EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Adenekan	v	British Gas Trading Limited

Heard at: Watford **On**: 19-22, 25-29 November, 2, 4, 6 and (in chambers) 5 and 9 December 2019

Before: Employment Judge Hyams **Members:** Mr D Bean, Mr I Bone

Appearances:

For the claimant: In person
For the respondent: Mr S Purnell, of counsel

RESERVED LIABILITY JUDGMENT

The claimant's claims of a breach of sections 15 and/or 20 and/or 27 and 39 of the Equality Act 2010, are not well-founded and therefore do not succeed.

The claim of a breach of the claimant's contract of employment by wrongfully dismissing him is not well-founded and does not succeed.

REASONS

The claim, the parties, and the issues

1 In these proceedings, the claimant originally (in claim number 1300349/2017) claimed that he had been discriminated against because of his race as well as that he had been discriminated against because of a disability and that the

respondent had failed to make reasonable adjustments for that disability, contrary to section 20 of the Equality Act 2010 ("EqA 2010"). The claim was subsequently expanded in claim number 1301347/2017, but, after a hearing before Employment Judge Rose QC in Birmingham on 24 November 2017, it was refined as a result of a listing of the issues in the case management summary issued after that hearing of which there was a copy at pages 99-104 of the hearing bundle. (Any reference below to a page is, unless otherwise stated, to a page of that bundle). However, Employment Judge Rose QC also, i.e. at the same time, ordered the claimant to provide further particulars of the claims as identified by him.

2 Two further claims were made, and they were consolidated with the two to which we refer above. One of them (case number 1305120/2018) was subsequently dismissed by Employment Judge Bedeau on its withdrawal. The other one (case number 3334419/2018) was of victimisation through a demand for the repayment of overpaid sick pay, although that overpayment was subsequently not pressed, i.e. the respondent did not pursue that overpayment.

3 There were other preliminary hearings in the claim, but it is not necessary to refer to more than the one of 18 July 2017 before Employment Judge Hughes, which led to a determination by her that the claimant "was a disabled person for the purposes of bringing claims under the Equality Act 2010 relating to the protected characteristic of disability from 2 June 2016" and that that was the date from which the respondent ought to have known that the claimant was suffering from a disability within the meaning of the EqA 2010. Otherwise, it is necessary to record here only that by the time of the start of the hearing before us, the issues had neither been agreed nor determined definitively by an Employment Judge. Mr Purnell (counsel for the respondent) had done his best to define the issues, but his list of issues ran to 26 pages, and we therefore commenced the hearing on 19 November 2019 by discussing with the claimant and Mr Purnell how we were going to approach the case, given the apparent breadth of the case and the multitude of issues.

4 The claimant had a short period of time before the hearing produced what he had called a skeleton argument which was in large part a statement of his evidence but was also a statement to the effect that the claim of race discrimination was no longer pursued. The document contained a helpful table of the issues which were now pursued. The claim was now, as a result of that table, of the following things:

4.1 a breach of section 15 of the EqA 2010 (i.e. by way of summary, unjustified less favourable treatment because of something arising in consequence of the claimant's disability) through

4.1.1 failing to allow the claimant to return to work in December 2016;

4.1.2 failing to provide the claimant a copy of occupational health

assessments of 30 November 2016 and 2 December 2016;

4.1.3 failing to allow the claimant to return to work in January 2017;

4.1.4 failing to pay the claimant the full amount of the 5% contribution to his pension to which the claimant was entitled;

4.1.5 failing to offer the claimant the role of Distributed Energy Technical Expert ("DETE");

4.1.6 failing to offer the claimant the role of Heat Pump Specialist;

4.1.7 dismissing him in February 2017; and

4.1.8 post-termination discrimination concerning the manner in which the respondent communicated with the claimant about the amount of salary that had been paid to him in the final three months of his employment;

