EMPLOYMENT TRIBUNALS

Claimant: Mr. K. Hirani

Respondent: **(**1) Institute and Faculty of Actuaries
(2) Mr T. Watkins
(3) Ms K.Russell
(4) Ms K. Brocklesby
(5) Ms E. Harriman

Heard at: London Central **On:** 5-6,9-10, 12-13, 16-17,19-20 and 23 September 2019; submissions 27 September; deliberation 4,10, 11 October

Before: Employment Judge Goodman
Mr M. Simon
Ms S. Plummer

Representation
Claimant: in person
Respondent: Ms. J. Connolly, counsel

RESERVED JUDGMENT

1. **The claims of disability discrimination under sections 13,15, 19 and 21 of the Equality Act do not succeed.**

2. **The harassment and victimisation claims do not succeed**

3. **No declaration is made as to the first respondent's rules.**

REASONS

1. The claimant, who is disabled by a number of neuro-diverse learning disabilities, wants to qualify as an actuary. He has passed the first stage, but has had difficulty passing the higher skills papers.

2. He brings claims of disability discrimination, harassment and victimisation in respect of the first respondent's setting of examinations to qualify as an actuary.

3. The first respondent ("the Institute") sets and marks the examinations required to qualify as an actuary. It is a qualifying body for the purpose of part 5 of the

Equality Act 2010.

4. The second, third, fourth and fifth respondents are or were employed by the Institute as Director of Education, Corporate Secretary, Registrar, and Deputy Registrar, respectively. It is agreed that they acted in the course of employment at all material times.

Claims and Issues

4. The claims were presented on four claim forms, two in July 2013, a third in February 2014, and a fourth in November 2014. They have been consolidated for hearing. Some claims were struck out or withdrawn in earlier preliminary hearings, where the issues were clarified and refined. For this final hearing, we were asked by the claimant to use a 120 page list of legal and factual issues (in 8 point type, single spaced) from an earlier stage in the proceedings; it was last amended in February 2017. A close reading of the list shows that its status is better described as a consolidated statement of case. It sets out each claim and the response to each claim.

5. We also had an 8 page "short" list of issues, prepared at the direction of the judge at the May 2019 preliminary hearing. For practical reasons we have worked from the "short" list, referring back to the long list when necessary to clarify the full case. The short list is appended to these reasons.

6. In addition to these documents, the respondent prepared a summary list of claims, extracted from the "short" list, summarising the claims under 11 headings by subject matter, rather than by each section of the Equality Act. The claimant did not wish us to use it, and said he would not read it as it was not presented until the first day of the hearing. The summary of claims that follows is related to each Equality Act claim, rather than the subject matter, so that the claimant can understand it, and not because this is the best way for all readers to understand it. Many of the activities or provisions complained of feature under several claims, and we found the respondents list a useful way to understand the evidence on which the various claims are based. When we come to discuss the evidence in order to reach conclusions about the claims, we preferred to do so by subject matter, to avoid duplication.

6.1 There is a section 13 (direct discrimination) claim about 14 episodes of less favourable treatment because of disability between September 2009 and May 2014.

6.2 There are section 15 (discrimination because of something arising from disability) claims for 17 episodes of treatment between September 2009 and April 2014.

6.3 Indirect discrimination claims under section 19 are based on 23 practices alleged to have disproportionate impact. The respondent argues that any discriminatory effect proved is justified by the need to ensure that those who pass the examinations are fit to practice as actuaries. The aim of their examination system, as described in the response, is "to regulate entry into the actuarial profession according to certain fair and objectively measured professional standards", and it is asserted that the means adopted are proportionate to that aim.

6.4 Failure to discharge the duty to make reasonable adjustments for disability (section 20). The claimant relies on 40 practices requiring adjustment. The respondent says that all adjustments that could reasonably be made were made.

6.5 The disability harassment claim (section 26) is about reference to the claimant's case at the Education Committee in October 2013. Four episodes are pleaded.

6.6 The victimisation claim (section 27) lists 18 allegations of victimisation between 31 July 2013 and 1 May 2014. The protected acts are not set out in the short list. The long list gives the presentation of the first employment tribunal claim on 26 July 2013 as the protected act in every case, save that for an allegation that his complaints were not dealt with properly, the claimant adds as protected act the presentation of the third claim on 26 February 2014.

6.7 Finally, the claimant seeks a declaration under section 145(2) that 15 of the first respondent's rules are not enforceable against him as they promote prohibited treatment.

7. One important feature of this case is the scope of the protection provided by the Equality Act when it concerns a qualifying body. The scope is limited by section 53 to discrimination in "arrangements..for deciding" on whom to confer a qualification, and to "the terms on which it is prepared to confer" a qualification, or, if already qualified, varying the terms on which it is held, or by withdrawing it. There was dispute whether some of the actions and activities complained of fell within scope at all.

8. Another important issue in this case is whether any of the rules, practices or provisions complained of are *competence standards*, as defined in section 53(7) of the Act. If they are competence standards, a claimant can only bring a *disability* discrimination claim about them under section 19, as indirect discrimination, and he cannot bring claims under sections 13,15 or 20 (that it, direct discrimination, discrimination because of something arising, and not making reasonable adjustment for disability). It has already been decided as a preliminary issue by E J Clark on 4 February 2014 that the complaint about time allocation and split for one of the required exams – CA2 - related to a competence standard. We have to decide whether the same applies to the time allocation for other exams the claimant took, or wanted to take. We also have to decide whether the means chosen to assess competence (examination, the type of question or exercise, the difficulty of questions, how strictly they were marked) is a competence standard.

9. Judge Clark also dismissed on withdrawal on 4 February 2014 claims of victimisation brought in the first 2 claims (26 and 28 July 2013), but further claims were made in the third and fourth claims presented in on 26 February and 23 November 2014. In claim 4 the claimant argued he had only withdrawn claims related to a complaint on 1 May 2013.

10. There are time points in respect of events more than three months before claims were presented, so, all events before 26 April 2013, and some after that. If they are out of time, the tribunal must decide whether it is just and equitable to allow them to proceed. An Equality Act claim is in time if presented within three months of the act complained of. An act may be "conduct extending over a

period", in which case time runs from the end of the period. SA Tribunal may extend time I fit considers it just and equitable to do so having regard to the length of delay, the reason for delay, the effect pf delay on the cogency of the evidence and balancing overall the prejudice to each party of allowing the extension (**British Coal Corporation v Keeble**).
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The Claimant's Disability

11. It is common ground that the claimant is impaired by reason of four neuro-diverse conditions, namely: dyslexia, dyspraxia, Attention Deficit Hyperactivity Disorder (ADHD) and Asperger's syndrome. It is also agreed that the impairments amount to disability within the meaning of the Equality Act, that is, that they have a substantial and long-term effect on his ability to carry out normal day to day activities..

12. The tribunal had reports from two clinical psychologists, and what follows is taken from the joint report of Mr Gary Fitzgibbon, dated 30 June 2014.

13. Dyslexia is a developmental disability that is characterised by a weakness in short-term memory. Dyspraxia is a disorder of motor coordination leading to clumsy movements, including untidy handwriting, and can affect perception, thinking, planning and organizing, and short-term memory. Many of the symptoms of these conditions overlap in their impact on thinking, problem-solving, and sitting examinations. The impact of dyslexia on reading is not that dyslexics read slowly, but they have trouble remembering what they read, so they have to read, and reread. Long passages are therefore more difficult than a series of short passages. The weak short-term memory also affects recall of remembered information, which makes it difficult for a dyslexic to formulate an argument, and to use precise language. Complex questions are also harder to answer than a sequence of simple questions. Weak short-term memory can also affect the ability to carry out mathematical calculations requiring the transfer of numbers from one stage to another. Dyslexic dyspractics may overwork and "overlearn" in an attempt to compensate for these deficiencies. They also have more difficulty managing distractions and interruptions. Finally, listening can be as difficult as reading, as they have trouble remembering what was said, and trouble processing the information to make notes.

14. Dyslexia and dyspraxia were first diagnosed in the claimant in February 2011, when he was 43 years old.

15. ADHD was diagnosed 2 months later, in April 2011. It is a disorder where individuals cannot control their responses to environmental stimuli. As a result, at times they cannot concentrate on a task, or on instructions they are being given, and at times they give too much attention to a task ("hyperfocus") and so cannot move from one task to another to meet deadlines. (An example of this came on the afternoon of day four when the claimant revealed in answer to a question that he had been so absorbed in the detail of two of the respondent's six witness statements, that he had not read the other four, disclosed two weeks before; we suggested he spend the non-hearing day and the weekend that followed preparing his questions on the remaining four).

16. Asperger's syndrome (now known as "autistic spectrum disorder") was

diagnosed two years later, in May 2013. The claimant is relatively high on the spectrum (scoring 47 out of 50). While it presents differently in individuals, the condition can involve *difficulties* with empathy – recognising emotional states in others - and *strengths* in systemising – such as assembling things, studying maps and drawings, insisting on following social rules, solving maths problems and mentally ordering information. These traits can cause trouble with multi-tasking, and also some cognitive inflexibility. There can be difficulty understanding metaphor, idiom and the flexible use of language, and in reading body language. The claimant is nevertheless in the "high average to superior" (80th centile) range for perceptual reasoning ability.

Reasonable Adjustments for the Hearing

17. The claimant's particular disabilities required some adjustments to enable him to conduct his case at the hearing. Adjustments were discussed at a preliminary hearing before E J Auerbach on 30 June 2016, but neither side has put this hearing summary into the bundle, so we do not have the detail. We have however read the list of requests drawn up by claimant's counsel for reference at that hearing. In practice we have worked from the list of adjustments drawn up by E J Grewal after discussion with the parties at the preliminary hearing on 21 December 2018.

18. Following this list, the hearing took place in a quiet room, away from the street. There was a 10.30 start each day, so the claimant did not have to travel from Harrow to central London in the rush hour. There was no hearing on any Wednesday, so he did not have more than 2 consecutive hearing days, and could recover. The documents in the bundle had been arranged as ordered. He was able to use a laptop and his own screens in the hearing

19. He was (as agreed in December 2018) provided on day one with a list of topics for cross examination, with the cross examination to begin on day four, so giving him time to prepare. He objected in the interim that the topics should be arranged chronologically, rather than by subject matter. That request was refused because (1) although requested by him, it was not in the agreed adjustments of December 2018 (2) he had had five days (including the weekend) to prepare and order his thoughts, and (3) if counsel had to take time to reorder her questions and then allow him further time to prepare for that order, the tight trial timetable would be jeopardised. It was also relevant to us that much of the claimant's own witness statement did not follow a chronological order.

20. During the hearing the claimant was allowed time to write questions down before answering them, simple language was used, he was told when we were moving from one topic on the list to the next, and interruptions were kept to a minimum. From time to time on request from the claimant I repeated or summarised for him a point made by counsel for the respondent so he could better consider it. We broke at his request for 10 minutes each hour, and also when he wanted to review his questions in the light of a witness's answer. He had some assistance from the tribunal in formulating his questions for witnesses when he found it difficult to express himself.

Case Management Decisions made during the Hearing

(1) Fifth Claim

21. On day one, before we adjourned to read the evidence, the claimant asked for a fifth claim, which he had presented at the end of May 2019, to be heard with these four, alternatively, for the decision in these four to be reserved until after a hearing of the fifth. The respondents objected: they had not been sent the claim until the end of August and had not yet been able to file responses. After hearing both sides I refused the claimant's application with oral reasons, which at his request were then provided in writing, and so are not repeated here. The reasons included the addition of a race claim to the disability claims, and the addition of new respondents. However, it was envisaged that after the responses were filed (due 17 September) there could be a half day preliminary hearing within this timetable to consider whether any claims were presented out of time, or were res judicata, (as the claimant had withdrawn a race discrimination claim in October 2013).

22. In the event, a case management hearing took place after the conclusion of submissions on 27 September. A one day open preliminary hearing was listed for 27 November.

(2) Admission of Extra Hearing Bundle

23. Also on day one it became clear that the claimant was relying on many documents that were not in the agreed bundle. This had not come to light earlier because he had only disclosed an incomplete draft witness statement in August, when exchange took place, and he did not send a final statement, cross referenced to page numbers, until the Friday before the hearing, leaving only two working days. The page numbers did not correlate to the agreed bundle, and so it became apparent he was using a bundle prepared for the 2014 preliminary hearing. He provided his bundle (which was part two of the 2014 bundle), which did not have an index, and it was copied at short notice and returned to him by the respondents' solicitors. We agreed to take an extra day for our reading to enable counsel for the respondent to assimilate the several hundred new pages. Counsel for the respondent displayed great fortitude in the coming days, as the claimant did not limit his cross examination to the pages referenced in his own witness statement. We comment that at the May 2019 preliminary hearing listed to decide disputes about documents, the claimant, having complained that many documents had been omitted from the hearing bundle, was ordered to send the respondent the documents he said were missing, and he did – they are now the 1700 odd pages of bundles C1-2. The claimant has not explained why he did not then send them the additional documents that came to light on day one.

(3) Inclusion of Without Prejudice Material in Hearing Bundle

24. Shortly after we began to read on day one, the respondent emailed asking for removal of a without prejudice letter included in the bundle in error. The claimant then objected that privilege had thereby been waived. Pending a decision, the letter was removed, unread by any tribunal member. On day 4 the claimant renewed his request. The respondent pointed out that E J Auerbach had already ruled the letter was privileged, and it had been included only because of a typing error in the judgment (the reasons gave the correct date of the letter– 17th, rather than 27th, the date stated in the judgment). I ruled that I would arrange for another judge to consider his application that privilege had been waived if he made an application in writing, setting out his reasons. He did not do so.

(4) Application for Disclosure of Documents on Mutual Recognition of

Qualifications

25. On hearing day six, the last day of the 3 day cross examination of the claimant, he applied at the start of the day for an order that unless the respondent disclosed documents about their contacts with the European Association of Actuaries (EAA, formerly Groupe Consultatif) and the International Association of Actuaries (IAA), the response be struck out. This is a renewal of an application made by email on 30 August 2019, three working days before the hearing started, responding to the respondent's application for an unless order earlier that day if he did not disclose his witness statement. He referred to a recent discovery that information relating to the CA2 and C3 examinations had been concealed, and a request for disclosure of "all AAE and IAA related information which demonstrates that other bodies are not required to meet the same competence standards as the IFOA", without other explanation.

26. In this hearing the claimant was asked which issue the application related to and how the documents would assist. The claimant said they concerned "mapping" of other countries' actuarial qualifications onto the Institute's qualification, for the purpose of mutual recognition. From this material he would seek to argue that the first respondent's standard was far higher than that required to practice as an actuary in the UK. He said about half of European bodies do not assess CA3 (communication skills) and "potentially" CA2 (application of concepts). He identified 3.14, 3.15 and 3.16 as the relevant issues. These are the requirements complained of as indirectly discriminatory to pass CA3-1 in 1 hour 45 minutes, to answer a question set by the examiner, not to provide information about the exam in advance, and not give choice of topic (3.14); and to complete CA3-2 in 2.5 hours, use questions set by the examiner, not providing advance information on the topic, or giving a choice of topic (3.15), and "requiring students to pass CA2 and CA3" to become an actuary.

27. The claimant was unsure whether a foreign actuary whose qualification was recognised could call himself a fellow of the UK Institute, or whether he had equality in some respects and not others.

28. The claimant had identified in the lists of issues and in his witness statement that the standard was too high compared to the Indian Actuarial Institute's (IAI) qualifying exams, and that exemptions for some university courses showed the same, and so documents about the IAI and named universities appear in the hearing bundle. The only passage about other associations in the claimant's 59 page witness statement (disclosed in draft 30 August 2019) is paragraph 44, which reads:

> "Moreover the respondent have not required members that qualified pre-2005 or those gaining Fellowship or Associateship via the mutual recognition agreements (MRAs) to demonstrate their attainment of the IFOA's alleged competence for CA2 by way of examination or CPD".

29. The respondent objected to the application. This was a wide and complex area never raised in the issues. The respondent could not have known there was any argument related to the IAA or EAA. The 30 August email reference was so brief and opaque (it covered a number of other matters) that the respondent did not know what was meant; the witness statements should have been disclosed on 12 August (when the respondent disclosed their statements) but the claimant's incomplete and unreferenced draft statement was not disclosed until

20 August, and the 30 August complete statement referred to documents by pagination not corresponding to the agreed bundle, with the result that they could not understand that this (comparison with these other institutions' qualifications) was now his case, or how these documents related, until late on Friday 30 August, with the case starting the next Thursday. The relevant witness (a Mr Friend) is on leave that week, and at a meeting in Chicago the following week; Trevor Watkins, who was giving evidence, had some involvement at the relevant time, but he had retired in 2015 and had no current access to documents, nor was he available for taking instructions until he attended on the planned day to give evidence, so the respondent could not seek instructions in preparation. It was not explained why this had not been mentioned before.

30. After retiring to discuss the application the tribunal refused to make either an unless order, or an order for specific disclosure, nor was the claimant permitted to adduce the 20 or so pages on this which he said he had, but had not handed to the tribunal. The reasons were, in essence, that the respondent could not have identified until now that the documents sought were relevant to any issue. Even now, it was not established that if relevant they were necessary, as to establish the point the claimant already has the IAI and some UK university material to demonstrate that the Institute's high standards may not be necessary to work in the UK as an actuary, and so could not be justified as reasonably proportionate. Even if they were both relevant and necessary, it would not be fair to make the order at this stage. The volume of material and the need to call a witness to deal with it would in practice require an adjournment, likely in practice to be at least six months, given current pressures in listing multi-day cases and reassembling this panel. Adding the selection of 20 documents (as an alternative to fuller disclosure) still requires finding a witness to deal with the point, and it is not clear why relevant documents which *are* in in the claimant's possession had not been disclosed before. If adjourned for several months the panel would need to refresh its memory on evidence already heard. There was no clear reason why the claimant could not have raised this before 30 August. He always knew there were arrangements for mutual accreditation and exemption for exams. There have also been hearings on disclosure, notably a preliminary hearing for that purpose alone on 21 May 2019. Even if the matter did not come to the claimant's mind until he read a tribunal judgment in another claim (of age and race discrimination, rather than disability) against the first respondent, published 22 May 2019, after hearings in January which he had himself attended, it had been another three months after promulgation of the tribunal decision before he mentioned it. Had he raised it promptly then it might have been possible to add this to the list of issues, get the disclosure, and draft the necessary witness statement(s), but to do so now meant a substantial postponement of the final resolution of claims which are now more than six years old, and if justice is to be done they must not be further delayed unless for a compelling reason, which this was not.

31. In the course of cross examination, the claimant said the 2013 examiners' handbook should be in the bundle. As each handbook is a substantial document in itself, he was asked to identify how the 2013 handbook differed from the handbooks already in the bundle, so the variant pages could be inserted. On a later day he introduced 3 additional pages, which had instructions to examiners on types of questions to be set or avoided. These were admitted.

