated as follows: -

> 36. The Claimant makes a complaint of failure to make reasonable adjustments under section 20 of the Equality Act 2010.

37. The Respondent's position is that the PCP identified by the Claimant is not valid. We have heard in evidence by Jim Friel, the Claimant and Ms Janet Crawford that the Respondent does undertake return to work interviews.

38. There is no statutory obligation on an employer to undertake a return to work interview and certainly not before the commencement of an employee's shift. It is the Respondent's position that a return to work interview is undertaken within the first 4 hours of the employees first shift back and in my submission had the Claimant not walked off he would have had a return to work interview.

39. If the Tribunal are not with me on that point then I submit that the suggested adjustments are not reasonable.

40. The first adjustment of having a back to work interview is not, in my submission, a valid adjustment on the basis that the Respondent does undertake back to work interviews. Therefore in my submission this adjustment proposed is unreasonable.

41. In relation to the second adjustment suggested in my submission it would not be reasonable to expect managers to be trained in understanding the nature of certain disabilities and the symptoms this is likely to cause on the basis that this is too extensive an adjustment given the wide variety of disabilities and their symptoms.

42. I would direct the Tribunal to the authority of General Dynamics Information Technology Ltd v Carranza [2014] UKEAT 0107_14_1010 in which the EAT suggested that **amendments** must be understood as "practical actions which are taken to avoid the disadvantage" (paragraph 35). It is the Respondent's position that the adjustments identified are not practical actions.

349. In considering these submissions, we have taken, as a typographical error in paragraph 42, that the word shown as "***amendments***" should, read in context, say "***adjustments***."

350. We reminded ourselves that **Environmental Agency v Rowan [2008] ICR 218** sets out guidance on how to approach reasonable adjustment cases, and how, in particular, a claimant must show a "***PCP"***. The Equality and Human Rights Commission Code construes a PCP widely, and it can include formal or informal policies, including one-off decisions and actions. Although it is not binding, the Code's definition was endorsed in **Lamb v The Business Academy Bexley [2016] UKEAT/0226/15,** at paragraphs 25 and 26, by Mrs Justice Simler DBE, then President of the Employment Appeal Tribunal.

> "25. As has been emphasised, most recently in **Griffiths**, it is critical to identify the relevant PCP and the precise nature of the disadvantage it creates in relation to a disabled individual by comparison with its effect on non-disabled people. The nature of the comparison required in a given case will depend on the disadvantage caused by the relevant arrangements. Where the disadvantage is the risk of dismissal for lack of capability, the comparator is likely to be an able-bodied person not at risk of dismissal because capable of performing the job (as for example in **Archibald v Fife Council** [2004] UKHL 32). In a case where the complaint concerns the requirement to maintain a certain level of attendance at work to avoid disciplinary sanction and possibly dismissal, although both able-bodied and disabled employees will suffer stress and anxiety when ill and unable to attend work, the risk of this is likely to be greater for disabled employees whose disability results in more frequent or longer absences, making it harder for them to comply with the requirement to attend work on a regular basis. In **Griffiths** that was recognised as a more than minor or trivial disadvantage: paragraph 47. The Court of

Appeal made clear that the fact that an able-bodied and a disabled employee are treated equally and are subject to the same disadvantage when absent for the same period of time does not mean that there can be no disadvantage if the PCP bites harder on the disabled employee than it does on the able-bodied: paragraph 58.

26. The phrase "PCP" is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. In **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12 Langstaff J said it had:

> **"18. … something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."**

351. We have also reminded ourselves that, in **Project Management Institute v Latif 2007 IRLR 579**, the EAT said that "***There must be evidence of some apparently reasonable adjustment which could be made***." The onus is upon the claimant and not upon the respondent to point the Tribunal in general terms to the nature of an adjustment which would avoid the substantial disadvantage. Where that is done, the burden shifts to an employer, on the basis that the employer might show that the disadvantage would not have been addressed by the proposed adjustment. Alternatively, the employer may in that scenario demonstrate to the Tribunal that the adjustment proposed was not a reasonable one.