4.2 a breach of section 20 of the EqA 2010, in the form of failing to make a reasonable adjustment as a result of failing to allow the claimant to return to work in December 2016 or in January 2017, and then, in February 2017, dismissing him;

4.3 direct discrimination against the claimant because of the protected characteristic of disability through failing to offer him either the DETE role or that of Heat Pump Specialist;

4.4 victimisation by

4.4.1 failing to allow the claimant to return to work in December 2016 or in January 2017,

4.4.2 failing to provide the claimant a copy of occupational health assessments of 30 November 2016 and 2 December 2016; and

4.4.3 in February 2017, dismissing him; and

4.5 breach of contract by dismissing him wrongfully on 31 January 2017, and then dismissing him on 28 February 2017 without letting him serve out his notice period.

5 The claims stated in paragraphs 4.3 and 4.4 above were stated to be pursued only if the claims in respect of the same events stated in paragraph 4.1 above were not successful.

Procedure

6 After initial discussions with the parties on 19 November 2019, we spent the rest of that day and the next day reading witness statements and as many of the documents in the bundle which were referred to in those witness statements as possible. We then heard oral evidence from the claimant, who was cross-examined by Mr Purnell for three days. We then heard oral evidence from the respondent's witnesses, some of whom were present under witness orders. We subjected the cross-examinations of some of those witnesses to time limits, and we did so for two reasons. The first was that their evidence was mainly relevant to the claim of race discrimination which had now been abandoned, and the other was that they had childcare or other domestic difficulties which meant that it was in our view right (and not contrary to the interests of justice in the circumstances) that their cross-examinations were time-limited.

7 After the oral evidence had been completed, at 13:50 on Monday 2 December 2019 (and before we adjourned for lunch), the parties departed to prepare their written submissions. We then resumed the hearing on Wednesday 4 December 2019. The parties exchanged their written submissions, and we read them. We then heard oral submissions from both parties from 14:05 until 17:22. We spent the next day and Friday 6 December 2019 deliberating, forming conclusions, and preparing reasons for our conclusions. We initially planned to give judgment orally on Friday 6 December but we had not concluded our deliberations by the afternoon. We therefore informed the parties of that, and discussed one aspect of the case with the claimant with a view to obtaining clarification of it. We then reserved our decision and concluded our deliberations on Monday 9 December 2019.

8 On Tuesday 10 December 2019, two emails were sent on behalf of the claimant to the personal inbox of the judge, and copied to Mr Purnell. There was no express application for them to be taken into account, but the judge read them as being sent with such a request implicitly made. The judge read the emails and their enclosures in order to see whether it might conceivably be (despite the need for finality and the fact that the hearing had ended on Friday 6 December 2019) in the interests of justice to take into account their content. However, in his view they added nothing material in the light of the conclusions which had been reached unanimously the day before. Accordingly, the judge concluded that it was not necessary to invite a response from the respondent to the application for them to be taken into account.

The evidence

9 Much of the initially-intended oral evidence was relevant primarily, if not in the case of some witnesses, only, to the claim of race discrimination. We read all of the witness statements of the respondent but we sought to ensure that we heard oral evidence which was relevant only to the claims as stated in

paragraph 4 above.

10 Most of the evidence was documentary. There was an extraordinarily large bundle (it consisted of 4107 pages, although there was in those pages much repetition), and we read only those parts of it to which we were referred.

11 We heard oral evidence from the claimant on his own behalf, and, on behalf of the respondent, from

11.1 Mr Peter Harrison, who was, from 30 March 2016 onwards (see page 850), the claimant's line manager;

11.2 Mr Rob Moore, who was Mr Harrison's line manager;

11.3 Ms Linda Taylor, who was employed by the respondent as the HR Business Partner for the respondent's Construction Services business at all material times;

11.4 Ms Sukie Sangha, who was employed by the respondent for the period stated below as an HR Manager, reporting to Ms Taylor;

11.5 Mr Wayne Smith, who at all material times was employed by the respondent as its Director of Construction Services;

11.6 Mr Oliver Smedley, who was at the material time employed by the respondent as the Managing Director of Home Assistance UK Limited, which was a business regulated by the Financial Conduct Authority and provided insurance services to third party intermediaries and British Gas companies in the home emergency market; and

11.7 Mr Stephen Powell, who at the material time was employed by Centrica as its Global Business Services Operations Manager.