(5) Request for Further Information

32. At the end of day 9 the claimant asked the respondent to provide further information, specifically, an analysis of the proportion of students in any year who passed first time, second time and third or more. The application was left for decision to the following day, so counsel for the respondent could seek instructions on whether and how the respondent held this information. On the morning of day 10, after hearing argument from each side on this application, the employment judge refused to make an order. Reasons were given orally at the time. Summarising them now: this is not an application for disclosure of documents, but for information assembled from an analysis of documents. The respondents have confirmed they have not made that analysis, and that the information will be found by looking at the examination file for each student recorded by their examination number. The respondent has around 15,000 student members, there are 15 examinations for each to pass, usually taken separately, and the information sought goes from 2004 to 2015. Even though not every student will take more than one exam a year, that is still a very considerable volume of material to sift and review. The claimant said that the Institute of Actuaries of all people should have the material, but we can see even so that the information may not be held in a form permitting a speedy calculation, and while they will know the pass rate of any given exam, from the examiners' reports, they will need to carry out a specific exercise to find out which students had to retake more than once, and the information may require a detailed review if it has not already been done. The claimant has identified the issue as being the justification of the difficulty of their own examination, and whether that difficulty is in fact relevant to actuarial fitness to practice, when they permit exemption from most papers for those who have passed an MSc course at Imperial College where 94% (of 20-30 students) pass first time. Dr Watkins was able to say this was better than the first respondent's pass rate, but not give the actual pass rates.

33.The tribunal must consider whether the documents are both relevant and necessary to decide the issue. Clearly they are relevant, but it is less clear that they are necessary, because the respondent accepts they have lower pass rates than universities (and proffered several reasons for this) and that many students retake exams. The precise rates might still be helpful. The tribunal must also heed the overriding objective to deal with cases justly and fairly, and in particular, here, delay, expense and equality of arms. The claimant took us to correspondence on this request. He made the detailed request by letter on 25 November 2013. He asked the tribunal for an order on 2 December 2013, and E J Grewal decided on 6 December that an order should not be made at that time - at that time, there was a preliminary hearing coming up in February 2014. In March 2014 the claimant renewed with the respondent a detailed request for this and other information, and on 1 April was asked to specify which issue the information went to, and how it would demonstrate a point. The claimant did not give this information, and did not return to the request at all until a letter to the respondent's solicitor on 18 April 2019 (five years later), to which he received a detailed reply about pass marks, but not pass rates. He did not ask the tribunal to make an order, although there were case management or open preliminary hearings in November 2015, June 2016, November 2016, February 2017, May 2017, October 2018, December 2018, and a hearing devoted to disclosure issues in May 2019. Had he done so, it would have been feasible to ask the respondent to analyse their examination files and supply a table, but to do so on day 10 of the final hearing, would require a substantial adjournment, and then the recall of one or more witnesses. For the reasons already given, that would be

lengthy. It was not in the interests of justice to make the order.

34. After delivering the reasons the claimant said that the tribunal had overlooked that the respondent gave prizes to those who passed some exams first time, so they could supply that information. The tribunal ruled that this would provide the *some* of the information he had asked for, (it would not show who passed on which subsequent attempt) but it would still require research into information which may be held in many files, when at this stage there were only two more witnesses yet to be heard. This was also information he could have requested much earlier in the case. It was refused for similar reasons.

(6) Submissions

35. The evidence was concluded by 3pm on day 10, a Monday, some days ahead of the timetable. The claimant had on day 4 asked for submissions to be taken in writing only, with no opportunity for oral submissions. Then and on day 5 he was asked to consider whether this might put him at a disadvantage, as he might not have foreseen a point, and want to speak about it. On day 10, Monday, the tribunal ruled that written submissions should be exchanged by 4 pm on Thursday, so giving the parties three clear days to write their submissions, with a short hearing to follow on Friday, to afford each an opportunity to address additional points arising from the other's submission. The reason for an oral hearing was to provide the claimant with an opportunity to address points he had not thought of; not to give him this opportunity was to his disadvantage. Asking for further written representations in answer to the primary submission (requested by the claimant as an alternative to a short oral hearing) would significantly extend the delay before the tribunal could begin its discussion of the issues and their findings, and delay between hearing evidence and making decisions about it was prejudicial to justice. The difficulty the claimant had had in meeting the long heralded deadline to exchange witness statements, even when extended, showed there was a risk he might not meet the deadline and so prolong the time before tribunal discussion could begin if all submissions were in written form.

36. The claimant argued that **L B Barking and Dagenham v Oguako**, an EAT decision of 1999, was authority for having written submissions in 14 days. However, that case was not about how long parties should have to make written submissions, but about it being unfair that they should not see each other's submissions, and so have no opportunity to answer them.

37. The tribunal had wanted to take oral submissions on the Thursday, affording the claimant two days to write his submission, but conceded three days having regard to his disabilities in reading and writing. On the day appointed for submissions, the claimant said his written submissions were still incomplete, and asked for another 14 days. He said Judges Auerbach and Grewal had allowed him to send written representations later. It was explained that a three person panel had far less flexibility on when to make a decision than a single judge, and delay now meant the panel could not reassemble this year. Such delay was not conducive to good decision making. We read the written submissions and then proceeded by the judge explaining to the claimant each point made by the respondent in turn, and making a note of his comment on each point in turn. This lasted from 11.30am to 12.55, then from 1.30pm to 3.20pm, following which the respondent replied on new points, and the claimant spoke finally on whether there was a difference between the Disability Discrimination Act 1995 and the Equality Act 2010 on qualification bodies.

Evidence

38. The tribunal read statements from the following witnesses, who were then questioned by the other party and on occasions by the tribunal:

Kiren Hirani, claimant

Karen Brocklesby, the first respondent's Head of Quality and Assessment (formerly Registrar), who is also fourth respondent to the claims

Kimberley Russell, a solicitor who was the respondent's corporate secretary, and third respondent to the claims

Trevor Watkins, Education Director (retired 2015), and second respondent to the claims

Sally Calder, Education Actuary employed by the first respondent.

Elizabeth Harriman, Deputy Registrar, employed by the first respondent until the end of 2017, who is fifth respondent to the claims.

39. The respondent had proposed to call a second Education Actuary, **Colin Thores,** but in the event did not, as his knowledge duplicated that of Ms Calder and was more limited than hers, as he only started employment in 2015. We discarded his statement.

40. We had between 4,500 and 4,700 pages of documents spread across several bundles:

R1 – pages 1- 344 pages of pleadings and orders

R2 – pages 345 – 617 of chronological correspondence

R3 - in two volumes – pages 689 – 2112 - examination materials for the first respondent and the Indian Actuarial Institute.

C1-2, in two volumes, pages 1-1783, additional material such as emails in the course of events, notes of meetings, and other examination material.

C- new , the extra bundle produced on the first day, numbered 581 to 1411 but with some documents removed. This bundle did not have an index.

Findings of Fact

41. The first respondent is a non-profit making organisation incorporated by Royal Charter, formed from two predecessor bodies, the *Institute* of Actuaries in England and the *Faculty* of Actuaries in Scotland. It is the professional body which represents and regulates actuaries in Great Britain. It has a permanent staff of 150 in offices across the UK. Of these around 40 worked in registry, with 7 of these (including the registrar and her deputy) assigned to handling requests for access arrangements and other exam queries. In addition to the permanent

staff, around 400 external examiners are engaged from time to time on a sessional basis. The examiners are qualified actuaries.

42. From May 2006 the FRC (Financial Reporting Council, a regulator) assumed oversight of the actuarial profession and the independent setting of actuarial technical standards. The FRC also regulates accountants and auditors. It aims to ensure that investors, and ultimately the public, can have confidence that information about companies in the UK financial sector is of good quality and reliable.

43. The FRC meets the Institute's examiners and Director of Education after each examination round. It also assumes a disciplinary role – otherwise left to the respondent - where the alleged misconduct is a matter of public interest.

44. The Institute admits to membership (according to the 2002 student handbook) in four categories: student, associate, fellow and affiliate. Candidates for the qualifying examinations must be student members. Associates (AIA) must have completed most of the examinations and a professionalism course. Associates who have completed all the examination requirements and have three years practical experience in the industry are admitted as Fellows (FIA). As for affiliates, the categories include those with relevant degrees who do not wish to enrol as students, professionals in related fields, and actuaries qualified with another association. Affiliates do not have letters after their names.

45. The 2002 handbook describes what actuaries do. They: "make financial sense of the future" as "experts in assessing the financial impact of tomorrow's uncertain events", by analysing the past, modelling the future, assessing the risks involved and communicating what the results mean in financial terms. Their skills "enable businesses and individuals to make better informed decisions, and are used extensively in the areas of insurance, pensions and investment, and manage and lead the design and pricing of such products". They also advise on the overall management of insurance companies and pension schemes. "Actuaries apply professional rigour combined with a commercial approach to the decision-making process".

46. Importantly, "actuaries balance their role in business management with responsibility for safeguarding the financial interests of the public. The duty of actuaries to consider the public interest is illustrated by their legal responsibilities for protecting the benefits promised by insurance companies and pension schemes. The profession's code of conduct demands the highest standards of personal integrity from its members."

47. The 2002 Handbook noted that 44% of actuaries work in insurance and reinsurance, and 36% in consultancies providing business advice. Pensions are traditional area for actuaries; although the rapid demise in the last few years of private sector defined benefit pension schemes has reduced the demand for actuaries overall.

48. The Institute prescribes examination syllabuses and draws up required reading for the syllabus. It sets and marks the examinations for qualifying as an actuary. It does not provide tuition.

49. Most students have a relevant degree (usually mathematics) and are working

in actuarial departments while taking the exams step by step, often over years. Many have “study packages” from their employers, which pay for exam fees and course material, and allow some time off for study. Students can obtain teaching or coaching for particular topics or papers from ActEd, an independent company.

50. Graduates of some university postgraduate courses are given exemption from some exams, and this will be discussed later.

51. The exams are notoriously tough. The claimant volunteered more than once that students without neuro-diverse disability, “even those from Oxford and Cambridge”, often fail repeatedly.

52. The UK qualification is internationally recognised. In 2015 the respondent had 14,000 student members, more than half of them overseas. Each year about 3,000 students are sitting some kind of exam.

53. Examinations take place twice a year. Students enter and pay a fee for each exam as they are ready. As far as we know there is no limit to the length of time a student can take to complete the necessary exams.

54. What follows is about the examination system of which complaint is made. It started in 2005, with some transitional arrangements for those (like the claimant) who were part-qualified at the time. It has been superseded by a new syllabus, introduced in 2019, which we do not discuss.

55. In all, a student must pass 15 examinations to qualify as a Fellow.

56. Although exams can be taken in any order, students usually start by taking the nine CT (Core Technical) exams designed to test numerical mathematical techniques. The ninth, business awareness, requires attendance at a two day residential course followed by the test. These exams are numbered CT1, CT2 and so on. Each involves a three hour examination.

57. Between 2002 and 2012 the claimant passed eight of the CT exams, or their corresponding predecessors, though for most of them this required more than one attempt. He was not required to take CT9 (business awareness) as he had started before 2005.

58. The next stage (from 2005, when they were introduced) is to take the “Core Application” exams, CA1, CA2 and CA3. The CA papers are designed to test the application of technical knowledge to practical scenarios. The claimant sat CA1 on five occasions between September 2010 and September 2013, without success. He has not yet attempted CA2 or CA3.

59. The next set needed to complete the examinations to qualify is to pass two ST (specialist technical) subjects, which the student can choose from 8 subjects, and one SA (specialist application) subject of his choice. The claimant has sat ST7 once, in May 2014, without success. He entered for ST8, but did not attend the examination, in September 2014. He has not entered for any exams since then.

60. While the claimant makes some complaints about the exam system generally, there are particular complaints about CA1, CA2 and CA3, and ST7.

These are called the “higher skills” papers.

CA1

61. CA1 consists of two three-hour papers about the application of *concepts*, one on assets, the other on liabilities and asset liability management. The papers were sat on successive days. The marks on both papers are contribute to one final mark for CA1. The published syllabus (2014) describes the aim of CA1 as that the candidate “should understand strategic concepts in the management of business activities of financial institutions and programmes, including the processes for management of the various types of risks faced, and be able to analyse the issues and formulate, justify and present plausible and appropriate solutions to business problems”. It states that it builds on the principles and tools learned in subjects CT1 to CT 8. There is then a detailed list of objectives over 9 pages. Most of these are requests to “discuss” or “explain” concepts. Some, particularly in contract design and modelling, appear to require wide consideration of different factors. However, all are likely to be covered in textbooks, and could be memorised; the skill is to recognise which concepts are relevant to the particular set of facts in the question. The examiners’ report for the September 2011 CA1 paper states: “this subject examines applications in practical situations of the core actuarial techniques and concepts. To perform well in the subject requires good general business awareness and the ability to use common sense in the situations posed, as much as learning the content of the core reading”. There is a complaint that weak candidates do not read the question carefully but write around the subject matter generally. Specialist knowledge was not required, nor detailed development of particular points.

CA2

62. CA2 is called: “Model Documentation, Analysis and Reporting”. The aim given in the syllabus is “to ensure that the successful candidate can model data, document the work (including maintaining an audit trail for a fellow student and senior actuary), analyse the methods used and output generated, and communicate to a senior actuary the approach, results and conclusions.” The student is required to undertake a practical modelling assignment, which can be based on many of the core technical subjects, and also uses the principles in CA1. The objective is a demonstration by the candidates that they can analyse data, develop a model with clear documentation including an audit trail that can be followed by a fellow student and a senior actuary, analyse the methods used and the outputs, apply and interpret the results, and communicate the approach, the results and the conclusions to a senior actuary.

63. From 2010, before sitting CA2 a student needs to have passed or have exemption from all the CT subjects, and also have at least one year’s work experience with an actuarial employer, and a working knowledge of computer-based spreadsheets and word processing packages, but there is no requirement to have passed CA1. The standard is to sit it over a full day of 7 hours plus an hour’s lunch break, designed to mimic a day at work. The initial problem to be worked on for the day was set out in the paper. After that most of the time would be spent working out how model it in practice (with the documents and audit trail communicating the work to a trainee and a senior actuary). Until the test went online, a candidate who did not understand some part of the question was allowed to ask an assessor in the exam room for clarification. If a candidate did this, up to 5 marks were deducted from the overall score. The purpose was to prevent candidates getting stuck on some feature of the initial problem and so be

unable to do all the rest of the work on it required in the day. We understand that since then a “hint sheet” can be requested, with a similar adjustment of the final mark if it is used.

CA3

64. CA3 is entitled communications. The overall objective is: “to draft communications intended for a non-actuarial person who is usually assumed have some business knowledge”. Both written and oral communication is examined. To pass, the information conveyed must be clear, and contain no major misstatement or omission of fact, but must omit superfluous detail which would detract from the core messages. Overall, the recipient must be likely to understand, and be satisfied that the issues raised have been answered, and be pleased with the way the messages have been communicated. There is much detail on what must be done to achieve this (such as correct spelling, use of headings, avoiding colloquialism, tact, appropriate use of numbers, and so on). It is sat as a 90 minute exam, followed by a 2 hour session preparing the slides for a 10-15 minute presentation the following day. The presentation (designed to test oral communication) is held in the afternoon of the next day to allow the candidate the morning to practice the presentation. The pass rate, at any rate initially, was relatively low – about 30%

65. Paper ST7 is entitled: “General Insurance: Reserving and Capital Modelling”. with detailed objectives listing what must known. It is a conventional exam lasting three hours, plus 15 minutes reading and planning time. So is ST8, “General Insurance: Pricing”. These are the two topics chosen by the claimant from the eight available.

Background to the 2005 Changes

66. The changes to the exam system introduced in 2005, especially the communications paper, and some curriculum reform to focus on business awareness and practical application of techniques, were introduced to tackle perceived shortcomings in the training of actuaries which had come to light.

67. In 2000 the long-established Equitable Life Insurance company closed to new business when it became clear that for many years they had sold guaranteed annuity contracts which they could not fund (as began to happen when current annuity rates fell and members began to exercise their options under the contract) either without understanding the legality of some restrictions imposed or without appreciating the consequences.

68. Following the Penrose enquiry into the causes of the collapse, which included a recommendation of changes in governance of the actuarial profession, came the Morris report (final version March 2005) into the actuarial profession, which found insularity in its methods and approach, lack of transparency in advice, and failure among actuaries to keep up with developments in financial economics. It recommended changes to the training and education of the profession. They should compare training and education on university courses as an alternative. There was emphasis on the need to ensure actuaries were both able to understand the business context of their work and to communicate their findings to financially literate people who were not actuaries. There was also concern about the length of time it took to qualify and the high drop-out rate.

67. In 2006 the FRC assumed responsibility for oversight of the profession. In 2008 it reported that "the industry has responded positively and actively to the recommendations, particularly in relation to education and training", through "its new education structure, the new qualification review teams, the new university accreditation scheme and the new mandatory CPD scheme".

68. The FRC considered there was still work to be done in "developing appropriate measures of quality", and in "benchmarking" against other professional bodies; so far there had been some discussion with the qualifying bodies of the US and Australia.

Setting Examinations

69. The Institute has a Lifelong Education Board to set education strategy, and an Education Committee which meets six times a year to implement the strategy. The syllabus is reviewed once a year, but it tended to change only when statutory changes occurred in the field of actuaries' work.

70. The Director of Education was Dr Watkins, an economist by training, with a previous career in university administration. The Institute employs about 8 Education Actuaries, who are qualified actuaries, to prepare syllabuses, and the core reading material for students, and to assist the examiners in setting and marking papers. They also review university courses, to assess whether they can provide exemption for the professional exams (see below).

71. Examiners are recruited on a fee-paid basis from actuaries in practice, to set and mark papers, and attend examiners' meetings, chaired by a principal examiner, to moderate results.

72. The claimant agreed that the skills tested in these exams are those required of an actuary in real life. He disputed however that the standard required bore any relation to what was needed in the industry. He also disputed that it was necessary for an actuary to be fit for practice in insurance or in a business advisory role. They could be fit for one particular role, he said, and need not be fit for others.

73. For all exams (except CA2) the Institute published past papers on the website, plus the marking guide, and the examiners' report. For CA2 there was little year to year change in the project set for the day's test, and candidates were simply asked not to reveal the subject matter to others. In addition, the Institute provided students with core reading materials which set out what they needed to know to pass.

74. Question setting. The 2013 examiners handbook shows that examiners were asked to avoid:

> "Direct questions, that is to say questions which may be satisfactorily answered by straightforward response are to be preferred. Routine questions should not be excluded, but should not become a prominent feature. Questions may be set that are similar to those that have appeared in a previous exam, otherwise the exams will become steadily harder. Questions of the "brainteaser" type (i.e. designed to test intellectual ingenuity) should be avoided. "Trick" questions involving a fortuitous element in the discovery of the solution should be barred. Try to avoid questions which require correct

calculation, or derivation, from only a part of question."