352. The reference to **Griffiths** is to the Court of Appeal's judgment in **Griffiths v Secretary of State [2016] IRLR 216**.

353. In considering this aspect of the case, we referred to Mr Robertson's written submissions, which we accepted, as well-founded. It was clear from the evidence that the respondents do undertake return to work interviews for returning employees coming back from sick leave, and that appears to us to have been a part of their employment practices and procedures generally at the factory. While Liz Pryde did not tend to take them herself, we were satisfied that they did occur, and that there was a system in place to hold them.

354. Having been off work on the Friday, 21 July 2017, with a chest infection, there was no guarantee when the claimant would return to work. The fact that he returned, on Monday, 24 July 2017, when Ms Pryde was on holiday, meant that another a supervisor would have required to do the claimant's return to work interview. He had appeared for work, and it was not unreasonable in those circumstances for the employer to take from that that he was fit to work. He gave no contra-indicators, until such time as he upped and left the factory.

355. The employers' business is, not surprisingly, focussed on the work at hand, and getting the working day's production lines under way. The fact that there

was not a return to work interview held before the claimant's shift started is not in dispute, but we do not think that there was any obligation on the employer to hold it before the start of his shift. The fact that, in ordinary course, it would have been held at a convenient time later in the day, having regard to the availability of both the claimant and his supervisor, Liz Smith on that day, in the absence of Ms Pryde, was not unreasonable. Had the claimant not walked off, we were satisfied that he would have had a return to work interview later that day

356. As regards the second proposed adjustment, that managers should be trained in understanding the nature of certain disabilities, and the associated symptoms, we agree with the respondents that such a broad adjustment is not reasonable, given the wide range of illnesses, disabilities and symptoms.

357. We do, however, agree with the claimant, that the respondents, through Ms Pryde, his immediate line manager, and higher up in the management, namely Mr Friel as the Renfrew director, should have taken a greater interest in finding out about the claimant's diabetes, and depression, and been more pro-active in discussing matters with him, and in taking their own occupational health advice, or instructing a medical report from at least the claimant's GP.

358. Diabetes is a fairly widespread condition in the general population, and something most people are likely to know something about. The respondents should, in our view, have been more understanding of how diabetes could affect the claimant in his workplace, and made more appropriate arrangements than they did for him to take his insulin.

359. While the claimant stated to us, in his evidence at the Final Hearing, that he did not ask for it, there was evidence before us that there is a medical room in the factory, a fact spoken to by the first-aider, Ms Janet Crawford.

360. It seems reasonable, at least to us, for any manager or supervisor at the respondents' factory to have regarded that location as a more appropriate

place for the claimant to take his insulin, rather than, as he stated in his evidence to us, he took it in the canteen, or cloakroom.

361. He spoke of never being "***offered the luxury***" of the medical room, yet Ms Pryde and others at the factory knew he kept his insulin in the fridge in her office. In those undisputed circumstances, it is not clear why he was not offered the medical room facility as well as a reasonable provision of adequate premises to take his insulin.

Remedy

362. As we dismissed the disability discrimination heads of complaint, there was no live issue for us to consider as regards remedy, and in particular parties' competing views on the amount of compensation that might have been payable to the claimant, if we had upheld any, or all, of those complaints.

363. That said, however, 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 any punitive element in order to punish the employer or reflect the Tribunal's disapproval of the employer's employment practices.

364. 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.

365. In any event, in the present case, while, for his discrimination heads of complaint, the claimant sought awards for injury to feelings, under **Section 124 of the Equality Act 2010**, we also record that, other than the supporting evidence from the claimant's wife, as well as the claimant's own evidence,

there was no supporting medical evidence presented of the claimant's injury to feelings.

366. In his closing submissions for the respondents, Mr Robertson's principal submissions were that no discrimination had taken place and therefore no injury to feelings award should be made to the claimant, but, if the Tribunal were not with him on that point, then he submitted that any award should be in the low band of **Vento.**

367. As such, had he been successful in his discrimination heads of complaint, in whole or in part, the Tribunal would only have had that evidence before it on which it could properly assess the extent and nature of, and thus calculate damages attributable, to any injured feelings suffered by the claimant.