12 In our findings of fact below, we refer only to the material facts as we determined them to be in the light of the issues stated in paragraph 4 above.

13 In what follows, we first state our findings of fact so far as possible before stating our conclusions (some of which were factual, arrived at in the light of the application of the relevant case law). We then state the applicable law, after which we state, so far as necessary, the parties' submissions. We then state our conclusions.

<u>The facts</u>

The claimant's qualifications

14 The claimant is a mechanical engineer. He obtained a first degree in

Mechanical Engineering, and he obtained a masters' degree in Building Services Engineering. He is a Member of the Institute of Asset Management and a Member of the Institute of Engineering and Technology. In his curriculum vitae, he stated (at page 2892) that he was "At home on the internet".

The history of the claimant's employment with the respondent up to 27 September 2016

15 The claimant was first employed by the respondent on 9 March 2015, when he commenced as a Lead Designer (Engineer) in the respondent's New Energy division's Heat Network team, based in an office at Sharnbrook, in Bedfordshire. That office, however, was not profitable, and as a result, after the claimant's employment started, the respondent merged the Sharnbrook office with the division's Facades team, which was based in an office in Rugby. That merger occurred during the second half of 2015. Until mid to late 2015, Mr Smith was the Operations Director for the New Energy division. He described the reasons for, and intended effect of, the merger, in paragraph 9 of his witness statement, which was in the following terms (which we accepted):

> "The reason for this office closure was because we intended to merge the Heat Networks and Facades teams under one common platform which would be known as 'Construction Services'. As part of that, it was more efficient to move to one location (which was proposed to be Rugby) and merge those teams. The Sharnbrook office was not profitable and by closing that office, we hoped that we could review personnel levels and overhead costs. We hoped with reduced numbers of personnel and overheads that Construction Services would be an entity which could stand on its own two feet."

16 The merger was called by the respondent "Project Shard". Mr Smith continued in paragraph 11 of his witness statement (which we accepted):

> "As Project Shard was a workplace closure, we offered affected employees the opportunity to apply for potential suitable alternative roles elsewhere in the business (including specifically in the Rugby office) if they did not want to opt for voluntary redundancy. In order to facilitate this, affected employees were asked to complete an 'Aspiration form' and provide an up to date CV in support of their application to be considered for an alternative role. Existing employees were 'mapped' into roles where possible- this was done by way of a CV review and 1-2-1 interview/ meeting followed by a group senior managers meeting with Linda Taylor (HR Business Partner) at which it was decided who could be moved into which role."

17 Following the completion of Project Shard, in about the middle of December 2015, Mr Smith became the respondent's Director of Construction Services.

18 During the whole of the period of the claimant's employment with the respondent, Mr Moore was employed by the respondent as the Head of Construction, and Mr Harrison reported to him and was the Design Manager for the Facades team.

19 The claimant's claim of race discrimination was based in part on his perception that he had been overloaded with work during the first part of 2016. Mr Smith's witness statement contained (in paragraph 13) this evidence (which we accepted):

> "Following this move [i.e. of the Heat Networks team to Rugby], I was not aware of particular workload pressures in Construction Services in the Design team. We were not signing up to many new contracts, so in that period there seemed to be very little work. Ironically, the work started to flow in from June 2016 onwards and then the announcement about the closure was made (see below - Project EOS)."

20 The claimant was adamant that he had been overloaded, and we were fully prepared to accept that he may have had a high workload during the first part of 2016. However, it was, we concluded, a workload of a sort that he would have been able to achieve if he had been able to perform at the level which could reasonably have been expected of him. It is not necessary, however, to refer here to the detail of the evidence in that regard, as it is of peripheral relevance only.