"The wording of each question should be clear and free from ambiguity."

"A distinction should be drawn between the complexities arising in the day-to-day practice of the subject (which may be labelled "practical experience") and "practical" in the different sense of applying a broadly based knowledge of fundamentals with a proper sense of limitation (which may be labelled "practical approach"). A "practical approach" can and must be expected from candidates in all subjects. Evidence of "practical experience", that may help the candidate, should not be demanded, but breadth of knowledge and evidence of judgement to be expected of candidates in the SA stage subjects".

75. The claimant said there had been questions which assumed horses could draw pensions, or were about mining projects on asteroids, which were too far removed from real life. Many exam papers were in the bundle, but not one with a question about horses' pensions. We could see the asteroid question. If rewritten to refer to projects on remote islands accessed by ships, rather than asteroids accessed by spaceships, it would be more plausible as a scenario, but it was not one he had had to sit. The claimant referred more than once in his evidence to "curveball" questions, but was not able to describe what a curveball question was, or give an example, except to introduce an exam paper about trade in bananas. In this question three exporting countries had been given fictitious names, beginning A, B and C. Information was given about distances and speed, how long it takes bananas to ripen, and so on. He did not state how this put him at a disadvantage. We speculate he would be disconcerted by unknown countries being named, but also considered candidates might be distracted if real countries were named, if they might think some specialist knowledge of each was called for.

76. We heard that draft questions had been revised by the examiners to take student understanding into account, in particular, a draft question about a business model involving LPs was altered, as at the time the target group had no experience of listening to music in this format; and a question about wedding planners had been changed before it was set, on grounds that Chinese students would not know what they were.

77. Such matters had came to light in the "guinea pig" system for checking papers before they were set. Guinea pig 1 was a recently qualified actuary who worked through the examiners' draft paper and reported back on the content of the questions, and the time it took to answer them. They would also comment on questions that might baffle current students, especially those from overseas. Adjustments would then be made after a scrutiny meeting involving the examiners and the education actuaries employed by the first respondent; the latter also checked consistency between subjects. The final version was read ("sense checked") by Guinea pig 2, an experienced actuary, where the aim was to check that a fair spread of the published syllabus was being examined, and that there was consistency of difficulty with past years.

78. In addition, after each exam, student feedback was obtained (usually through local societies) and their reports considered. Finally the FRC would meet the examiners to "grill" them (according to Dr Watkins) on whether the exams were fit

for purpose; we had no other evidence of the content or outcome of these meetings..

79. There was a target pass mark of 60% (see examiners handbook). Pre-meetings reviewing the papers gave an indicative pass mark. The final mark was determined at the examiners meeting after marking. After the examination a sample of 5 scripts was test marked by the examiners and their results compared so as to standardise the marking scheme, using "actuarial technique and academic judgment", before all the scripts were then marked by two examiners, independently of each other. Borderline scripts would be triple marked blind.

80. The 2013 examiners handbook states that: "the examiners will be aiming to maintain standards, not an arbitrary pass rate". Target pass rates for the CT subjects are said to be "30-70%", and for the CA exams, 30-60%. The expectation for the SA subjects was 30-50%.

81. Following that came an examiners meeting. We heard that the actual pass mark varied from subject to subject and was often very low. The examiners' report commented on the pass marks, the pass rates compared those of earlier years, and checked differences in rates between UK and overseas candidates. We did not have a detailed breakdown of pass rates year by year.

Exam Counselling

82. A candidate who failed a paper could apply to receive individual feedback. Until 2016 they had the option either of a short written report coupled with a face to face interview with an Education Actuary, as exam counselling, or a full written report. Now, in part because there are so many overseas students, they receive a report, sometimes with a short telephone consultation as well, and get fuller counselling only if the exam in question is the last one needed to qualify. The claimant received exam counselling on four occasions to 2013, namely in 2005 on CT7, in August 2009 on CT2, in January 2011 and January 2012 on CA1. On CA1 he was advised to spend more time working on past questions and model answers so as to become familiar with what was required to demonstrate knowledge.

Mitigating Circumstances

83. If a candidate submitted that there were *mitigating circumstances* why he had underperformed, they would apply. Such circumstances were only considered if the final mark was 5% off the pass mark. Failures were graded FA, FB, FC and FD, to indicate to the candidate what ground they had to make up to pass – mitigating circumstances were applied to FA marks only, and even then might not add enough to take the mark to a pass. Until 2016 exact marks were not given, to discourage students from saying their passes were "better" than others; now they are.

Access Arrangements

84. Candidates could also apply for reasonable adjustments for disability, known as *access arrangements*. Liz Harriman joined the Institute as deputy Registrar in October 2010 and led on access arrangements. She had prior experience of administering exam access arrangements at a large secondary school. Her

evidence was that she followed the guidance of the Joint Council for Qualifications (JCQ), advising the examination boards for GCSE, A Level and City and Guilds, that 25% extra time for an examination paper was an appropriate adjustment for students with dyslexia. Any other time requirement, or other adjustment, had to be related to specialist medical advice.

85. In May 2012 she explored getting formal advice from psychologist on student requests for extra time for examinations because of dyslexia, forming a large part of the 300 or so various access requests received each year. She spoke generally to a psychologist, leading to discussion within the education committee in October 2012 (minutes not in the bundle). The concern was the rising number of requests for extra time, and whether restricting this would have "legal implications". This led to a conference call in January 2013 with an external psychologist about formal advice. The notes show the Institute's concerns – candidates sometimes supplied a primary school report; a report related to adult ability was preferred, as a childhood report may be less accurate as to the level of disability and less useful guidance on what was needed. Most of the applications to the Institute's exams team for adjustments related to dyslexia. Requests for a scribe, or a raised desk, or a quiet room, for larger fonts and specialist software were generally granted without a detailed assessment as: "it is clear that they will not compromise our objective of ensuring that all candidates have an equal chance of attempting the exams". What caused concern were proposals for large amounts of extra time, which might make the advantage unfair to others. As to how far the Institute would go, the evidence of Ms Brocklesby - and others - was that they would accommodate requests "provided that no one candidate is given an unfair advantage and provided that no adjustment would prevent the IFoA from being able to accurately distinguish who has demonstrated a satisfactory attainment of the competence standard and who has not".

86. Notes from student feedback meetings in May 2013 show that student societies were told that extra time arrangements were being reviewed, in particular, how often medical evidence must be renewed, and that the Institute was having to consult with lawyers and other professionals to "ensure all students were treated fairly".

87. The exam administration team has an annual "catch up" with occupational therapists on developments in knowledge and practice of adjustment for disability. Requests for adjustment of the CA2 exam would require discussion with an Education Actuary of what could be done within the scope of the competence standard required. A team of seven people manages the exam process. For the April 2012 session there were 129 requests for adjustments, of which 103 were for dyslexia, and in September 2012 they began to ask candidates to complete an "access arrangements form", so as to structure the process. In 2016 there were 175 applications for adjustments for one of the two sittings.

88. In October 2013 Ms Harriman presented a paper on access arrangements to the Education Committee. The need for consistent policy had already been identified, and the committee had asked for further professional advice before implementing proposals. The paper identifies a current legal claim, (which must be that of this claimant), having come up while the consistent policy was being developed. The committee was asked to adopt recommendations that medical reports for specific learning difficulty be no more than 5 years old, and for other

disability, 2 years; that 25% extra time be standard, with requests for up to 50% having to be justified by reference to an occupational health adviser nominated by the Institute. It was not recommended that extra time exceed 50%, as that called into question the student's ability "to conduct actuarial work successfully in the workplace", as there were "regular situations where they are requested to produce work of a certain nature and to deadlines". Next, it was recommended that CA2 and CA3, the practical exams, were ringfenced to no more than 25% extra time, because CA2 "sets out what may be required of a actuary in preparing a model, audit trail and summary in a given time". It was noted this may have to be reviewed if a court decided otherwise. Finally, there should be an appeals procedure, as the ringfencing provision might lead to more challenges; this would make decisions seem fairer and would introduce finality to the process.

89. The minutes of the October 2014 meeting show that these arrangements for the 2014 exams were "agreed in principle, subject to the outcome of a current legal case". If a court decided otherwise, they would have to be reviewed.

Exemption of University Courses

90. One recommendation from the Penrose report was that the profession should use the expertise of the universities to broaden actuaries' appreciation of the business context of their decisions, and should work on benchmarking the examination process to allow a university course as an alternative route to qualifying. We heard that about 80% of actuaries qualify by part-time study while working, and about 20% gain substantial exemption by following a university master's level course. It was said that actuarial employers, influential in the Institute, historically tended to favour the work-study route as they can then employ lower paid trainees for routine work; a result of this was a narrower focus, on pensions and insurance, where many actuaries are employed. Against that, many maths and physics graduates who would hitherto have become actuaries, were now said to prefer the high salaries available in general financial services to long years of lower pay while qualifying as actuaries, and may find university courses more attractive as a shorter route to qualification..

91. The 2008 FRC report (that is, three years after the introduction of the CA subjects) mentioned there was more work to be done in "developing appropriate measures of quality and in benchmarking against others".

92. The current evidence is that a university planning a master's course will apply to have the course recognised for exemption. The Institute's Education Actuaries will map the subject matter of the course content to their own syllabus. They accept an 80% match; not all universities omit the same 20% of the syllabus. They will also look at sample exam papers to check they are of the same level of difficulty, requiring analysis rather than straight recall. If there is broad equivalence acceptance will be recommended to the Education Committee.

93. The Institute's position is that it does not have the resources to include coursework in its own route to qualification, whereas universities do have the resources. While some coursework is permitted in the exempt courses, at least 70% of the final mark must be obtained by examination.

94.By way of quality control, the Institute requires and will pay for two of its own examiners to examine the university exam papers and scripts. There is also an

annual visit by the Director of Education and an education actuary to meet the staff and sample exam papers. There was no attempt to test equivalence by requiring university students to sit and pass the Institute's own exam as well, as suggested by the claimant.

95. For the two year part-time MSc course in Actuarial Finance at Imperial College, candidates attended on a day a week basis, funded by their employers, from 2012, and block exemption from the Institute's equivalent exams was granted for the core technical (CT) papers by a student passing all the course first time at a 60% pass mark, with no less than 50% in any paper. There was a further block exemption for CA1, CA3 and two ST papers on the same terms. Those who fell short could still obtain exemption for individual equivalent subjects if passed at 60% or more. In the bundle are materials from Herriott-Watt and Kent universities, as well as Imperial, but we were not taken to them, for comparison with the first respondent's papers, so we assume they had similar arrangements.

96.So far, no university has run a course giving exemption from CA2, the practical modelling exam.

97. The Imperial course was discontinued on costs grounds, as 40 students were required to break even, and fewer than that were sponsored by their employers. but we heard that when it was running 94% passed at levels sufficient to get block exemption. (The sample is small). The claimant suggested to Dr Watkins that this indicated the course was easier than the Institute's papers. The pass rates for the Institute's exams are not known but Dr Watkins seemed to accept they are not as good. He did not accept this meant the course was easier, he responded that the group was selected from high flyers who had good marks from their first degree courses, and been selected by their employers, who were large institutions. The students also benefited from dedicated teaching, rather than self-study, being taught one day a week over 2 years, which favoured better results than self study. He commented that those who did university courses said the Institute's exams were easier to pass, and vice versa.

Indian Actuarial Institute (IAI)

98. In 2010 the claimant proposed to qualify with the IAI in addition to the IFoA (first respondent), but was told by IAI that he could not. Allegations against the Institute (IFoA) about this are set out in paragraphs 20-22 of the second July 2013 claim. They allege discrimination because of nationality. This claim was been dismissed on withdrawal. There is a further claim that an instruction, inducement or requirement by the IFoA that the IAI discriminate because of a protected act, namely, the claimant telling IAI they must make adjustments for disability if he is to sit exams in the UK.

99. The background on the links was given by Dr Watkins. On his account, in the last part of the twentieth century the system of actuarial examinations in India had fallen into disuse. As a result, there were few qualified actuaries, mostly elderly. When the earlier restrictions were lifted, the IAI was then hit by an explosion in student numbers, and was unable to find enough examiners and markers to meet demand. The IFoA stepped in to help. The IAI is supplied at cost with the UK course materials and exam questions, to assist with the shortage of senior people to set exams, and to help in raising the reputation of its qualification, Nevertheless, he stated the American Institute of Actuaries did not

recognise the IAI qualification, though Casualty, providing general assurance in the US, does, relying on the IFoA's monitoring. Dr Watkins had visited India to assist IAI, but also to attend events hosted by IFoA for its own Indian members (as shown for example in a 2012 magazine report in the bundle). He knew Liyaquat Khan, the IAI President from 2010. With respect to a question on the respondents influence on IAI, he described the relationship as "fractious", such that if he had intervened on the claimant's behalf "they weren't going to take any notice of me". He said that there were rumours that the IAI used senior students to mark papers rather than qualified actuaries, and the IAI was "rife with internal politics", and that "many (Indian) students had voted with their feet" and joined IFoA to qualify (while based in India); many Indian companies encouraged their staff to qualify with IFoA. Dr Watkins also observed that the pass rate for India-based students of the IFoA was about 20% - "abysmal" – much lower than the average pass rate. He observed this was likely to be related to teaching rather than inherent ability. The 2012 article shows IAI had recently introduced an entry test for admission as a student (ACET) to improve the quality of those entering for its examinations.

100. The IAI has an exam centre in Wembley, London, to accommodate actuarial students of the Life Assurance Company of India, which has an office there, and often asked the IFoA for assistance with invigilation there. Otherwise its exam centres were in India. IFoA accepts students from any country, and has many overseas exam centres. In India it has 2,000 students.)

101. It was not clear to us how similar the IA exam papers were to the IFoA papers. In the second claim form the claimant said the IAI exams "did not contain as many convoluted and ambiguous question as the IFoA papers". This formulation suggests they were different, and easier. Later he suggested the IFoA should set him additional exams bases on IAI papers. Although we had large amounts of examination papers for both the first respondent and IAI in the bundles, we were not taken to them to make comparisons, nor did any witness, including the claimant, discuss evidence to support or refute the assertion that they were easier. As there were *similar* (we assume) reading materials and examination papers, a student who enrolled for both could gain four opportunities to sit an exam in a year, rather than two.

102. In May 2010 the claimant wrote to the IAI: "I am in the process of joining the Indian Institute and have a few questions. I am dyslexic and have attached the psychologist's report which I sent examination team at the Institute of actuaries UK for which I am granted extra 25% top time for each exam. Will the IAI be able to accommodate me by doing the same?" Despite chasing from time to time, he did not get a response. It seems he joined the IAI as a student in the summer of 2010. He then pointed out to the IAI, "if you are offering exams in UK, it is UK law the candidates with disability such that awarded examination access arrangements such as 25% additional time allocation as well as the use of a computer when the formal documentation is in place", and that he would like adjustments to be made to cater for his needs in the IAI exams. He would forward documentation about using a computer.

103. Later, when he got a notice about the location of the exams for which he had entered, he responded that he still wanted to know if he was going to have the adjustments he had requested. On 20 October 2010 the IAI in Mumbai responded:

> "as of now we do not have provision for extra time for handicapped student. I have put your case to strategy area advisory group on examination the chairperson and I will get back to you on this shortly."

The claimant said all he needed was 25% additional time and the use of the computer with a screen size of 15 inches or more. On 29 October, a few days before he was due to sit the November 2010 IAI examination, he was told:

> "I have discussed the matter with the President, Mr Liyaquat Khan, who took over charge as President on 4 September 2010. I regret to inform that your registration has been cancelled and hence you will not be able to appear for November 2010 examination. President will write you separately on this matter. Currently he is unwell and will write you shortly".

Next day, 30 October 2010, Liaquat Khan wrote to the claimant direct. He sympathised with the claimant's disability and offered good wishes for his future, then explained that the reason for cancelling this membership was that the IAI:

> "conducts its examinations since 2000 under an agreement/arrangement with the UK actuarial profession and this means all our examinations except at SA level are based on syllabus and study material of UK. We have mutual recognition arrangement too. We are facilitated to have the ActEd material at low cost (initially it was free). Such an arrangement made it necessary to ensure that we do not compete with UK actuarial profession and in specific terms not to conduct examinations in UK for UK resident/subjects. We do however make arrangements for students of IAI who visit UK for training, study or work but such students normally are students of IAI prior to moving over to UK. Though IAI does not have an exam centre in UK, we make arrangements in number of ways including through employers or Universities where such students go for study. It's another matter that such students may be students of IFoA in the same manner as many of the IAI students sit IFoA examination in India. It's unfortunate your admission as IAI student was processed by staff who were not aware of this historical arrangement to the extent that they should have been".

Mr Khan copied the email, headed 'Kiren Hirani – examination arrangements in the UK' – to Trevor Watkins of the Institute in London, who in turn forwarded it without comment to Ms Brocklesby.

104. There it ended, until revived by the claimant nearly 3 years later, when on 16 July 2013 (at the time of presenting the first two claims to the tribunal) he wrote to Liyaquat Khan asking if the arrangement still in place, as he wanted to join the IAI as soon as possible. Mr Khan replied:

> "Yes the status of IAI stand as for admission of students from UK remains the same as earlier. I believe you as resident of UK and probably student member of IFoA should certainly explore possibility of pursuing actuarial examinations from IFoA".

The claimant forwarded this to Trevor Watkins, asking who put the agreement in place, whether anyone from the UK IFoA had instructed IAI to terminate his membership, and the extent of his involvement in this.

105. Mr Watkins then wrote to Liaquat Khan asking if he had a copy of the 2000 agreement he had mentioned to the claimant, as they could not locate one. Mr Khan replied: "there was no agreement, it was more of an understanding with Liz Goodwin". Dr Watkins sent this on to the Institute's in-house lawyers, saying: "as I thought, there is no agreement. (Liz was my predecessor)". Dr Watkins's evidence to the tribunal was that he was not aware of any agreement and did not know why Liyaquat Khan should believe there was.

106. Although we were not taken to it in evidence (and so do not know if it was signed in this form, or some amended form, or at all) , the hearing bundle contains an unsigned draft of a *2004* agreement by the first respondent and the "Actuarial Society of India" (President Liaquat Khan) for mutual recognition of fellows of each institution who had completed exams after 2010, undertaken a professionalism course, and been in practice; in the Indian case, they must be India- resident and intending to practice there. It relates only to Fellows who have already qualified, and is entirely silent on dual membership students.

107. We concluded there was in fact neither an agreement nor an understanding between the IAI and the first respondent not to admit each others' students. Clearly it was recognised by Mr Khan that IAI students could also be members of IFoA, and the wriggle may have been the claimed lack of an IAI exam centre in the UK, except for those who were normally India resident. Our reading of the sequence of emails is that (1) the IAI had no arrangements for adjustment for disability at all, (2) IAI may not have appreciated he was UK resident until late on and (3) when the claimant stated he was sitting in the UK and was entitled to adjustment for disability under UK law, the solution to the inconvenience was to represent that there was an agreement, when in fact there as no such thing. The later admission in 2013 that there was no written agreement, and it was "more of an understanding" with someone no longer in post, suggests that Mr Khan knew there was no such agreement, written or otherwise. Asserting an agreement had been a bureaucratic response to administrative inconvenience.