368. The principles to be determined when assessing awards for injury to feelings for unlawful discrimination are summarised in **Armitage & Others v Johnson [1997] IRLR 162.** Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

369. Citing from **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 / [2003] IRLR 102**, we remind ourselves that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."*** Lord Justice Mummery said (when giving guidance in **Vento**) that "***the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise……. tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson".***

370. In **Vento**, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

371. The appropriate sum for each band has been up-rated in cases subsequent to **Vento** to take account of inflation, see **Da'Bell v NSPCC [2010] IRLR 19 (EAT)**, and also to take account of the 10 per cent uplift for personal injury awards based on the Court of Appeal decision in **Simmons v Castle [2012] EWCA Civ 1039**. Therefore, until recent Presidential Guidance was issued, the amount appropriate for the lower band was £660 to £6,600 and the amount appropriate to the middle band was £6,600 to £19,800. The amount appropriate for the top band was £19,800 to £33,000.

372. More recently, in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, the Court of Appeal in England & Wales ruled that the 10% uplift provided for in **Simmons v Castle** should also apply to ET awards of compensation for injury to feelings, but it expressly recognised that it was not for it to consider the position as regards Scotland. However, account has now been taken of the position in Scotland by Employment Judge Shona Simon, the Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, President of ET (England & Wales), issued on 5 September 2017.

373. For claims, such as the present case, presented after 11 September 2017, the **Vento** bands are now a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award

in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.

374. We have had to address the competing submissions made to us about whether it is lower or middle band **Vento.** The claimant sought an award of **£10,000**, being the lower end of the middle band, whereas the respondents' Counter Schedule suggested **£1,000**,

375. While dismissal was a one-off, which is unsurprising, given its very nature, we cannot accept the respondents' position that the matters complained off by the claimant were a "***one off occurrence***". There was clearly a course of conduct by Ms Pryde towards him, prior to is dismissal, and failings by the respondents from investigation through to appeal stages. As such, had we required to do so, we would have been likely to make an award somewhere in the lower end of the middle **Vento** band.

376. Finally, on the matter of the claimant's proposed recommendations, all we need say is that we agree with Mr Robertson that, even if we had upheld these parts of the claim, a recommendation under **Section 124 of the Equality Act 2010** would not have been appropriate, as the claimant is no longer in the respondents' employment, and so his proposed specified steps could not, as per **Section 124(3)**, be "***for the purpose of obviating or reducing the adverse effect"*** on him as the claimant in these Tribunal proceedings.

Closing Remarks

377. In closing, arising from our consideration of the facts and circumstances of this case, there are a few matters we wish to comment upon for the assistance of parties.

378. Firstly, in dealing with this case, the Tribunal has had regard to the terms of the respondents' Company Handbook, and the grievance and disciplinary procedures set out there.

379. Apart from the respondents' own breach of their procedures, by Mr Friel not being invited to, nor attending, the appeal meeting held by Mr Toal, the other peculiarity of their procedures is that we noted that an employee's right of appeal is to be exercised "***within 2 working days***."

380. In our collective experience, that is a very, very short period of time for any employee, in any business, to act, when the generally encountered benchmark in most workplaces is at least 5, but sometimes 7 or 10 days, to appeal against an employer's decision.

381. While, in the present case, the claimant was able to appeal in writing within 2 working days, by submitting his internal appeal on 3 August 2017, after his summary dismissal, on 1 August 2017, such a short window of opportunity does not strike us as being a fair and reasonable period of time for a dismissed employee to carefully reflect, and decide whether or not to lodge an internal appeal against dismissal and, if so, to decide on what basis.

382. Accordingly, we encourage the respondents to look again at their procedures, and seek to review them, and their employee, supervisor, manager and Director awareness of procedures in the company Handbook, as also the ACAS Code of Practice.