21 Mr Harrison became the claimant's line manager formally on 30 March 2016: that was clear from the email at page 850 from Mr Moore with the subject line: "Design Team – Update". Mr Harrison was employed at a grade below that of the claimant: the claimant's grade was Level 6 and that of Mr Harrison was Level 7. (Mr Moore's grade was Level 5.) It was Mr Moore's oral evidence (which we accepted) that he promised Mr Harrison promotion to Level 6 if he took on the additional responsibility referred to in the email at page 850, but in the end the respondent did not formally promote Mr Harrison so, having exercised the function of being the Design Team's manager for no additional remuneration, Mr Harrison stopped being that manager. As Mr Moore put it in paragraph 16 of his witness statement:

> "Peter's own capacity was very stretched when he joined Construction Services because he had been asked to take over the management of the former Heat Networks employees on top of his previous duties. After a time, he stepped back from the management side as he was not provided with sufficient recognition for this."

22 However, at all material times after 30 March 2016, Mr Harrison was nominally the claimant's line manager.

23 Because of the evident difficulties in the relationship between the claimant and

Mr Harrison during April 2016, Mr Moore arranged a meeting with the claimant and Mr Harrison to take place on 4 May 2016. Mr Moore told us that the meeting was of a sort that he had not previously arranged, and that he had not arranged one like it since. He described it, and the background to it, in paragraphs 21-25 of his witness statement, which we accepted:

"**4 May 2016 - Meeting with Abraham and Peter Harrison**

21. On 4 May 2016, Peter, Abraham and I had a meeting to openly discuss the team issues around communication, roles and performance. Minutes of the meeting are set out on pages 986A - 986B of Bundle 3.

22. I was aware that the Design Team had not been working as a team. Peter and Abraham both said that they did not have personal issues with each other and they both explained to me the work related issues that they had experienced. I understand that Abraham alleges in his witness statement that this meeting 'planned to intimidate him' - this is untrue; there were considerable design delays by this point and the purpose of the meeting was to try to move things forward supportively and productively.

23. It was clear that Peter and Abraham were experiencing difficulties with their working relationship. Peter's primary concerns were around agreed target deadlines / dates being missed by Abraham. Abraham claimed that Peter did not communicate effectively and he said that he expected Peter to 'tell him exactly what he wants each time'. Peter queried whether, as a senior member of the team and Lead Designer, this was to be expected of Peter as Abraham's role was clearly one which required self management and leadership of his direct reports. Peter is not a heat design engineer by background. Therefore, he would have been unable to communicate with Abraham in terms of the technical level of detail which I think Abraham was suggesting that he should have been using. Due to the limited resource in the team as a result of the merger and redundancies, there was no alternative to them working together and these relationship difficulties between them needed to be resolved.

24. I questioned Abraham's availability because he seemed to have spent only 6 days in the Rugby office in April. Abraham said he had been off sick from 12 to 22 April and had been on site visits. I understood Abraham had been in the office on only around 8 days in March. I explained that Abraham's lack of presence and availability to the team could be a reason for the delays in relation to project work. The purpose of having the Design team based in Rugby was so that they could work collaboratively together - home working was actively discouraged by British Gas at this time and the Heat

Networks employees including Abraham had been advised of this when they had moved across to the Rugby office. I knew Abraham lived a significant distance from the office and understood he had previously been allowed to work remotely more often at his previous office.

25. In order to try and solve the issues, I asked Peter and Abraham what could be done to enable them to move forward effectively. Peter put forward six requests, which we agreed on as actions going forwards. Abraham did not put forward any requests. We agreed that the first review of the actions would take place in the week commencing 9 May 2016 and that we would review the actions every week going forwards. I believe we did try to do this, but cannot recall the details."