108. As for Ms Brocklesby not investigating in 2010, as the claimant suggested she should have done when the correspondence was forwarded to her, the claimant did not raise it with the first respondent as an issue in 2010, and Mr Watkins did not suggest it should be investigated. He and Ms Brocklesby did not see the need to investigate the IAI's own membership rules.

The Claimant's Experience

109. At school the Claimant took 2 A-levels in Maths and one in Physics, and then took a Maths degree at UMIST (taking a year out with a laboring job to earn some money) graduating with a 2:1. He never had adjustments for disability, nor a formal diagnosis, but he knew his strengths and weaknesses, and in his words: "I picked subjects I could smash".

110. As already noted, he then started to sit the actuarial exams while working, with mixed success. In 2005 he applied for exam counselling for CT7, which he passed 6 months later, and after failing the next five exams, he applied for exam counselling for CT2 in August 2009. At this point he was given 25% extra writing time (45 minutes) and passed CT2 and CT6, but he failed both exams in April 2010 despite the extra time. It was at this point that he applied to the IAI, as described,

to add to the opportunities to sit and pass.

111. In September 2010 he sat CA1 for the first time, but failed it FC. On this occasion he was provided with a laptop and separate room (to ensure quiet) as well as the extra time. Unfortunately, he was supplied with a notebook rather than a laptop, and it took half an hour to find one. We understand he got the extra half hour. He submitted a mitigating circumstances form which was passed to the examiners. We do not know the outcome but note from Ms Harriman's evidence that in general mitigating circumstances would only gain a candidate a few marks. Thus, if he failed by anything other than a small margin (FA, which is 5%) it is unlikely to have lifted his marks to a pass.

112. In February 2011 he had a further session of exam counselling. He supplied an assessment by a psychologist (Michael Woods) recommending 40% extra time. In April 2011 he sat CT5 with an extra 72 minutes (40% extra) and passed.

113. In September 2011 he sat CA1 again, this time with the extra 40% with laptop and quiet room, but failed FC. He had more exam counselling in February 2012. Despite the adjustments he failed CT8 and CA1 in April 2012, both FB, but went on to pass CT8 on a retake in September 2012.

Access Arrangements for CA2 and CA3

114. In January 2013, the claimant advised the respondent he was due to sit CA1 again in April 2013, and would like to investigate adjustments for C2 and CA3. (These of course are the practical exams, different in format to the CT and CA1, with their traditional examination papers). He explained: "the adjustments have been very easy to implement for the CT exams which I have now completed". He had a reply on 8 January about the breakdown of the paper and reading time. He gave this to psychologist Katherine Kindersley, who in her report of February 2013 commented specifically on the requirements for CA2 and CA3. For CA2, she recommended the exam was sat over two days rather than one, otherwise with 40% extra time it would last over 11 hours. She also suggested he be given the paper in advance, to allow him an extra 40% time to read it. She made similar recommendations for CA3, adding he would need a rest break of 5-10 minutes each hour as well as the extra time.

115. At this point, as the claimant was not yet entering for CA2, he was asked to advise the team when he came to enter for CA2, but in the meantime was asked if there were any adjustments in place at work. He did not get a specific answer on whether CA 2 could be taken over 2 days, but he was told (22 February) to submit an exam arrangements form, and that the online exam would be best for him. As for CA3, it was pointed out that he was not eligible to sit it until he had passed CA1.

116. In March the claimant chased for an answers, as he planned to take CA2 "some time after the April sittings". He also said he was being assessed for Aspergers. He was asked to supply documentation for that.

117. We can see from a BUPA health report from a psychologist, Stuart Haydock, in the claimant's bundle, that in March 2013 he was suffering anxiety because of "frustration/resentment towards his employer" (not the respondent) for "not implementing adjustments at work". It was recommended he obtain

medication from his GP. Mr Haydock also mentions "poor experience with past employers".

118. While conducting correspondence about adjusting CA2, the claimant received confirmation of his extra time for the April 2013 sitting of CA1, where he would get an extra 72 minutes for each paper, plus laptop and separate room.

119. In April 2013 the claimant told the respondent's staff he would sit CA2 in the next three months, and he asked for "a detailed breakdown of how the examination process will be conducted from registering, and the receiving the material right through to the actual exam". The reply said arrangements were being made for him to have a discussion with an education actuary. The claimant's immediate reply was that he wanted it "in one document", and that a one day exam with extra time would be detrimental because ADHD limited his concentration. On 24 April he spoke to Liz Harriman, deputy registrar, by telephone, the first of two conversations which, unknown to her, he recorded. (There seems to have been a previous one which was not recorded). In the first he said the EHRC had told him ask what arrangements they had in place for people with ADD and Aspergers. She asked if he had discussed the exam with ActEd, and: "see how you think it would be able to operate and when you have got that information and you know how each section works and then come back to us and tell us what you think would be reasonable and what we would do is go away and have a look at it but…you're not actually telling me at the moment in time, how we can best help you; how it can be best split up. To say split the exam up in 2 days, our board wouldn't agree to it. It's not something we to do. I need to go back to them with reasons why and what you've been advised".

120. She emailed him that evening to say that to say that she was trying to get one of their staff actuaries (i.e. not ActED, which is an independent company, making a charge) to go through the format of the exam with him. He replied: "can I have it in one written document, the reason why the 40% extra time is likely to be detrimental to me and can you then how and will not disadvantage me given I have ADD which affects my concentration span".

121. When arrangements were made for him to talk to a staff actuary, he told her he did not want to discuss it on the telephone, he wanted it in writing. Our comment on these exchanges is that at the time of the first call Ms Harriman had not reviewed earlier emails between the claimant and her colleagues, and may not have grasped that he now had not only dyslexia but also ADD and Aspergers.

122. On 30 April there was a second recorded call. The claimant said he had now done some research and had found out that a university course could gain exemption with coursework, and that this meant "the time element could not be a competency standard". Ms Harriman pointed out that the university exemption still required sitting examinations. After further discussion, which at his end became heated (she complained of interruption) he insisted on having something in writing saying they would not be making the adjustment, to which Ms Harriman replied they had not said they would not make it, she would put it to the board, and that he had told her he was confused as to the structure of the exam.

123. He then submitted an access arrangements form for CA2. He asked for the pre-exam material, usually sent one month ahead, for an estimated 50 hours work, to be sent 3 weeks earlier. He also asked for the exam be set over two

days rather than one, as with extra time it would otherwise be too long, and an extra 40% time for CA3 with some additional breaks. He followed it up with a request whether (in effect) CA2 was only one day, saying "whether the CA2 structure document is correct" by "the end of today".

124. Next day he was told the education actuary could discuss the format of the exam and what was required, but the registrar and director of education had to deal with access arrangements, and she asked him to send details of "what you have issue with" (as he said he had a number), then they could reply. The claimants response on 1 May 2013 was that he had been told in February his request for exam arrangements would be referred to the board, he would need to take time off from work to write a complaint letter, as it would take him "the best part of the week", to review the emails he would like to follow internal procedures but "I feel I will be time barred and be at the mercy of those who have been prepared to ride roughshod over my statutory rights", and "I have 6 months less one day to take court action. This leaves me 25 days".

125. We comment on these email and telephone exchanges that the claimant did not well explain in writing or by telephone that he had (for example) already sent in a medical report about dyslexia, and he now had ADD and Aspergers as well. He was anxious and abrupt. Ms Harriman was speaking generically, though by 1 May, when emailing the education actuary to speak to him, she had linked the conditions. He was also contemplating a tribunal claim; the reference to 6 months rather than 3 months probably adds in the extra time allowed under the Disputes Resolution regulations, repealed soon after.

126.When the claimant emailed the education actuary on 1 May he said he had made the request in February and still had no answer, he needed to know if the CA2 document on the structure was correct, as that was the material given to his psychologist. He was "in no fit state" to talk to her, and was now behind with his work. The tone is frustrated.

Adjustments at Work

127. The claimant had started with a new employer in September 2012. The claimant found it difficult to adjust to the job, and took time off with stress after problems arose at the (accounting) year end, which led in turn to his employer commissioning a psychologist's report on his difficulties, through its occupational health department. We can see a letter from the psychologist in September 2012 recommending a workplace assessment. The claimant was told in February his probation period was to be extended and lodged a grievance. In April 2013 the psychologist then interviewed both the claimant and his line manager. The very detailed report, dated 21 May 2013, is in the bundle. The psychologist identified his difficulty performing tasks to time, related to short-term memory and the need to keep checking calculations and outputs, and lack of attention, such that there were many mistakes. He also found it difficult to communicate verbally – instructions should be confirmed in writing. He was using his own adaptive methods, involving checking each calculation in an Excel spreadsheet, rather than following instructions in the workplace. He had been given simpler tasks as a result of these difficulties. Stress had occurred because of overworking to compensate. The psychologist, Gary Fitzgibbon, identified that he needed a specialised coaching programme to develop his memory, verbal communication and listening skills, and be allowed a further 3 months on reduced workload to

develop these.

128.We do not know if he did have a coaching programme. The claimant has not mentioned it.

Requests for Modified Testing of CA1

129. All this January to May correspondence concerned CA2, the day long practical exam. The subject of correspondence now switched to CA1 - two exam papers in traditional format covering the application of theoretical material already examined in the CT subjects. The marks for the two papers were combined to give a single mark for the subject. As noted above, he was given extra time, a quiet room, and a laptop for the exams.

130. After the claimant failed the CA1 papers he sat in April 2013, he wrote at length (13 pages) to the respondent. Noting that he had now failed CA1 four times, he did not anticipate he would be able to develop the coping strategies. The examination, he said: “is not measuring my knowledge of the subject, but instead measuring my ability to perform tasks which are difficult for me due to my disability”. He should be “offered alternative methods of demonstrating my knowledge”. Events at work at present prevented him using his study days effectively, and he was running out of study package days to be able to retake. Specifically, the exam had contained CB (curveball) questions about business models, which was not on the syllabus, and comparing credit and market risks, which was difficult for someone like himself who worked in GI reserving. He made some recommendations: (1) that examiners remarked his script, in the knowledge of his difficulties (i.e. not blind marking), and (2) avoid all questions which the Institute of Actuaries of India tended not to use, although recognised by the Institute (he did not say what these were, then or in evidence to the tribunal). (3) He should have assistance to clarify the questions, and (4) a post-examination discussion so he could explain what he would have written, by way of an additional supplementary verbal assessment or viva. This post examination discussion would enable the Institute to ascertain his understanding of the question, the questions he could not decipher, those that took him a long time, and how his disability had an impact on his exam performance. To justify this, he pointed out that Imperial College students could pass using the exemption, which had 60% coursework, and that (7) the Institute should offer coursework, open book assessment, exams with fewer CB questions, and modular alternatives, separately examined. These would not compromise the competency standard.

131. On 5 July as well, Mr Fitzgibbon wrote to the first respondent about his failure in the April 2013 exam. He said the claimant had been disadvantaged by the combination of lack of adjustments in examination arrangements, and high levels of stress at work, involving panic attacks, sleep loss and general anxiety, plus having to travel to Bournemouth to London for preparatory coaching sessions. It would be reasonable, he proposed, to remark his exam taking into account his performance over previous examinations. In addition, an examiner could carry out a viva so that he had the opportunity to demonstrate his knowledge and understanding which he had not been able to demonstrate in the exam itself. We note here that Mr Fitzgibbon was not suggesting that CA1 should be subject to radical modification because of learning disability, but that this particular mark should be set aside because of high levels of stress caused by access arrangements and work difficulties, so the plea was of mitigating

circumstances, requiring reassessment of his performance on that occasion.

132. The Claimant's long letter contained many extracts from case law and statute. As a result, Ms Harriman passed the correspondence (including a 17 July email with extensive quotes from Codes of Practice as well) to the first respondent's in-house lawyers, who would be better able to understand these points. Several further emails came from the claimant, about the IAI 2010 correspondence (already noted), about a pending tribunal claim (the first two claims were sent to the respondent by the tribunal on 27 and 28 July 2013), an exam appeal, and a grievance (under the "Putting Things Right" – PTR - policy) on 31 July, complaining of disability discrimination. On 1 August he emailed four times asking for answers. Receipt was acknowledged on 2 August; he then sent more material and queries on 3 August.

133. The in-house legal team strategy was to respond to the PTR complaint and prepare a tribunal response, and to appoint a single person to handle all correspondence from the claimant, although "simple factual questions about exam booking" would go to Karen Brocklesby. The internal email proposing this is headed "plan of attack". We do not think this was (as the claimant has suggested) sinister, or indicating hostility to the claimant. It is a colloquial term to denote having an agreed approach to a problem. The claimant was emailing so many people, and at such length, with legal proceedings just having begun, that an agreed approach was sensible.

134. The claimant was asked to contact Kim Russell, of corporate legal affairs, who told him she was investigating. He was to carry on with exam bookings in the normal way. He then booked for CA1 in September 2013, this time asking for 50% extra time. He relied on a new report, from Dr Charlotte Boulton recommending 50% extra time. The respondent's view was that Dr Boulton had not considered the exams themselves, but was making a general recommendation. He was told he could have 40%. The claimant says extra time did not help, because of his "difficulty deciphering the questions". He then asked for extra time on the time allocated for reading the paper, and was given that (6 minutes added to 15 minutes).

135. On 15 August the Chief Executive told him they would conclude the tribunal proceedings before responding to his complaint.

136. On 23 August the claimant asked the Institute to get hold of the IAI paper (for CA1), allow him to sit it, then mark it. This would give him a second chance to pass, based on his existing revision. It is not suggested here (in contrast to the claim form presented a month before) that the IAI paper is any easier. Ms Brocklesby replied he had to be a member of IAI to sit their exams, and she was not aware of any restrictions on his ability to sit it with IAI.

137. On 11 September the claimant agreed his start and finish times for the CA1 exams he was to be sitting on 23 and 24 September 2013. In the meantime, there were frequent emails from the claimant pressing for replies to his earlier questions; he also added a request to be told their competence standards.

138. On 7 October 2013 he received a formal reply about the competence standard. "The primary objective of the exams is to test knowledge and understanding of the main principles of the syllabus set by the board of

examiners, and candidates' ability to apply these principles with judgement. The exams are time-limited to replicate the transactional aspects of practice in acknowledgement of the fact that actuaries often work under pressure and time constraints and have to react quickly to the needs of the client while the deadlines". Examiners set the pass standard and try to ensure it is consistent from year to year. Examiners are has had to keep at a constant level the standard required of an actuary on qualification. Papers conform to the syllabus. Guidance to examiners ensures the testing processes are aligned to the competent standard. Although there was no statutory obligation to accommodate the needs of students with disabilities, the Institute would do so as far as it was able "without challenging the integrity or purpose of the exams". At the same time it was suggested he could seek advice on resolving his claims through the Worshipful Company of Actuaries.

139. On 30 September he said he wanted to work for *CA2*, so needed to know about adjustments. He was told that if he submitted the application form they would discuss access arrangements. They would not seek payment of the exam fee until adjustments had been agreed. Correspondence on CA2 continued through the autumn. With the assurance about the fee he did submit an application form. He was told CA2 would be split over 2 days, with 25% extra time, rounded up to 4.5 hours per day. Ms Brockleby listed all the evidence she had seen and said if they were to consider more than 25%, Mr Fitzgibbon would have to say this was necessary in the light of what CA2 required. The claimant did not proceed with this.

140. In December 2013, after failing the CA 1 sat in September, the claimant lost his employer's study package.

Mediation after PH

141. After the open preliminary hearing in February 2014, and after the claimant lodged claim 3, the parties entered into mediation. Unusually, it was agreed that the framework agreement, reached in May 2014, would not be confidential. It was part of the agreement that no further claim would be presented while the parties were in mediation. There was to be a joint instruction of psychologists, who would interview the claimant and the exam staff to understand the exams, and recommend suitable adjustments for the parties to consider. The first respondent then agreed some changes and declined others.

Request for Adjustment of ST7 - Excel

142. While the mediation was getting under way, (and before the psychologists were instructed) the claimant entered for the ST7 exam, and asked to use an Excel spreadsheet in the exam rather than a calculator. He said this was proportionate to the competence standard because in the workplace calculators were not used to calculate runoff triangles.

143.Excel software can contain many mathematical functions, and the respondent was concerned he would gain a substantial advantage over other candidates besides run off triangles. On 16 April Ms Brocklesby told him there was no medical reason for using Excel, and the reason he had given (normal use at work) could apply to any student. It was not being provided. The claimant asked why not, and was told (25 April) it would be considered if he could provide

new facts, or point out overlooked facts, on why Excel was needed. His response was that "because of my disabilities" he required the Institute to take out questions involving heavy calculation of run-off triangles, or, provide the answers to the calculation element of the run-off triangles questions, and assess the rest, and:

> "take out all questions which are not proportional to the requirements of the job of a qualified actuary. For example they asked questions about zombies and aliens in a past exam. Unless the IFoA can prove that such beings exist, it is likely be disproportionate to ask these types of questions and will result in indirect discrimination unless the IFoA can demonstrate that actuaries have been required to model such beings and it is essential to the requirements of job".

144. He was asked to supply medical evidence about use of Excel, and told that the question paper had already been set. At 3 pm on the day before the exam he replied: "dyspraxia it makes it difficult for me to perform long-winded calculations on a calculator", to which Ms Brocklesby replied that she needed medical evidence. On the evening of 1 May then, he contacted Gary Fitzgibbon, stating: "I have dyspraxia and it affects my fine motor core skills in particular my ability to compute the calculation on the calculator. My other impairments also impact on my ability to keep track of the calculations performed in the calculator." Mr Fitzgibbon replied next day (after the exam) that this sounded reasonable, based on both fine motor control and on his working memory weakness, "it's obviously better if you can see everything that you are doing in a calculation because that reduces the demands on working memory".

145. In evidence to this tribunal the claimant has explained because of his memory difficulty he cannot recall the sequence of calculations carried out by a calculator, without writing each stage down, and that he is assisted by an Excel spreadsheet, as he can open each cell and interrogate the calculation at each stage to show what the individual stages are, and where he has made mistakes. He did *not* add that reduced motor skills mean he cannot use a calculator; we note there is no suggestion he cannot use a keyboard. The claimant accepted that Excel software could give him a substantial advantage over other candidates, because of its many functions. He explained that an Excel spreadsheet could be *adapted* by disabling all other formulae within it (which might provide an unfair advantage to him), so that it can be used as a "dry calculator".