383. It was troubling for the Tribunal to hear from Gail McAlpine that, in being tasked to investigate matters, she was given no specific guidance by the respondents' Director, Mr Friel. Similarly, it was troubling that, despite the claimant's repeated concerns about what he saw as bullying behaviour by Liz Pryde, those concerns were not dealt with by the respondents as a grievance.

384. We refer the respondents to, and commend that they read, the **ACAS Code of Practice**, as also the associated **ACAS Guide to Discipline and**

Grievances at Work, and the separately published ACAS ***"*Guidance on Conducting Workplace Investigations".**

385. As the ACAS guidance explains, the role of an investigator, which is to see if there is a case to answer, is to be fair and objective so that they can establish the essential facts of the matter and reach a conclusion on what did or did not happen, and they should do this by looking for evidence that supports the allegation and evidence that contradicts it.

386. In our view, the ACAS guidance is a particularly easy to read guide which outlines the essential decisions and actions that employers of all sizes must and should make when deciding to conduct an investigation, and it also provides important information divided into 6 manageable steps for anyone who has been appointed to conduct a disciplinary or grievance investigation.

387. It is both a reference tool for those with experience, and an introduction for those new to investigations, and ACAS highly recommend that anyone appointed as an investigator should be trained in this area whenever possible. We endorse that approach. Making a decision without completing a reasonable investigation can make any subsequent decisions or actions unfair, and leave an employer vulnerable to legal action.

388. Secondly, the claimant, as an unrepresented party litigant, failed to comply, from time to time, timeously with the Tribunal's previous case management orders, but he did ultimately comply. It is a matter of regret, however, that the Tribunal has to record that the respondents' solicitors, being professional legal agents, failed to comply with orders of the Tribunal, and so they were in breach of their duty to assist the Tribunal to further the overriding objective under **Rule 2** to deal with the case fairly and justly.

389. Whatever the reasons within the internal workings of Jackson Boyd LLP, it was Mr Robertson's professional responsibility, as the respondents' legal representative at this Final Hearing, to ensure that all outstanding orders of

the Tribunal were complied with by the respondents, before the start of this Hearing, or at least to seek an extension of time to do so.

390. While he referred to having received a "***hospital pass***" from a colleague, a phrase which we understood, but we did not think was the best use of vocabulary, that was not particularly helpful, although he did then take action to rectify the respondents' earlier failures to comply, and accordingly we give him credit for that rectification.

391. We are sure that Mr Robertson will have learned many important lessons from his conduct of this Hearing that will stand him, and his future clients, in good stead as to the importance of preparation for, and efficient and effective conduct of a case on a client's behalf.

392. We also trust that Jackson Boyd LLP will review their internal working arrangements, as to case handover, and case supervision, so as to ensure that whoever in their firm is dealing with a Tribunal case, it is done to appropriate professional standards, and timeous compliance with orders of the Tribunal.

393. However, in respect of the respondents' representative's failure to comply with certain case management orders of the Tribunal, prior to the start of this Final Hearing, the Tribunal finds that failure to have been unreasonable conduct of the proceedings by the respondents' representative, being a failure to comply with an Order of the Tribunal, as also a failure to assist the Tribunal to further the overriding objective under **Rule 2 of the Employment Tribunals Rules of Procedure 2013.**

394. As their failure to do so was remedied, in the course of this Final Hearing, the Tribunal makes no further order as regards Wasted Costs against them, as the Final Hearing was thereafter conducted and concluded within the allocated sitting.

395. Thirdly, and finally, there being no application made at the Final Hearing by the claimant for a Preparation Time Order against the respondents, the

Tribunal notes that the claimant had the standard 28 days from date of issue of our Judgment to intimate any such application. He has not done so. In that event, if application is made now, following the issue of these Written Reasons, by the claimant, and opposed by the respondents, the Tribunal will thereafter determine any appropriate further procedure before the Tribunal to deal with that matter. Meantime, we need say nothing further.

Employment Judge: Ian McPherson
Date of Reasons: 01 April 2019
Entered in register: 02 April 2019
and copied to parties