24 In the following couple of weeks there was an exchange of emails about the proposed interview of a potential recruit, in which, as Mr Moore described the situation in paragraph 27 of his witness statement, after Mr Harrison had asked the claimant "to prepare a copy of the proposed agenda and a list of questions for the interview", the claimant responded by saying that "he just wanted to have a conversation with the candidate and it was not his 'style' to conduct a job interview with pre-planned questions and he was 'not about to start now'". Mr Moore said (and we accepted) that he thought that the "tone of [the claimant's] emails was unacceptable, particularly given that [Mr Harrison] was his line manager".

25 Then, on 18 May 2016, Mr Moore was copied into an email sent by Mr Harrison stating that the claimant had "put a note on the system that he was off with stress and would not be returning to work until 23 May 2016". The situation as it developed subsequently was described by Mr Moore in paragraphs 30-45 of his witness statement, which, for the reasons which we give below, we accepted. Those paragraphs were in the following terms.

"30. On 24 May 2016, Abraham emailed me a copy of the email that he had sent to Peter saying he did not want to have a return to work interview with him because he said Peter was affecting his well-being. A copy of the email is on page 1127 of Bundle 3.

31. Peter had also come to me at 11 am that day to say he had tried on at least 4 occasions over the last 24 hours to arrange and carry out this interview with Abraham. Peter asked me to step in to support him and I agreed to do so. I therefore replied to Abraham to say that I could do his return to work interview at 12 noon that day (page 1127 of Bundle 3). Peter was frustrated because he felt that HR were not supporting him in trying to resolve matters with Abraham and that Abraham was dictating the processes and meetings.

32. Just before 12 noon, I met with Abraham to conduct the meeting. I

have undertaken return to work interviews on numerous occasions as a manager and received training from a previous employer on how to conduct such meetings. The minutes of this meeting can be found on pages 1105 - 1107 of Bundle 3.

33. During the meeting, I confirmed to Abraham the days on which he had been absent from the absence management system. At that point, Abraham became confrontational and asserted that on some of the days I had highlighted, he had been absent due to annual leave not sickness. I explained I was simply trying to clarify the dates because these had not been confirmed on the system.

34. Abraham became aggressive from that point onwards and made a number of personal comments towards me, in particular he said that Peter and I were "nothing". He spoke over me and so, in response, I had to try to speak over him as well. He did not seem to be willing to listen to me at all.

35. I was shocked by Abraham's behaviour. I asked him to calm down and told him that his attitude was not acceptable. However, that was when he told me that I was "a slimy snake" and that I would "get what was coming to me".

36. Due to his quite frankly threatening behaviour, I asked Abraham to leave the room. I stood up and opened the door asking him to leave. He walked to the door, but then sat back down again. I said we could start again and continue the meeting, but Abraham called me a "slimy snake" again and seemed angry.

37. At this point, I ended the meeting - I was not prepared to accept such unprofessional behaviour. I walked downstairs with Abraham back to the office. I asked him to leave the building in order to 'cool down' as it had been such a tense meeting; I expected him to return to the office after the short break which I had suggested. At no point whatsoever did I suggest that he had been dismissed.

38. When I got back to my desk, I telephoned Linda straight away and asked her to come to the office immediately so that we could discuss what had happened. I told Linda that Abraham had become confrontational and aggressive during the meeting and had made a number of personal comments to me, and that as a result, I had ended the meeting. Linda asked me to write up a note of what had happened and this is the note at pages 1105 - 1107 of Bundle 3.

39. Abraham sent me an email after the meeting to say that he could not continue to expose himself to "such threatening behaviours". I was shocked by this email given that he had been the one threatening me during the interview.

40. Linda advised me that I should try to reconvene the meeting after lunch. I therefore phoned Abraham in the first instance. However, he did not answer. So I sent him an email inviting him to meet with me at 2pm that day because I knew he would be able to pick up my email on his mobile phone (page 1125 of bundle 3). However, Abraham did not reply to me or attend that meeting.