146. It is clear from reviewing the correspondence that the claimant did not say so at the time. Nor do we see how Ms Brocklesby, neither an actuary nor a mathematician, could understand this from what he said, or from what was in the medical reports then available. The term "dry calculator" was unknown to her, as it was to Sally Calder too. In our view, if the claimant had explained this in his own terms, or if he had consulted Mr Fitzgibbon earlier, so as to relate the dyspraxia or dyslexia to use of a calculator, or had explained about disabling functions within the software to make it suitable for exam use, she could have consulted an Education Actuary and permitted the adaptation, as it is now conceded, once explained, that this could be done.

147. Exam letter delay. The claimant was given his exam letter, with details of venue and times, two days later than others. It is explained that this was because the respondent had to find a place at the Oxford test centre, rather than London, as before, for practical reasons. He had been told by email before this it was

likely to be in Oxford rather than as before in London, because of office changes and the need for a separate room.

148. In the 2 May 2014 exam, the claimant complained to the invigilator on the day that he needed an adjustable chair. They were able to find one for him, but such a chair had not been requested before by the claimant as an adjustment for disability. The invigilator also reported back to the exams team that the claimant's computer screen had turned off twice during the exam, and although both times an IT technician had fixed it within a minute, he had been given 10 minutes extra time to compensate, allowing for the need to recompose himself after the interruption. The technician had however commented, according to the invigilator's report, that was no power outage at the time, and he thought that the user had switched the screen off. The same equipment had been used for all other exams that session without apparent fault. Could the exams team suggest what they should do about this screen?

Further Request for Alternative Assessment of CA1

149. On 28 May 2014 the claimant presented a submission that he should be *exempt* from CA 1, on the basis that he would have passed it on an earlier occasion if disability had been properly taken into account. He argued he had an existing project management qualification, which could have been taken into account instead of making him answer a question on project management; he would then have gained more marks on the project management question in the exam he sat in September 2010. In addition, if his needs had been properly assessed at the time, he would have had an extra 40% time and a separate room. He would then have been borderline, and mitigating circumstances would have allowed him to pass. The project management section should alternatively have been sat open book (as with his existing qualification). The respondent replied that such issues were all part of the mediation.

The Psychologists' Proposals for Adapting the Exam System for the Claimant's Disability

150. As a result of the framework agreement in the mediation, two psychologists, Gary Fitzgibbon (who had already reported for the claimant's employer) and Ben Donner, were instructed as independent witnesses, at the respondent's expense, to interview members of the respondent's staff and examine the papers and test methods so as to report what could be done to alleviate disadvantage. Mr Donner made four attempts to meet the claimant, who cancelled every appointment, as he was suffering stress. The resulting reports are dated 30 June 2014 and 9 July 2014 respectively.

151. Mr Fitzgibbon was concerned about some of the questions on CA1 being overlong, and needing to be broken down, so easier for someone with memory difficulty to understand. The perfectionism and overfocusing of those with ADD meant it would be better to say "list the two main issues" rather than "list the issues", as they would overlook the guidance provided by seeing the number of marks allocated to the answer and be unable to control the amount of detail to select. On time generally, 50% was about right, but with double reading time; 100% extra time overall was undesirable as it would encourage candidates to write without selecting. It might be possible to use an experienced invigilator to interpret questions, but some careful guidance would be needed on what exactly

was permitted. On coursework as an alternative, he thought someone with ADD and Aspergers would get too bogged down in detail, but a mini thesis could help with the flow interrupted by breaks in an exam made very long by extra time, it could peraps replace CA1 in whole or in part, and in ST7/8. On the questions, he advised the two longer ones on the paper he reviewed be broken down into sub-questions, but many of the other questions were acceptable. He accepted that memory had to be tested in some way. He thought too many of the questions could be answered by memorising the required reading, rather than the stated aim of testing the application to the real world. On questions about "niche industries", such a horseracing, he thought this would disadvantage all students, as they might think they had to know something about it to answer the question, but the neuro- diverse to a greater degree. He noted an education actuary's suggestion that an FA grade could count as a pass if neurodiversity seemed to account for some of the unsatisfactory answers. He said nothing about CA1 being a double exam.

152. On CA2, he noted neuro-diverse candidates would have trouble planning and organising, might not understand the different levels requited in explaining to a student and to an actuary, and disadvantaged by the proposal to remove the facility to ask an invigilator for guidance. He suggested it could take place over two days rather than one. He recommended redrafting the guidance (e.g. to be 'clear and concise'), as some students would not recognise when they were not). He suggested some research on how neuro-diverse actuaries coped in the workplace, so as to inform the examiners on what had to be assessed.

153. On CA3, he recommended leniency in organisation, literacy and presentation, rewriting the guidance, and offering the possibility of using a video of an actual presentation the candidate had made at work, rather than a presentation as part of the test. He also suggested adjusting the marks of a neuro diverse candidate to make allowances for lack of social interaction, and providing a spellcheck.

154. Mr Donner focused on the autistic spectrum disorder. He suggested an exam paper adapted for this disability, with more generic names and scenarios to avoid distraction, shorter questions, long questions being broken down with bullet points, and fewer open-ended questions.

155. In July 2014 the Institute responded item by item to the proposals. They agreed to meet students to discuss particular needs. It was not necessary to sit two exams on the same day. Up to 50% extra time would be given if supported by a report. They could provide a quiet room, but not a soundproof one; students could wear headphones and play "white noise". They could not provide coursework, as it was disproportionate, and exams based on a student's work for an employer had "detrimental impact on the competency standard." They would redraft the guidance with neuro-diverse students in mind. Responding to Mr Donner's suggestion that questions avoid novel scenarios and names, as well as metaphor, idiom and verbosity, the Institute responded that they would not introduce a paper adapted for autistic students, but would recommend these suggestions to the examiners as "they would be helpful for the student population and not only disabled students". Nor could they make a subject matter expert available during the examination process to clarify points for the claimant: it was disproportionate, gave rise to difficulty monitoring the level of consultation, and would have detrimental impact on the competency standard. They would also

continue to examine memory skills, and suggested the claimant discuss coping strategies. They could not remove graphs and tables, but were happy to introduce colour and other aids to reading them. Long term they would consider pre-release of material for some examinations. Finally, they did not agree to adjust historical exam results (a reference to a May 2014 request to remark his CA1 script of September 2010).

156. The claimant replied angrily. He did not attend the September 2014 sitting of the ST8 exam for which adaptations had been made.

157. While waiting for the Institute's response to the psychologists' proposals, on 11 July 2014 the claimant renewed his request to be told the competence standards. On 16 July the respondent's in-house lawyer wrote about the psychologists' proposal for an advocate for him. The claimant replied that the problem was not his communication, but the exams team, "who appear to be sadistic bigoted individuals". The mediation was a waste of time; he had just started writing an ET1 (tribunal claim form) "because I do not wish to be timed out". He then asked for alternative assessment, referring to earlier CA1 failures. He said that in September 2013 Liz Harriman, Karen Brocklesby and Kim Russell were "deliberately trying to trigger my impairments". His chain of emails continued into the small hours of 18 July, when he said they should just defend the claim: "all I ever wanted was adjustments to the assessment method. Instead I feel I have been set on by a gang of sadistic paedophiles who can not hold back from subjecting me to this pain for reasons which I believe are solely for their own pleasure". Questioned about this, he said it was not language he would normally use, but he still held that the exam team had refused to answer queries or agree proposed adjustments "for their own kicks". Early in the morning of 18 July 2014 asked for a reply by 1pm, otherwise he would withdraw from the mediation – the mediation was a set up, and a joke, he was not asking for competence standards to be adjusted, which would make him a cheat.

158. He was asked to wait for the response, as there was so much detail in his queries, but meantime given the earlier CA1 results he wanted.

159. In November 2014 he started tribunal claim 4. This is the claim form the claimant had been writing in July so as not to be timed out. The claimant said the delay was because it took so long to write. It is very long.

160. There was some follow up nonetheless. The respondent arranged disability awareness training for its staff, which took place in October 2014. In March 2015 CA1 was split into two papers on successive days. From August 2015 they started to use external psychologists as advisers. In February 2016 it adopted an Equality and Diversity policy. As noted earlier the exam system which is the subject of this claim was superseded in 2019.

161. The mediation ended formally in November 2015. A decision of privilege for a letter, an application to reconsider, and an appeal to the EAT, have held up the hearing of the claims.

Relevant Law

162. Part 5 of the Equality Act 2010 is headed "Work", and sets out the particular groups to which its provisions prohibiting discrimination are to apply, and in some

cases, what activities carried on by those groups. Employees, police officers, partners, members of the bar, office holders, employment service providers, trade unions, and at section 53, qualifications bodies, are listed under "Work

163. Section 54 defines qualification body as one which can confer a relevant qualification, which is:

> "an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession".

It is agreed that the first respondent is a qualification body.

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164. Section 53 sets out the discrimination that is prohibited for the specified activities of a qualification body. Subsection (1) prohibits discrimination:

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

165. There is also provision for harassment and victimisation in relation to specified activities:

(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—

(a) a person who holds the qualification, or

(b) a person who applies for it.

(4)A qualifications body (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

Subsection 5 provides protection from victimisation of those "upon whom (it) has conferred a relevant qualification" by withdrawing the qualification, varying the terms on which he holds it, or by "subjecting B to any other detriment".

166. By section 53(6), a duty to make reasonable adjustments applies to a qualifications body. This subsection does not go on to specify activities which subject to the duty, unlike the cases of discrimination, harassment and victimisation, but in schedule 8 to the Act, entitled "Work: reasonable adjustments)", paragraph 165 restricts the duty to qualification bodies "deciding upon whom to confer a relevant qualification", and "conferment…of a relevant qualification".

167. So only a restricted range of the activities of qualifications bodies is covered protected from particular types of discrimination. Within that range, there is a further restriction where the activity concerns the *application of a competence standard.* Here, and where disability is concerned, only indirect discrimination is prohibited. By section 53(7):

The application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19.

168. Competence standard is defined in section 54(6):

> "A competence standard is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability".

169. There is EAT authority on competence standard in **Burke v College of Law and another**. A solicitor sitting the legal practice course who had multiple sclerosis was given 60% extra time. A claim that a refusal to give extra time beyond that, or allow the exam to be taken at home, was rejected by an employment tribunal because the time requirement was a competence standard, and need not be subject to the duty to make reasonable adjustments. The EAT upheld the tribunal decision. In answer to an argument that by giving extra time at all the exam body had faced both ways, it was held:

> "the fact that additional time is granted within which to carry out the exam does not of itself mean that time was not a competency standard, for these two reasons. First, the fact that an adjustment is made is of no evidential value. It does not mean that the matter is not a competency standard. The respondent is and was entitled to make adjustments to competency standards and did so. However, that does not automatically mean that it was required to do so by virtue of the DDA. Second, there is a clear distinction to be drawn between giving a candidate some extra time, the nature of the examination (and competency standard) is maintained, and giving such an amount of extra time so that the examination is no longer testing what is intended to test (in this case the ability to work under time pressure)".

170. This decision was appealed. One appeal point was whether the mode of testing the ability to work under time pressure was to be separated from the competence standard, such as it could be subject to the duty to make reasonable adjustments. In the event this point was not decided, as the Court of Appeal found the lower tribunals had been right to say that, in the round, the respondent *had* made reasonable adjustments to the time and place requirements, so it was not necessary to decide if the mode of testing was itself the competency standard.

Competence Standard - Discussion

171. As noted, E. J. Clark found that CA2 *was* about the application of a competence standard, namely, completing it within a specified time. Her decision was not appealed.

172. At the time of that preliminary hearing, the tribunal relied on a summary of claims drawn up at a case management hearing. The claims at the time were about failing to extend CA2 by 40%, and hold it over two days, with an additional claim about making reasonable adjustments to CA1 in April 2013. That leaves open for this tribunal:

(1) whether completing CA1, CA3 or ST7/8 in a particular time is a competence standard

(2) whether the various modes of testing (exam rather than coursework, the type of questions asked, and the level of knowledge and understanding required, and the marking scheme) are part of the competence standard.

173. The claimant argues that this tribunal cannot consider an argument that timing in CA1 is a competence standard, because the point could have been argued in January 2014, but was not, so the rule in **Henderson** applies. What does the claimant say of each exam in the two claims before the tribunal in January 2014? Taking CA1 first, in claim 2, paragraphs 31 - 36, the claimant said of CA1 that the language of questions should be unambiguous, there should be extra reading time, and stress at work should have been allowed as a mitigating circumstance. He does not complain of having to sit it in three hours per paper, or that there should not be an exam.

174. In claim 3 (which postdates the January 2014 hearing), paragraphs 11.1.-11.7, the complaint of CA1 is that it was a double exam, rather than two single exams, and this was not a competence standard but a mode of assessment, which must be adjusted for disability. He also complained of the September 2013 CA1 exam and refusal of the adjustments requested. Claims 1 and 4 are silent on CA1.

175. Of CA3, there is no mention in claims 1,2 or 3 (it is mentioned in the summary of claims in 3, but cannot be found in the text). Claim 4 includes a complaint that CA3 is ringfenced to 25% extra time, that there is no choice of topic, and that is not split into separate exams.

176. Claim 4 also covers ST7: that there is not enough time, the time pressure is more than is in practice necessary, too much time must be spent on calculations, that there is a question on mining in space, and other questions are poorly worded.

177. The claimant argues in claim 4 that:

> "generally, there is a difference between a competence standard and the process by which attainment standard is determined. For example, the conferment of many qualifications is dependent upon passing an academic examination. Having the requisite level of knowledge to pass examination is a competence standard. However, the examination itself (as opposed to performance in it) may not involve the competence standard – because the mechanical process of sitting examination is unlikely to relevant to the determination of the relevant competent or ability".

178. He submits that the respondent being prepared to allow even 100% extra time shows time is not a competence standard, and that the guinea pigs do not have to compete the paper in time. Although the claimant both pleaded and, in asking questions, asserted, that 100% extra time had at one point been allowed, there was no document, nor did any witness know of it, he believed it had come from an earlier handbook or examiners report, but had not been able to trace the document). In the light of this it is possible that at some point a blind candidate was allowed 100% extra time, but it is not

proved, and we do not accept it as something on which we can rely. We recognise of course that the respondent *has* allowed up to 50% extra time. As for the guinea pig, the claimant has in our view misunderstood. The guinea pig was being asked to test whether the questions could be done in 3 hours, as if it took him longer, the paper must be cut back. That he could take more than three hours to do it does not mean time was not a standard, it means only that the paper as drafted was not a good test of an ability to answer questions in three hours, and must be revised before anyone sat it.

179. We must deal with an argument by the claimant, in his written submission, that the respondent cannot assert that time is a competence standard for CA1, because they did not say so at the preliminary hearing in January 2014, and so are barred by the rule in **Henderson**. To this the respondent counters that at that stage time was only complained of in relation to CA2; the claim for CA1 in 2010 was withdrawn, while the claim for CA1 in 2013 was about failure to adjust it, and he was in fact given extra time. The tribunal agrees: the claimant was given the adjustments he sought for CA1 in April 2013, it was not apparent from the claim form that the complaint related to the time he had to sit it; close reading of Mr. Fitzgibbon's letter about the effect of stress at work shows that the complaint was about having to sit an exam, rather than be assessed on past performance, not about the time allowed for sitting it. We conclude that the respondent is not barred from asserting that a timed exam is a competence standard for CA1 as for the other exams. They are not of course barred from asserting it for CA3 or ST7, as no claim for those exams had arisen in the claims live at the preliminary hearing in February 2014.

180. The respondent's case is that the individual learning objectives of the syllabus for all the exams are competence standards.

180.1 Of CA1, this is "understanding strategic concepts in the management of the business activities of financial institutions and programs, including processes for management of the various types of risk faced, and the ability to analyse the issues, formulate, justify and present plausible and appropriate solutions to business problems".

180.2 Of CA 3, this is "the ability to communicate clearly to non-actuaries".

180.3 Of ST 7, this is "the ability to apply, in simple reserving and capital modelling situation, the mathematical and economic techniques and principles of actuarial planning and control needed for the operation on sound financial lines of general insurers".

182. Taken together they are said to encapsulate "fitness to practice as an actuary".

183. The long list of issues sets out the process involved in assessing a competence standard, as described by the respondent. It includes testing ability to apply actuarial principles to real life problems, not just recalling particular material; working to time; the ability to time manage so as to be able to deliver their work within a reasonable timescale, and the ability to work to deadlines; the exam environment is not exactly identical to an office environment, but the respondent Institute is not looking for perfect answers.

Other approaches are given appropriate credit. Time bound periods to complete exams are "necessary to replicate the situation actuaries will find themselves in the workplace"; much of the drafting in fact reflects the requirements of CA2, but is pleaded for the other exams as well. The respondent submits that when assessing candidates for fellowship by exams under time pressure they are applying these competence standards to them. Sitting exams based on the syllabus, which is itself based on skills reasonably expected of an actuary, the knowledge and practical skills, and ability to manage the time pressures of commercial life as an actuary, are assessed. The respondent contends that the process of rigorous testing by examination under timed conditions is part of the competence standard that cannot be separated from, and is inextricably linked to, the competence standard.

184. The claimant appealed, following a later reconsideration, Judge Clark's decision of CA2 that time was a competence standard. The EAT refused the appeal, largely because the parties had agreed a list of "deduced competence standards" which included "working to time". Nevertheless, the EAT wondered if this would have been different if it had not been agreed, given that the respondent was prepared to adjust time for disability – was the competence standard the standard time, or the adjusted time? It was suggested it might be hard to justify when the time came - an "aspect which may come back to bite the respondent".

185. The tribunal considered whether completing an exam in a set time was a competence standard. CA1 and ST7 or 8 were aiming to test knowledge, rather than ability to do a practical task. (CA3 is a little different, as it is intended as a practical test, to explain a problem and solution to non specialists verbally and in writing, it is designed to test practical skills rather than knowledge). It is of course traditional to fix a maximum time for an examination, and generally provide enough material for standard ability candidates not to finish early. They do not generally exceed 3 hours, presumably because there are limits to human concentration. That time may be testing knowledge of subjects as diverse as surveying and Greek, so are about testing knowledge generally. We were alert to the danger that just because this is what has always been done, it may not mean time is a standard. In any profession the professional, expected to be knowledgable, must be able to recall his knowledge, and even if he may need to check a specific detail, must have enough recall to remember what areas if that knowledge may apply, or need to be checked. Open book exams are sometimes used, but are generally timed such that the candidate must be very familiar with the content of the book to pass – there is not enough time to read it all to answer the question, just enough to check accuracy. Untimed tests may not be able to test familiarity with the material at all, as a candidate could look it all up from scratch. A mini-thesis may not demonstrate knowledge of the spread of the syllabus. Coursework and theses can though be arranged so that they must be written up in a set time. We concluded that sitting a written exam to time is intrinsic to how knowledge is tested; even if open book is permitted, the time limit tests familiarity with its contents. An ability to demonstrate knowledge in a timely way is a competence standard for an actuary. Whatever time is chosen, if this has disproportionate impact on the disabled, it has to be justified.

186. As for the exam, the questions and the marking scheme, we had to

consider whether these are intrinsic to the competence standard, or a means of assessing the competence standard. The purpose of limiting claims about a competence standard is presumably so that there can be confidence in a a qualification, provided of course it can be justified. Our difficulty is that there was little exploration of how else knowledge of actuarial principles and ability to apply them to real life could be demonstrated to be satisfactory. The claimant did not advocate an oral test, probably because of his difficulty expressing himself verbally and understanding oral questions, except in the request for a viva arising from the April 2013 CA1. He asserted that some coursework could be used, but did not explain how that would test knowledge of the syllabus. That examinations have been relied on for centuries in western Europe and in China (for example) may indicate that no one has found a better way to asses mastery of a body of specialised knowledge. Coursework has only ever had a limited role. We concluded that the wording of the questions, the scope of the syllabus, the marking schemes, the pass marks – that which is necessary to "satisfy the examiner", are all intrinsic to the competence standard, which can ultimately be reduced to ability to practice as an actuary.

Scope of Protection in Qualifications Bodies' Activities

187. If some of the complaints in this case are *not* about a competence standard, then they may be discriminatory, or there may be harassment or victimisation, but only in relation to the restricted set of activities set out in section 53 (that is, arrangements for deciding on whom to confer it, terms on which it is prepared to confer, and not conferring the qualification). So it is important that in relation to any matter of which complaint is made that we decide whether that activity was about "the application … of a competence standard", in which case we can only consider the indirect discrimination claim. If it is not about a competence standard, we must consider whether the activities complained of are in scope for discrimination, reasonable adjustments, harassment and victimisation claims.

188. This point was considered in part by E J Auerbach in a decision of 8 December 2016, and in reconsideration of that decision on 4 April 2017, when the respondent applied to strike out some claims. There were two routes by which the claimant argued that complaints (about no single point of contact, not dealing with his complaints and of a statement made to the Education committee in October 2014) were in scope of section 53. They were (1) they concerned arrangements for conferring a qualification and (2) that a qualification had been conferred (the claimant said because he was part qualified) and the treatment subjected him to "any other detriment". It was held that it could not reasonably be argued that they fell within the scope of "arrangements for conferring a qualification", as they did not relate to exam content, pass marks, exam conditions or timing. On the other point, he held, after analysing **McDonagh v Ali (2001) UKEAT 1386/00** (suspension from the Labour Party removing eligibility to stand as a councilor), and **McLoughlin v Queens University Belfast (1995) NICA 82** that it was arguable, although his own view was that the restriction of the scope of the Equality Act to qualifications bodies meant that it was limited to conferring or withholding a qualification. The McDonagh decision meant that *prior* status and *prior* requirements for conferral of a qualification could be protected from discrimination. He referred to the explanatory note to section 53, that

"discrimination, harassment and victimisation were unlawful when conferring a relevant qualification (which includes renewing or extending a relevant qualification".

189. It is clear from the reconsideration decision that the claimant relied on a dictum in **Savjani v Inland Revenue Commissioners** to the effect that a court should be slow to find that the effect of something which is humiliatingly discriminatory in racial matters falls outside the ambit of the Act.1976 Act (a predecessor to the Equality Act); the issue in that case was whether the Inland Revenue provided services to taxpayers as it did to government. Thus he argued that generally relations between a qualifications body and its members should be protected. This was left to us to decide.

190. The respondent argues that the following claims are not in scope of section 53, as they do not relate to the conferment of the qualification, or his status as a member of the Institute:

(1) the requirement for awareness training of staff;
(2) not providing a single point of contact for the claimant in the exams department;
(3) "giving him the runaround", by not answering emails but referring them to the legal department;
(4) the delay explaining the structure of CA2 and not providing an answer on a single document;
(5) not investigating his complaints in time or at all;
(6) the report to the education committee in October 2013, alleged as harassment;
(7) remarks about the application of **Burke v the College of Law** in the context of the claim;
(8) a written statement to the education committee implying that dyslexic and neuro diverse students were more likely to cheat and abuse the provision for reasonable adjustments.

191. The claimant asks us to find that these are steps *within* the qualification process, and that the claims they seek to exclude "come into the arrangements they make for access".

192. Taking the specific claims in turn:

(1) awareness training for staff – we did not consider this was an "arrangement for deciding on whom to confer the qualification". As for section 53(2)(c), "any other detriment" is to be construed as of a similar character to "withholding" the qualification and "varying the terms" on which he holds it, and this is not of that character. The claimant seeks to argue that by **Savjani**, protection should not be cut back, and that protection in relation to qualifying bodies is not narrower than in an employment relationship, as the relationship may last many years and may be very important in getting work. This latter is a late attempt to reargue what was decided by E J Auerbach, and in any case this tribunal does not see that the argument has merit: Parliament clearly set narrower limits to what could be complained of in relation to a qualification body than to employees and workers.

(2) having a single point of contact with the exam team – we do not hold that this was an "arrangement", which could be discriminatory, etc. E J Auerbach ruled in the reconsideration judgment of 8 December 2016 that this was not an arrangement, and mere connection could not lead to protection. Nor can it be said to be a detriment similar to withholding or varying a qualification he already held.

(3) not answering emails but referring him to another department to reply- it is hard to connect this to an arrangement for deciding on whom to confer a qualification, as they concerned all sorts of matters such as legal argument, requests for the competency standards, and so on, connected only remotely to access arrangements for any exam. Nor did they concern withholding or removing a qualification he already held.

(4) and (5) explaining the structure of CA2 to him and complaint handling, these, depending on the subject matter, are capable of being arrangements for deciding on who to confer a qualification, for example if the complaint was about sitting a particular exam, or being barred from the exam room, it could be in scope as a discrimination or victimisation claim, and if so, they are to be decided on their merits.

(6)(7)(8) concern Ms Harriman's report to the Education Committee about exam access arrangements, and are harassment complaints. Persons who apply for a qualification are protected from harassment. If the complaint is of victimisation, it is also in scope, as it concerns "arrangements for deciding", or "the terms on which it is prepared to confer a qualification" as it is about exam arrangements, the means chosen to decide.

To conclude, (4) to (8) are in scope for claims of direct discrimination, harassment and victimisation, and (1) to (3) are not.

193. Having decided what is a competence standard, and what activities are in scope of the other protections, we now consider the indirect discrimination claims in respect of all the activities in scope, competence standards or otherwise.

Indirect Discrimination

194.Indirect discrimination is prohibited by section 19, which says:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

195. Guidance on making findings of justification is set out in **Chief Constable of Yorkshire Police v Homer (2012) UKSC 15,** and **Seldon v Clarkson, Wright and Jakes (2012) UKSC 16**. It is an objective assessment by the tribunal, not a review of the reasonableness of the respondent's decision making. The tribunal must find as a fact what the legitimate aim was, and then whether the measure is capable of achieving it, and whether the measure is both appropriate and reasonably necessary to achieving it. If there is a less discriminatory but equally effective way to achieve the aim, that could undermine whether it was proportionate, but is not fatal given that proportionality is a balancing exercise. In **Griffiths v Department for Work and Pensions (2015) EWCA 1265** it is explained that essentially the same analysis is carried out for both section 15 and section 19, though in section 15 it is the treatment that must be justified, while in section 19 it is the provision criterion or practice.

196. The provisions to be justified are: sitting an exam under exam conditons, rather than coursework; answering questions of a particular difficulty; the spread of the syllabus; sitting all the CA1 syllabus at one session; sitting CA1 on successive days, rather than 3 days apart; the pass mark; no viva; no explanation from the invigilator; and range of topics examined; the practical test being done to time; two sittings a year not four; sitting CA3 as three papers over two days; marking for "crisp and clear" English.

Legitimate Aim?

197. The first respondent's aim is to certify actuaries who are fit to practice as actuaries. That they are fit to practice is as important, say, as that doctors are qualified, given the integral nature of managing risk to sound business, but especially in insurance, and pension funds, which invest heavily in shares and bonds, for the operation of the financial systems and the consequences for members of the public if there are errors, as was shown in the financial crisis, which has now led to stress testing of financial institutions to see if they can cope with risks of adverse events materialising, or as in the Equitable Life collapse, both of which would require actuarial techniques being applied. They are needed as part of making healthy business decisions and a successful capitalist economy. It is important that there is public confidence on an actuarial qualification.

198. We consider first the requirement to sit an exam, or practical exercise, within a set time limit. In evidence we heard that actuaries have to meet statutory deadlines, such as pension fund valuations and reports (and that the penalty for late filing is stiff), or meet deadlines in commercial operations, for example when a business is being acquired and the extent of pension liabilities has to be valued, and also that, as for all financial professionals, there are the pressures of the accounting and tax year ends. More generally, actuaries will be asked to advise from time to time; colleagues or clients will have deadlines for advice, which may be negotiable, and some of which may be softer than others, but all require some confidence that the actuary would be able to report in the time required. Much of this evidence came from the respondent's witnesses, but we also had specific evidence of workplace

practice in the occupational health report, to the effect that the claimant's then employer had over several months experienced difficulties in the time the claimant took to carry out his work, which mattered because he had to work in a team. They had had to allocate him less demanding tasks. We considered whether this could just be personal conflict with an unsympathetic team leader, but there was evidence that the claimant had confirmed to the reporting psychologist not that his team leader had no cause for concern, but that he was slow because he needed to keep checking, and had his own ways of doing things, which were not the methods followed by his colleagues (and had in turn caused difficulty with shared team work). There was also mention by the claimant to an expert, as recorded in the expert report, that he had had similar difficulties with other employers in the past because of his disability. This suggested that the first respondent was not wrong in considering timeliness an important feature of practice as an actuary, and that checking that those they allowed to qualify were capable of working to time is a legitimate aim. That is what we hold.

199. There was also the claimant's argument that the syllabus was too broad and the standard too high. Given that qualified actuaries have to practice in variety of settings in financial services, and handle some big figures, this was a legitimate aim.

Disadvantage

199. Does this standard, of timeliness, and the level of competence required to be demonstrated, put those with dyslexia, and those with the claimant's group of four neuro-diverse disabilities, at a disadvantage? Any written material disadvantages dyslexics, as they need more time to memorise what they read. That said, we do not consider that on the evidence, the difference between 25%, 40% and 50% extra time clearly put the claimant at a disadvantage, especially when many of the complaints relate not to the amount of extra time allowed but to the nature of the questions and the way they were marked. The claimant passed CT7 without extra time. The claimant both passed (CT2, CT6) and failed (CT5, CT8) exams when he had 25% extra time. He had both passed (CT5, CT8) and failed (CT8, CA1) exams when he had 40% extra time, and then failed (ST7) when given 50% extra, and did not attend ST8, for which 50% was allowed.

200. On level of difficulty, as the claimant asserted, many candidates who are not neuro-diverse find the exams difficult.

201. The psychologists identified that planning a task was a difficulty for those who are neuro-diverse, quite apart from working to time, for example.

202. Real life scenarios may possibly disadvantage those with autistic disorders, if they cannot understand how to relate a theory to these facts. Those with ADD find it hard to detach from one topic and move to another, and equally may have difficulty concentrating. In the context of the respondent's exam system the disadvantages have been analysed in the psychologists' reports of June and July 2014, and we rely on their findings. There was both group and individual disadvantage in the respondent's CA1, CA2, CA3 and ST system, so it must be shown to be justified.

Reasonably Necessary and Proportionate?

203. Were the chosen methods reasonably necessary and proportionate? Sitting a timed exam or practical test plainly tests ability to work to time. It is capable of testing working to time. Related, but different, is that a timed exam is a way of testing whether someone has knowledge, and does not need to research every question, even if the knowledge is that this is an area where there is a problem. The claimant argued that because the university courses qualifying for exemption allocated some marks to coursework, this undermined the necessity of a timed exam. However, it was still the case that 70% of the marks (with a minimum pass rate of 50% per paper and 60% overall) went to examination, rather than coursework, so clearly timely work was essential to gain exemption. Further, the whole course had to be taken and passed in two years of one day a week teaching, while working the other weekdays, and any coursework would have to be handed in to a deadline, so timeliness was still to some degree being assessed for this section of the marks – students did not have unlimited time. In some ways the university route was more stringent, because retakes of individual papers removed the block exemption, putting these students in the same position as traditional candidates, where exam passes were required, so greater memory and concentration was required to master all topics in two years. They tested timeliness in a different way. It is conceivable that the Institute could devise ways of testing some subjects by a form of coursework, for example a presentation, or a thesis for part of a technical subject. That must be considered as part of proportionality.

204. The claimant also submitted that time was plainly not essential, as guinea pig one testing the papers did not have to complete it in a set time, and guinea pig two did not need to do it to time at all. We thought the claimant had missed the point of these testing exercises: guinea pig one, being newly qualified, was assumed to be someone who could work at what they considered the required speed. The test was not whether he could work to time, but whether the paper could be completed in the set time by someone who could work at that speed. Guinea pig two was not testing time at all, but the level and spread of questions as measured against the syllabus and the required reading.

205. The claimant also argued that the respondent had not provided any evidence in reply to his request to state what the competence standards are, suggesting this meant they had not carried out a review of whether they were necessary. While evidence of close analysis and mapping would be good support for justification, such an exercise is not essential. As a matter of practice an organisation may know well what it requires of competent actuaries, and be able to say so, without conducting legal analysis to identify what are its “competence standards”. Not having a list of them does not mean there were none. A review, as suggested in the Code of Practice of 2008 (from which the claimant takes it, and on which he relies) is a way for an organisation to check whether it could justify its standard, but it is not a requirement to establish justification. We did have the evidence, unchallenged by the claimant, that the curriculum and test methods had been reviewed, and critically, in the Morris report, a body external to the Institute, and that the respondent had then changed its qualifying exams so as to follow the report’s

recommendations, in particular in the new emphasis on practical application and communication skills, and considered alternatives in the form of university taught courses. This will have involved considering what was necessary to test competent actuaries. We also know that the FRC was involved in an ongoing review at the conclusion of each exam round so would see there was consistent marking and a consistent standard. The examination system's fitness for qualifying competent actuaries was under external scrutiny. The first respondent was not marking its own homework on this.

206. Moving from timeliness as a way of assessing mastery of a body of knowledge, to the level of difficulty and the range required, the claimant did not point to any part of the syllabus that was unnecessary, but made a general assertion that it was not necessary to know about topics outside the area where he was likely to practice. We considered it might be possible to split up an actuarial qualification to sub-groups, as has happened in accountancy or law: for example there are limited qualifications for conveyancers, immigration advisers, management costs accountants and so on, and they are restricted to practice in these areas. If the profession is not divided up – and it is not - it seemed to us reasonable to require a spread of knowledge of actuarial technique across the board, whatever the intended area of practice, so that an actuary would know enough to identify that a problem lay ahead, and recognise that a specialist was required, just as a GP with a general medical qualification in medicine and surgery would know enough to identify what required specialist opinion and technique, or a solicitor would know enough about, say, trust or tax to spot a potential pitfall for a client, and take advice if he did not specialise in that area. The Institute did in fact recognise the reality of specialism in the choice of two specialist technical subjects (and a further paper in their application) out of eight. Requirement of a range of knowledge, and to be able to recognise where a particular technique might be engaged, was necessary for a general qualification. We also hold that the requirement was proportionate to qualifying as fit for practice.

207. The claimant objected that the practical applications exams (CA1, 2, 3) were unnecessary because they had not existed before 2005, and actuaries who had qualified before 2005 had not been required to pass those tests after the changes were made. We were taken to figures on the ages of actuaries, suggesting that many who had qualified before 2005 were in practice, but we could not tell how many were in practice, and some were very old (including one over 100). The fact the higher skills papers were introduced in response to the concern expressed in the Penrose and Morris reports about actuaries' lack of understanding of business and apparent inability to communicate concerns to other financial professionals indicates that an ability to recognise which actuarial techniques relate to a particular real life scenario is an important part of being fit for practice. A policy decision not to require already qualified actuaries to now demonstrate those skills in addition does not mean the skills are not necessary; a change in what is deemed to be necessary does not mean the new qualification system is wrong, on review the old system may have been inadequate. In any case, this is something that could be addressed in continuing professional development (CPD) requirements. We had evidence that there was a CPD requirement, as in other professions, though not what topics were in fact covered. The claimant did not follow this up, but if CPD can cover a perceived deficit in those already qualified, that

would not undermine the requirement that actuaries should now be able to demonstrate it from qualification onward.

208. The claimant had a particular objection to CA1 being a double exam, that is, two papers taken on successive days and then marked together. He argues two separate exams can test the skills adequately. Clearly taking two papers together requires a lot of revision of the CT subjects which may have been taken over some years, as had the claimant. It is a burden for those with difficulties of memory. On the other hand, an actuary fit to practice had to be able to recognise how any of the techniques on which he had already been examined as core technical (CT) subjects apply to real life scenarios. Real life does not always conform to an individual examination syllabus. They might range over all sorts of areas. This is what makes it a test capable of assessing fitness to practice as an actuary with knowledge across a range of topics. As a candidate had already passed the technical subjects, he would have to revise to some degree, but should have retained much of the knowledge; arguably it is less challenging than university finals which examine in a few days the work of two or even three years. The claimant objects that at least one university course is marketed as not requiring a double exam, though we did not have evidence of how the CA1 exemption was obtained on that course. However, the fact is that whatever core application exam was taken on the university course would be assessing all the work on the syllabus studied over a period of two years, not the much longer period the Institute's students could use, indicates that this could test the practical application skill in a different way.

209. At times the claimant also argued that more days (say three) could intervene between the two papers of CA1,he would not find it so difficult, something the respondent's examiners had deemed impractical if they were to mark and moderate it in time. Such a small split between papers seemed to us of little advantage to the claimant, as most of the revision would have to be done over weeks or months before, not in a few days, but a great disadvantage to the examiners, who were not permanently employed as examiners, who must mark, average and then moderate large numbers of papers. Successive days was a proportionate means of assessing the skill.

210. To conclude, the CA1 exam was justified.

211. On ST7 and ST8, for similar reasons we hold that a requirement to sit the exam within a particular time, even if adjusted for a neuro diverse disability, was a proportionate way to test knowledge of the topic. There is no argument by the claimant that the level of knowledge of the specialist subject was too high or the questions too hard to understand.

212. As for CA2, the practical exercise, no university course offered this exemption. The aim, which seems to us legitimate, was to mimic a working day as a setting for a practical exercise. We understand the Institute has since split the test, so it is taken over two days not one. This allows more time to be allowed for it, but we do not know how much time it now takes. We do not know their reasons for doing so, but if there has been a rethink of how to reflect real life conditions in a test situation, it may be because there is more part-time working in some workplaces, or because so many students have been given extra time. It may be because the psychologists recommended

50% more time for the claimant in their joint report of July 2014, and this is to accommodate that, as the table responding to their joint report agrees this where it is supported by medical evidence. Evidently it is now seen as less necessary to complete the test in one working day, but it is still necessary to complete it in a set time (a day and a half, if there is 50% extra time). We know from the 2013 correspondence about CA2 that the respondent wanted to see medical evidence about the additional conditions before making a decision to give extra time over 25%, and was refusing to make a decision in principle without it, or until the claimant actually applied to sit it. There was a tension on whether the time extension supported by the medical evidence was 40% or 50%, whether the expert (Dr Boulton) knew the format of this particular test or was commenting generally, and which disability was engaged and subject to medical report. Here we meet the difficulty identified by the EAT, that adjusting the claimant's time may come back to bite the respondent when it came to justifying their time requirement. We conclude that being prepared to adjust the time is not fatal. The evidence of actuaries' work in practice shows that from time to time tasks have to be completed by deadlines. An actuary might be able to arrange to start early so as to finish in time, but there must a timeliness requirement. The respondent was prepared to extend the time (and, as it seems, let the task go into a second day to accommodate the extra time) if there was supportive medical evidence to show the individual did not gain an unfair advantage over others, but the evidence had not been provided in 2013, related to the claimant's frustration over CA1. He had indicated he would not be siting CA2 until after CA1 was passed.

213. At this stage we have returned to the psychologists' 2014 recommendations related to CA2. Other than seeking extra time, they did not challenge the format of a practical test. They did identify that the requirement to *plan* work was a "profound difficulty" for someone with dyspraxia, and would be "extremely challenging" for someone with ADD; there is no suggestion that adding time would help with planning a task. While suggesting the respondent could perhaps use work already performed for an employer, subject to checks, they recommended only that further research might be needed on how actuaries with these conditions coped in the workplace in practice. In their view therefore, time could be provided, but would not help the need to plan. In our view, being able to plan a task, and document that plan, is essential for practice, given that actuaries work in teams with more junior staff, (as the test envisaged, with the candidate having to explain the work in progress to a trainee and a senior actuary). A task requiring planning on how it could be investigated, and the plan to be documented, was likely to place the claimant at a disadvantage even if it was set over two days with 50% extra time. We cannot see how a test of planning and documenting the plan for others is not necessary to test ability to practice as an actuary.The nature of this test is proportionate, whether sat on one day or a day and a half, as the alternative of submitting work performed for an employer will require a great deal of staff time to source the work, check that it covers the skills to be tested, how much of it is the candidate's work, and so on, and the respondent had relatively few staff for the number of students sitting exams; this involves disproportionate work.

214. At this stage we consider the argument that coursework is the alternative for those with neuro-disability. Examinations are a way to demonstrate that

knowledge has been acquired – as opposed to researching it where necessary. There are other ways, such as coursework, and a thesis on one or more topics, as proposed by the psychologists in 2014. The question that arises is whether they are proportionate. A qualifying body wants to uphold the integrity of its qualification so that it is trusted by the public. Examining bodies already take measures to rule out cheating in exams. Schools and universities that supervise coursework are alive to similar problems; their staff are familiar with individual student ability, they also use plagiarism software to check what is a student's own work. Setting and supervising coursework, or a thesis, is resource intensive. The small staff, large numbers, and international spread of the respondent's candidates make this disproportionate, given that it is not a teaching organisation, as the universities are, and lacks the resources.

215. Dealing with other points, we did not accept on the evidence that the questions were too difficult, or that any questions on the papers on the claimant sat put him at a disadvantage. The question about mining minerals on asteroids (and we were not clear that the claimant had had to sit this one) was not, in our finding, more difficult to grasp for a generation accustomed to comics and films about space travel (Star Trek, Star Wars, and so on) than if it concerned mining in Pacific islands, or questions about banana production for someone who had not travelled to the Caribbean. The respondents took some trouble to ensure the questions did not require specific knowledge, (as with the LPs, or wedding planners) while setting a factual scenario that tested a candidate's ability to identify which textbook technique was needed. We add that after checking through the records of the Education Actuary comments for the claimant on papers he had failed, he had met difficulty on one paper because he had not identified that he was being asked (in the context of what work was needed) about a defined benefit pension rather than a defined contribution scheme. This is something that falls squarely within the competence of a practising actuary. We have picked it out for comment because it on something, namely different types of pensions, that is also within the knowledge of members of an employment tribunal, and we can see that it is a very basic mistake, whereas we may not understand the relevance or difficulty of many other questions. Of the many questions he has been asked in the various papers, these are the two he has identified. For the rest there are general assertions. Against this is the respondent's own 2013 handbook for examiners, which we have no reason to think was not heeded, to the effect that such questions must be avoided, the revision of ambiguous questions at the guinea pig stage, and the respondents' reply to the joint psychologists' recommendations that all students would benefit from clearly structured questions. The respondent has accepted the principle. The claimant has not shown it was not followed.

216. It is argued that blind marking is indirectly discriminatory, and that papers should be marked by an examiner who is aware of the neurodiversity and can adjust for it. We concluded that blind marking was important to obtaining objective assessment of candidates' answers. If a way could be found for markers to adjust the mark, that would still have to have regard to an actuary having to work with people who may not know to make these allowances. We also considered the cost of training, and the difficulties of moderating marks between candidates, would be costly and time consuming, and so disproportionate. Looking at the other requirements in the list of issues, we

did not see that deducting 5 marks for asking for help understanding a CA2 question (or using a hint sheet in the online exam) was a disproportionate penalty; given the overall mark scheme it made comparatively little difference to a pass or fail, and was an adequate compromise. As for marking for good English, the objective was to test actuaries could communicate with other actuaries and non actuaries. Spelling is affected by dyslexia, but not, to our knowledge, grammar. In any case, relatively few marks were allocated for this at CA3 (less than the claimant suggested, as each of two examiners marked out of 100 and the result was then averaged. We do not know how it featured in CA2.

217. In respect of CA3, the claimant objected to the requirement to be tested in written and oral communication over two days, rather than by setting three single exams. There is no reason to believe that if he had applied he would not have been given the 50% extra time for reading and writing that he was given for other exams by 2014. Extra time was in any case built in by having a free morning before the brief presentation was given. The format itself clearly signaled changes in question and task, with breaks between. This is useful for those with ADD, and those who needs tasks to be broken down. We do not understand that he was at a disadvantage by the format of this exam. There is an additional disadvantage to dyslexics and dyspraxics in being tested on the quality of a written presentation, but relatively few marks were allocated to this, spellcheck was available to help, and as a test of clarity of thought, that seemed to us to derive not from the process of writing, but from intellectual grasp of the problem and an awareness of non-experts' understanding. The same goes for the requirement to limit the word count. The count can be done in Word, and while a dyslexic may be slower in deciding what to cut, brevity is an important skill, and the quality being tested in the intellectual ability to grasp what is essential, rather than the mechanical one of writing or deleting words. That is a skill which can be learned. Being able to communicate was an important and necessary aim. Given the marks scheme, (with parallel marks allocated by an actuary and a non-actuary) we understood the test to be proportionate to that aim. On the oral presentation of pre-prepared slides, we considered the same applied to the disadvantage suffered by someone with Aspergers who may not make eye contact or understand body language. The claimant's own disadvantage in this respect was slight (it could put him at a disadvantage, we were not sure it would do so). Making eye contact and using body language can be learned in a professional context where it does not come naturally. It attracted only a small proportion of marks, more of which went to the message being communicated. We thought the limited requirement to communicate a technical issue in clear terms was proportionate to the aim of this competence standard.

218. Finally, on getting notice of the topic, or a choice of topic for CA3, the exam was conducted at a stage where all CT subjects had been passed, and CA1, and it was not unreasonable to think that the broad range of material could be broadly understood without revision. The test was not aimed at applying the knowledge to real life problems as with CA1, but to communicating a solution in clear terms. It was not shown to us on the material that advance notice of the topic, or a choice of topic, was a disadvantage. He would have had extra reading time to assist understanding and recall.

219. There is a claim that not permitting Excel to be used put him at a disadvantage. If by this is meant Excel with functions blocked so it is "dry" calculator, we do not hold that using a calculator and nothing else was a requirement imposed on him. Nowhere was this made clear to the exams team at the time. There was justifiable reason not to allow standard Excel to be used, as it disclosed much information, well beyond the claimant's particular need to review the sequence of calculation he had made because he could not remember or make a note of the calculations he had made with a standard calculator.

220. In conclusion, the indirect discrimination claism do not succeed.

Direct Discrimination, and section 15 discrimination

221. In the field of work, section 13 prohibits less favourable treatment because of disability. The comparison is to be made to an actual comparator, or a hypothetical comparator. "Because of" means examining the reason why the respondent acted as he did. A comparison must be material in other respects apart from the protected characteristic.

222. In addition, and specific to disability, there is protection against unfavourable treatment, subject to justification by the respondent, and knowledge by the respondent section 15:

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

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
(3) From schedule 13 on Education and the duty to make reasonable adjustments

223. Guidance on applying section 15 was summarised in **Pnaiser v NHS England (2016) IRLR 170.** In no particular order, it must decide if there was unfavourable treatment. It must decide what caused it, having regard to the mind of the person acting, and whether the "something arising" was an effective reason for the treatment, even if not the sole or main reason. Motives are irrelevant. This is the subjective stage. The tribunal must also identify the link between the "something", the disability, and the treatment, objectively. As for the knowledge issue in s. 15(2), it is about knowledge of the disability, not whether the "something" arises from disability.

Discussion of s.13 claims

224. Under section 13 the claims are listed at 1. Although we have done our best to make decisions on all points in the list of issues, under sections 13, 15, 21, 26 and 27, in some of them there was no evidence from the claimant abut what happened, and his submission did not address some points at all. We have done our best, sometimes relying on what is said in the long list.

225. Starting at 1.1, this claim is dismissed, because it is clear that the respondent did not require the claimant to go to ActEd (for which the claimant must pay a fee), and in fact offered an interview with a Education Actuary (no

charge). The discussion on 24/25 April, read in context, shows the reference to ActEd is based on misunderstanding and may even be a slip of the tongue, but it will have been clear to the claimant that he was not so required.

226. Taking next 1.6, May 2014, not providing his exam permit at the same time as non-disabled students, he already knew the date and time of the exam; the delay of one or two days was because he had asked for an adjustment to exam arrangements (a separate room) which took time to confirm in a sperate venue. It was not because he was disabled but because he had asked for an adjustment for disability, which the respondent provided. There is not a material comparison to a non-disabled person. If a non-disabled person had asked to sit in another venue, that would have caused delay. The reason was not that he was disabled, but because a special arrangement had to be made. In any case a delay of one or two days is minor, and he had already been told the position, so it cannot reasonably have caused anxiety.

227. Taking next 1.12, alleging delay investigating complaints in every exam since 2009, we do not have the facts before us with which to see if there was delay, let alone the reason, for all but what occurred in 2013. It is not shown there was delay. For dates before May 2013 we hold this complaint is out of time in any event. No reason has been given why it was not presented before, and the respondent is now disadvantaged by delay in finding correspondence and appropriate witnesses for earlier years, even were particulars given. As for what occurred in 2013, the tone of the correspondence was generally professional and helpful. From May 2013 there was a breakdown as the claimant intensified his requests, made across a range of topics, whether about his adjustments, or in argument about the law. The respondent's staff did their best but were overwhelmed, or (in matters of the law) unable to answer. Once proceedings were started, it was reasonable to postpone answers to the formal reply, and to handle complaints (rather than exam arrangements) within the legal process. If there was less favourable treatment, it was not because he was disabled, but because the volume and mix made them hard to answer except through lawyers and in the context of tribunal proceedings.

228. There is a complaint at 1.11 that the respondent applied its mitigating circumstances policy to CA1 on three occasions. The first, September 2010, is out of time. The delay and lack of material disadvantage the respondent in investigating and we do not hold it just and equitable to extend time. Of those in time, April 2013 relates to Mr Fitzgibbon asking for the paper to be graded on the basis of past performance and interview rather than the paper he had sat. A large part of the stated reason for this was not the disability but the stress he had been under at work, the time taken that might otherwise have been devoted to study, and so. This was clearly within the mitigating circumstances policy, not because of disability. He had failed by such a margin (FB) that the policy could not lead to a pass mark. (In any case, an assessment based on past marks may not have improved his mark much, and the claimant's lack of confidence in oral process means we cannot hold that he would have achieved a pass even of the recommendation had been followed). The final episode is about September 2013 when there were difficulties with a chair and the screen. It is not shown that granting extra time to compensate was less favourable treatment, or that it was because of disability.

229. Other matters complained of are all about the adjustments requested.

The same reasoning applies as in 1.6 why this is not direct discrimination, and these will be discussed within reasonable adjustments.

Section 15 claims: (by reference to the short list of issues)

230. 2.1 is about failing the CA1 double exam twice in 2013. The "something arising" the effect of dyslexia on memory, that more time is required to prepare and information cannot be retained over two days, and there is not enough rest time. The respondent pleads the requirement was justified, in that the 24 hour gap between the end of one and the start of another was the most they could accommodate given their examining resources, and that it was thereby disproportionate to make another arrangement. This has been discussed under the section 19 claims. To the extent that the exact length of the gap (one day or three) between exams is not about competence standard (having a double exm in the same exams session was part of the standard in our finding) we make the same finding that it was justified.

231. 2.2 - not providing Excel: the reason it was not provided was not because of memory difficulty (the reason he wanted it) but because he did not explain why it was needed, or how it related to his disability (which he said at first to Mr Fitzgibbon was because of dyspraxia) and because he raised it at the very last minute. The respondent's response was reasonable. Had the claimant raised it earlier, had he explained the use of "dry" calculator and how it related to disability, a different decision would have been made.

232. 2.3 May 2014 – granting 46% extra time rather than 50% in May 2014. The respondent had conceded the principle of 50% extra for the three hour exam. They forgot to add 50% to the allocated 15 minutes reading time, so the claimant was 7.5 minutes short overall. Clearly this was either oversight or a calculation mistake. Had the claimant pointed it out at the time there is every reason to believe they would have agreed and added it. It is not unfavourable "because of something arising from disability".

233. 2.4 concerns requiring the claimant to enter for an exam before they would discuss arrangements. This is about adjustment for disability. The respondent was prepared to and did discuss CA2 with the claimant in general terms, and to aid understanding arranged a discussion with an Education Actuary to interpret what was on the website. The building volume of material about CA1 at the same time, given the exam team's limited resources and the number requiring access arrangements meant it was proportionate (justifiable) for the respondent to decide not to enter into detailed discussion of an exam he was not sitting. They made it clear he need not pay an exam fee until the arrangements were agreed to be satisfactory, so it hard to see how this was unfavourable to him. The legitimate aim being justified was that of running an efficient exam system with very large numbers of entries, many overseas and in different time zones. There was a limited team of staff.

234. 2.5 Mitigating circumstances policy – see discussion of direct discrimination claim.

235. 2.6 Complaints – see discussion of direct discrimination claim.

236. 2.7 Delay answering questions about CA2. We could not see there was

delay. He was referred to the website for details of the exam structure and content. He was offered an interview with an Education Actuary to talk through it. If he was put off until he entered for it, we thought that was justified as discussed on 2.4.

237. 2.8 Not providing a single document about CA2: we could not see how this was unfavourable treatment when the material (and examiners reports) were all on the website and he had been offered an interview to clarify what he did not understand. Beyond that, demanding a single sheet, which would have to be specially drafted without knowing what he did not understand, was not reasonable, and certainly refusing to do it was in the circumstances proportionate to the respondent's resources.

238. 2.9 He was not required to go the ActEd – see above, 1.1

239 2.10 The requirement to "self-diagnose" before the respondent would contemplate adjustments. By this we understand the respondent wanting medical evidence that showed how the exam requirement disadvantaged the person with a disability, which mean the claimant had to give the expert information about the exam. It arose in the context of the request for Excel. There was no such requirement. At best they wanted an explanation from the claimant if not from his expert, of how the adjustment requested related to a difficulty arising from the disability. This was not unfavourable treatment but an essential component of adjusting for disability.

240. For the rest:

2.11 Complaint delays – see discussion of 1.12
2.12 Not in scope.
2.13 See discussion of 2.10.
2.14 See 2.4
2.15 See 2.2 and 2.10
2.16 see 1.6
2.17 see discussion of Excel request above.

Failure to make Adjustments for Disability

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241. The duty is limited for qualifying bodies, as discussed, to deciding on whom to confer a relevant qualification, and conferring it.

242. The duty to make reasonable adjustments for disability is set out in section 20, and section 21 provides that failure to discharge the duty is discrimination. The claims are all about the need to adjust provisions and practices (the "first requirement"):

Section 20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled

person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

….

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

Section 21 Failure to comply with duty

(1) A failure to comply with the first… requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first…. requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Discussion

243. The claimant relied on 40 provisions requiring adjustment, but 4.2 was struck out by E J Auerbach and 4.9 withdrawn in January 2014. Of those remaining, many others are about the competence standard:

4.1 not providing disability awareness training to those who designed CA2, or to the exams team. We could not understand how this was a provision which put the claimant at a disadvantage, rather than anything that staff it so trained might have required or done, having regard to **Rider v Leeds City Council UKEAT/0287/11**. Insofar as it about examiners making allowances for neuro disability when marking, this concerns a competence standard, and is discussed under section 19.

4.3 is about marking of exams, testing papers by guinea pig, blind marking, and the higher skills papers. As these concern the competence standard and are discussed under section 19. There was no duty to adjust them for disability.

4.4 is about alternatives to exams as a way to as a way to assess fitness to practice. Again, this is about competence standards.

4.5 concerns reading time for exams other than CA2. This is also about the competence standard.

4.6 ambiguous questions – the competence standard. Already discussed.

4.7 Coursework and open book exams. These are about the competence standard and discussed under section 19.

4.8 Two sittings a year only. To the extent that this is an arrangement, not a standard, we did not understand how it put neuro-disabled students at a substantial disadvantage compared to others. The request the claimant made was to be allowed to sit IAI papers as well as the respondent's papers and have them marked by the respondent. This was not a reasonable adjustment, because of the demands of exam administration, given that on the evidence the exam sitting process from start to finish took nearly three months. There must also have been practical difficulties, such as obtaining papers, and timing so they were sat on the same day as IAI students.

4.10 A verbal post exam assessment to check understanding. (This appears wider than Mr Fitzgibbons' request for a particular CA1 sitting; it is about all exams). This is about a competence standard. It is not clear how it would assist the claimant who prefers to avoid verbal explanation. Offering it to candidates as a viva would be disproportionate given the student numbers and size of the exam team.

4.11 Double CA1 – see section 19 discussion.

4.12 From September 2013, 40% time not 50%. Timeliness is about the competence standard. In any case the respondent hesitated only because they wanted to check with a medical professional why the time had increased.

4.13 Checking the computer (September 2013) and chair were fit for purpose. The computer was not known to be faulty, nor is it shown to have been faulty rather than being switched off by the claimant, accidentally or not. It is not anywhere shown how the claimant's disability requires a particular chair.

4.14 The claimant was provided with a quiet room; if the complaint is about the invigilator's fruit wrapper, this is not a breach of a duty to make an adjustment. Candidates were allowed noise cancelling headphones to reduce the chance of aural external interruption.

4.15 extra time for ST7. This is about the competence standard. He was given 50% extra time as the reports suggested, and any shortage of 7 minutes, if shown, was a mistake and unlikely in context to have made a difference to the result (FB); disadvantage not shown to be substantial.

4.16 Excel. This is about the competence standard, and if not, failure to comply was reasonable, given that on the face of it Excel, rather than a calculator, could not obviously be related to the known disability, and the claimant was not prepared (and possibly not able) to explain why he required it until it was too late.

4.17 Questions. These are about the competence standard.

4.18 CA2 being marked on grammar and clear English. Already discussed under section 19; the requirement to communicate clearly is part of the competence standard. In any case, the claimant did not proceed to CA2, so it was not necessary to adjust it.

4.19 Deducting marks in CA2. This is part of the competence standard.

4.20 CA3 as a single exam – competence standard.

4.21 CA3 marked for body language, eye contact, excessive detail and word count. Competence standard.

4.22, 4.23 CA3 time limit and lack of notice of topic – competence standard.

4.24 Having to pass CA2 and CA3- competence standard.

4.25 Not being allowed to take away their script after marking. A student could ask for feedback after an exam, for a fee. At this he had 30 minutes to read the script before a 60 minute discussion with an examiner, followed by being given a written feedback report. He was allowed to make notes of the script he had written. It is not shown he could not make a copy of the script. The script had no marks on it made by the examiner. The respondent would need it for their own record keeping. We did not understand how this placed the claimant at a substantial disadvantage, whatever his difficulty reading – he had after all written it, so it was not new material. All but he 2013 feedback session are also out of time.

4.26 Not providing a detailed report after counselling. The claimant was given a report. The reports are in the bundle. He was not given a marked script because marks did not appear on it.

4.27 That the student was not given exact marks, nor told where he had scored or not scored marks. Given the counselling process described at 4.25 we did not understand how this placed someone with the claimant's neuro disability at a disadvantage. The written report was full and supplemented by verbal discussion. It became fuller when the verbal discussion was cut to a follow up telephone call.

4.28 Not providing an exam counselling service adapted to disabled students. A counselling service for students who failed is not about deciding on whom to confer a qualification or about conferring it but a way to help students do better in future. If it *is* in scope, the claim states the respondent should have provided expert advice to a disabled student on coping strategy specific to his needs or his exact marks; but the respondent could not know the 90 minute session they provided was not adequate; nor was it clear that expert advice on different disability was required. There was no evidence he complained about it. If they did get expert reports on all requests for adjustments exam fees would have to rise to cover the increased costs. Such an adjustment was not reasonable.

4.29 Not seeking expert advice. The respondent asked for information and heeded the information they got in order to make adjustments. It was not unreasonable to ask if the claimant's expert could consider the specific requirement of a particular exam when apparently making an across the board recommendation.

4.30 Single point of contact – not in scope.

4.31 This collects to gather all access arrangements from 2009. In our finding, the respondent did deal with access as soon as raised by the student. It was not unreasonable not to do so until the student had entered (and they did not always hold to that in the claimant's case). Information about exams was readily available on the website. Arrangements were confirmed by email. There was no practice of delay. There was a procedure, namely to ask the exam team. It is not shown that a single sheet about CA2 was necessary or reasonable.

4.32 It was reasonable, given the number of candidates, and lack of contact with them (unlike a workplace) it leave it to the candidate to request adjustments and to provide medical support for the request, and to ask that the expert be aware of the exam system that was to be adjusted.

4.33 Single point of contact - out of scope

4.34 Having to enter before access arrangements made. The format of the exam was on the website. It was reasonable not to make adjustments until a candidate had entered, especially as the fee need not be paid until the arrangements were satisfactory. This was demonstrated in the period when the claimant was seeking adjustment for CA1, CA2 and CA3 in January to May2013.

4.35, 4.36 Self diagnosis. Not accepted on the facts. Already discussed. If it is about the substance of the decision, it is about the competence standard.

4.37 Single point of contact – not in scope. Systems, if related to decisions about conferring the qualification – not shown how they were inadequate.

4.38 not seeking assistance – the respondent had taken steps to get some expert guidance on extra time allowances. Charges would have to be met, and it was not for making a profit. They asked candidates for evidence to help understand what needed to be adjusted. This was not unreasonable.

4.39 Mitigating circumstances policy. It was not shown how this substantially disadvantaged disabled candidates, for whom access arrangements were an addition to mitigating circumstances which was applied across the board. If this concerns the requirement to fail no worse than FA before applying it, it relates to a competence standard.

4.40 Requiring medical evidence just before the exam to support Excel. This is discussed elsewhere. It was not clear why Excel is required or how it related to disability. The request was reasonable.

The Harassment Claims

243. Section 26- Harassment- states:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

….
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

244. Guidance on this in **Richmond Pharmacology v Dhaliwal (2009) IRLR 336** and **Pemberton v Inwood (2018) EWCA Civ 564** is to make a finding on whether there was unwanted conduct, whether it had the effect described in (1) (b) (i) or (ii), (a subjective question – is this what the claimant experienced?) and then whether it was reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him.

245. The claimant discovered in March 2014 that the report made to the Education Committee in October 2013 referred to a tribunal claim. This is the harassment – that he could be identified from that report. The respondent argues

this claim is out of time, as the claim was not made until November 2014, more than 3 months later. Further, the correspondence shows he was well aware of time limits (even if in 2013 he thought it was 6 months not 3), and that in July 2014 he was already writing the claim form that was eventually presented in November. In our view it is out of time. It was not a course of conduct. As for extending time he has not shown any reason why not could not have been presented in time, and it is clear he was not deterred by the agreement not to present claims during the mediation. If we are wrong and it is time, we do not understand how a report that a claim has been made, and that policy might have to change if there is a legal decision, creates a hostile or intimidating environment. The correspondence was always polite in tone. It is not reasonable for the conduct to have that effect, even of that is what the claimant experienced.

246. The second episode alleged as harassment is that he was "passed from pillar to post" when asking why no further adjustment could be made. There was some difficulty when he was in contact with several members of the exam team, though the claimant is in part responsible by going to different team members about the same matter. There was also a firm response in late 2013 after the claim was made, but this related to the large amount of legal material he sent. We comment that if there was any hostility it seemed to come from the claimant, not the exams team, noting the remarks he made of the staff being sadistic paedophiles. Of course this arose, most likely, from his frustration, as he could not perceive what information they wanted that he had omitted from his requests. They were having to cope with requests about exam arrangements mixed up with legal issues, and managed to maintain a courteous tone. However, we could find no evidence that the staff intended to frustrate his requests "for kicks", as alleged. The respondent did not create an intimidating (etc.) environment for the claimant in the dialogue about access arrangements.

247. The third episode is said to be the respondent's report to the Education Committee about **Burke** and the time adjustment. We assume this occurred in March 2014 when he saw the report. If so, the same finding is made about time. But if it is not out of time, it is not clear how and we do not find that holding a contrary view on a point of law, expressed in moderate and neutral terms, is to be reasonably experienced as hostile, intimidating, offensive, and so on. It is not harassment.

248. The fourth and final episode of harassment is said to be words express or implying that disabled candidates are more likely to be cheating. This is not what was said. There was a concern to ensure that some candidates did not get an unfair advantage, but that is a preoccupation for an examining body with all its candidates. Confidence in an exam system demands a neutral and fair administration, such that some candidates (disabled and not disabled) do not use cribs, or phone friends for answers, or buy papers on the web in advance, or reveal the questions to those who have for some reason not yet sat the exam, or get some other person to sit in their name, and so on. It was relevant to consider this element when making any adjustment to the exam system. It is not a slur on disabled candidates in particular. There was also a question of whether disabled candidates might be perceived by others to get an unfair advantage, and requiring some evidence of disability at the time was to make sure the system was seen to be fair. We did not understand how this could reasonably be experienced as harassment of disabled candidates.

Victimisation

249. As discussed in the context of scope of protection, qualifying bodies must not victimise in arrangements for deciding on whom to confer a qualification, or the terms on which it is prepared to confer it, or not conferring it, but in a disability case, excluding competence standards.

250. Section 27 provides:

> (1)A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a)B does a protected act, or
> (b)A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

As in other Equality Act claims, the "because" involves exploration of the mind of the alleged discriminator, not "but for" causation.

251. The list of issues shows that the protected act in each case is the presentation of a claim on 26 July 2013, with the addition for some of the claim presented in February 2014.

252. According to the reserved judgment and reasons of E J Clark of 4 February 2014, at that hearing the claimant withdrew his victimisation claims in both the claim forms then before the tribunal, and they were recorded in the judgment as dismissed on withdrawal. At that hearing (21-22 January) the claimant was represented by Miss H. Platt of counsel on 21 and 22 January. Then in his third claim form presented on 23 February 2014, he argued that he had only withdrawn victimisation claims related to a complaint made before the first and second claims, and that he could now present claims that he had been victimised because of making those two claims. The events listed as acts of victimisation there and in the November 2014 claim are in the list of issues. They date from 31 July 2013. On the face of it those that predate 24 November 2013 are out of time, unless he can show the acts of victimisation formed part of a course of conduct that ended on a date that is in time. The same would apply to acts of victimisation between 23 February 2014 and 20 August 2014 (3 months before presenting the claim form on 19 November 2014). If not part of a course of conduct making them in time, the tribunal would have to exercise discretion to extend time having regard to balance of prejudice and the factors listed in **British Coal Corporation v Keeble.**

253. The list of issues does not place the 18 acts alleged as victimisation into date order, but because of the time point we will do so in discussing the claim.

254. Starting with 6.11, and given that a complaint about arrangements for deciding (etc) is probably in scope, this is that the respondent did not deal with his complaints "appropriately". As far as we understood it, the failure occurred on 15 August 2013 when he was informed that the grievance would not be answered until the end fo the tribunal proceedings. That is out of time when raised at the end of February 2014. There was a letter on 7 October 2013 about the competence standard, which does answer other letters and queries, though it may also be clarification of the response to the tribunal claim (it is the subject of

6.16). This too is out of time. It is not shown that time should be extended. The reasons for this decision are that the respondent would need to call other witnesses. The claimant was wholly engaged with tribunal proceedings, aware of the rules, and with some access to advice. He has many other claims before the tribunal. The balance of prejudice favours the respondent.

254. Next is that the fifth respondent, Ms Harriman, was to be his point of contact although he had complained she was discriminating. There is no evidence she was unpleasant, or failed to reply to exam access queries, or that her attitude changed because of the tribunal claims. She was a senior person in a small team and already handled arrangements. It is not shown how this unfavourable treatment. In any case, telling the claimant she was to be his point of access was in August, well out of time.

255. Next, taking the allegations of unfavourable treatment on the September 2013 CA1 exam together (6.13, 6.14, 6.15, 6.10, 6.9, 6.8), we found no evidence, reading the correspondence before and after the presentation of the July claims, that the first or fifth respondents had changed their approach. They continued to ask for evidence of new requests for adjustments for disability. They referred material about the law to the legal department, which is unsurprising, as it was not in their knowledge. In any case it is rational for an organisation to want to coordinate its response to an individual who raises many queries on a range of topics, and although it may have informed by the knowledge pf live proceedings, it was no unfavourable treatment to reserve questions that were not about access arrangements to others. 6.9 is in any case about not providing someone to clarify questions for the claimant in CA1. As discussed, this is about a competence standard.

256. Allegations 6.17 and 6.18 concern the statement to the Education Committee in October 2013, as discovered in March 2014. It is well out of time for the November 2014 claim and there is no reason to extend it given that the claimant was in July saying he would be presenting a claim but delayed doing so. Even if we are wrong about time, on the merits this is consistent advice to te committee with earlier discussion of how to handle requests for extra time. It was right to mention the claimant's case (and his name was not mentioned) but no indication this was unfavourable treatment. In any case, timeliness was about the competence standard.

257. We recognise that there may have been a hardening of approach in whether anything over 25% could not be allowed for the higher skills exams, when they had hitherto been prepared to add 40%. We add into consideration here the allegations at 6.1, 6.2, 6.3 about December 2013. There was already a requirement for evidence showing that the particular test had been considered by the expert advising extra time, as shown by the correspondence up to May 2013 about CA2. Any apparent hardening of the line is likely to be the respondents (including Ms Harriman) now being more explicitly conscious of the concerns that always underlay their anxiety about suitable medical evidence, namely, that it went to the competence standard, even if they had not formulated it in those terms. The advice was not because he had brought proceedings, even though proceedings made the non-lawyers now more aware of what it was they worried about, it had not even changed much, as they were still prepared to consider more time with expert support related to the exam. The exam was not in the same format as CA1 and ST7, as the intellectual understanding (requiring

reading and thinking time) related to considering the initial problem, the rest was planning and documenting. The 2014 psychologists conclusions on the neuro-disability and CA" shows that they were not concerned by the time allowance, as the nature of the task. The evidence does not support the respondent's need for exam specific medical evidence was because he had brought proceedings.
As for 6.18, about disabled students being more likely to cheat, we rely on the same discussion as for the harassment claim for this.

258. Next, 6.4, 6.5 and 6.6 are about Excel. They are out of time, but even so are without merit. The respondent, as discussed, did not understand the request, there was no reason why they should have understood it, it was new, the claimant would know by now he would have to relate it to his disability but did not. The respondent's actions were not because he had brought tribunal proceedings.

259. Finally, 6.7, restricting extra time in May 2014 to 40%. We understood from the evidence the claimant was allowed 50% extra time on this occasion. It is in any event about the competence standard. It is also out of time. On the facts, if time as restricted to 40%, it was not because he had complained. The respondent continued to keep to its access requirements policy, and in the meantime was attempting to mediate constructively by having the experts examine the exam requirements in detail.

260. Although not on the list of issues, in his submission the claimant has argued that the respondent's lack of investigation or challenge to the IAI excluding him from membership in 2010 was an act of victimisation because he had asked the IAI to make adjustments for disability, alternatively, that they hasd instructed or required IAI to remove him from membership, and we shall deal with it.

261. One of the reasons for doing so is that we have been puzzled by the IAI material being included in the hearing. It related to a race claim which was withdrawn six years ago. It may have related to a claim that questions at the level of difficulty set by the IFoA were higher than those set by IAI whose qualification they recognised, though we were not shown questions to demonstrate this was the case. It also related to the request for the respondent to set and mark IFoA papers so the claimant had a second chance to sit and pass an exam.

262. On our reading of the emails it seemed the trigger for the assertion of the agreement by Mr Khan was the claimant's assertion that they must make adjustments for disability when he sat their exam, by giving extra time, and he was then told adjustments were not made. This was as apparent to the claimant then as it was in 2013 when he took it up again. It is out of time as an act done in 2010. As for 2013, the respondent investigated whether there was an agreement they were not aware of, were told it was more of an understanding, concluded there was no such agreement, and left it there. We do not see they were under any kind of duty to challenge the IAI about its application of its own rules. Nor do we understand how they should have instructed IAI on what was good practice (to make adjustment for disability). Even if pleaded, as argued it was not an act of victimisation. Nor can we understand any way that the respondent instructed IAI not to permit the claimant to sit their exam in 2010. This is speculation without evidence.

Discriminatory Rules

263. Section 145 of the Equality Act 2010 provides:

"a rule of an undertaking is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of the person that is of a description prohibited by this Act".

264. Who can complain of this to an Employment Tribunal is set out in section 146:

(1) A qualifying person (P) may make a complaint to an employment tribunal that a term is void, or that a rule is unenforceable, as a result of section 145.

(2) But subsection (1) applies only if—

(a) the term or rule may in the future have effect in relation to P, and

(b) where the complaint alleges that the term or rule provides for treatment of a description prohibited by this Act, P may in the future be subjected to treatment that would (if P were subjected to it in present circumstances) be of that description.

(3) If the tribunal finds that the complaint is well-founded, it must make an order declaring that the term is void or the rule is unenforceable.

(4) An order under this section may include provision in respect of a period before the making of the order.

(5) In the case of a complaint about a term of a collective agreement, where the term is one made by or on behalf of a person of a description specified in the first column of the table, a qualifying person is a person of a description specified in the second column.

(6) In the case of a complaint about a rule of an undertaking, where the rule is one made by or on behalf of a person of a description specified in the first column of the table, a qualifying person is a person of a description specified in the second column.

For qualifying bodies, those in the second column are:

"A person who is, or is seeking to be, a member of the organisation or body
A person upon whom the body has conferred a relevant qualification
A person seeking conferment by the body of a relevant qualification."

265 The respondent argues that the claimant does not have status to make this complaint. He has not entered for any exam since 2014. He ceased membership (by not paying the fee) in 2018. He is no longer seeking conferment of the qualification. It is argued he can only apply in relation to the past relevant qualifications, that is, the CT passes (as a person on whom a qualification has been conferred). The claimant did not respond to this, so we understand the factual position is not contested. We were not taken to case law.

266. At the time the claim was presented, the claimant was a member, and was still seeking conferment of the qualification. We do not understand that his claim has been lost because of the time it has taken to bring it to hearing – on the face of it that is unjust. However, beyond section 146(6) (who can complain) is the requirement in section 146(2) that the rule or term may *in future have an effect* on the person seeking the declaration. As he is no longer a member, and is no

longer seeking to qualify, it can no longer have that effect. We could make an order in respect of past effect of any rule, as part of the order, but we do not see that we can do this if there is no current of future effect as well. Now, in 2019, the claimant's remedy for past discrimination because of any rule while he was a member seeking the qualification lies in the claims he brought which have now been heard and decided. Our reading of the section is that a declaration can no longer be made.

267. In case we are wrong, we have reviewed the 15 rules complained of. The first eight have already been discussed and not found discriminatory. The next three are about requirements for medical evidence, namely every five years. On the face of it, neuro disability in adults is unlikely to change. However, a diagnosis may change or be reviewed in the light of evidence. On paying for an opinion when a new adjustment is requested, this was only when the request could not be explained. The respondent had no duty to adjust for disability if it related (as this did) to the competence standard). The last four concern ring fencing at 25% the time allowed for the higher skills papers. The recommendation to the committee was to allow 25% unless there was medical evidence why more was necessary. They had no duty to adjust the competence standard (as this was, in our finding); the decision was based on evidence of schools practice, and in the light of having to justify any decision to those not allowed extra time. We do not hold the rule discriminatory.

268. Finally, the time taken to send the decision to the parties is regretted. The panel chair was already committed to a four day part-heard case from earlier in the year, and two weeks annual leave intervened. The essential decisions were made on the discussion days, while the evidence was still fresh in mind, it is the writing up that has taken time.

Employment Judge

Date14 Nov 2019

JUDGMENT SENT TO THE PARTIES ON

15 11. 2019

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FOR THE TRIBUNAL OFFICE