41. Given the severity of what had happened and the behaviour of Abraham as a senior manager, I agreed with Linda and Sukie that Sukie would phone Abraham at 2.30pm. I understand Sukie did call Abraham, but was unable to speak to him (page 1106 of bundle 3).

42. I sent Abraham an updated outlook invitation inviting him to attend a reconvened Return to Work interview at 2pm that day (page 1127 of Bundle 3) and invited him by email (page 1129 of Bundle 3). He did not respond to the invitations. Consequently, Sukie, Linda and I agreed that Sukie would phone Abraham at 2:30pm if he failed to attend (page 1106 of Bundle 3).

43. Also on 24 May 2016, Linda sent me an email in which Abraham explained that he had a cardiac investigation appointment on 25 May 2016. Linda highlighted that he could be quite ill and that this could be the reason for his irrational behaviour (page 1112 of Bundle 3).

44. I have seen pages 24 and 71 of Bundle 1 which provide Abraham's account of that meeting. I deny that I shouted at Abraham and that I told him 'he wasn't working hard enough' and was 'lazy'. I did not tell him that he 'no longer work[ed] here', nor did I tell him to 'pack [his] bag' and leave the office, or stand by the door near him / your desk while he packed his things at his desk. This account is completely untrue.

45. I can see Abraham also refers in his claim to his illness being a 'direct consequence' of 'threatening behaviour' and 'abuse' towards him, along with other allegations. Again, I wholly deny that either me or Peter (to my knowledge based on our meetings and the emails I was copied into at the time) behaved improperly in any way towards Abraham at all. Abraham also says he felt victimised because he reported harassment to the business at this time - I had no knowledge of this."

26 The claimant denied vehemently acting in the manner described by Mr Moore in those paragraphs of Mr Moore's witness statement and as recorded in the document at pages 1105-1107. The notes were in the bundle without any email enclosing them at pages 1105-1107 and at pages 1861-1863 as an attachment

to an email (at page 1860) dated 29 November 2016 to Ms Taylor. Mr Moore's reason for sending them under cover of the email at page 1860 was stated by him in paragraph 70 of his witness statement, namely that he "wanted to remind [Ms Taylor] about the relationship difficulties which were evidenced in those minutes and which [he] had discussed with her at the time." The claimant asserted that Mr Moore had written the notes at pages 1105-1107 long after the event rather than contemporaneously and pressed Mr Moore in cross-examination on his account as recorded at pages 1105-1107. Mr Moore stood firm in regard to his account of the meeting. We preferred the evidence of Mr Moore to that of the claimant in this regard. That was for a number of reasons, one of which was that we accepted Mr Moore's evidence that he had written the note at pages 1105-1107 on 24 May 2016 and the following day, and that it was an accurate account of what he had experienced on 24 May. In addition, the description by Ms Taylor of the claimant's behaviour on that day in her email at page 1112, sent at 13:20 on 24 May 2016, as "irrational" was consistent with Mr Moore's account of what had happened. Further, in his email of 14:59 on 27 May 2016 to Ms Taylor and Ms Sangha, at page 1124, Mr Moore asked whether a letter could be sent to the claimant "for a disciplinary next week", which was also consistent with Mr Moore's account. There was in addition a reference by Mr Moore to his "notes from [the claimant's return to work] meeting" in his email to Ms Taylor and Ms Sangha of 14 June 2016 at page 1244. In addition, it was inconsistent with the proposition that Mr Moore had told the claimant that he was dismissed for the claimant to send the email (which was sent at 12:07 on 24 May 2016 and was at pages 1125-1126) referred to in paragraph 39 of Mr Moore's witness statement. Furthermore, the fact that the claimant himself wrote (at page 1232) that he had been dismissed "by Rob Moore on Tuesday" was consistent with him having been told to leave the meeting of 24 May 2016, which in turn was consistent with him having acted aggressively at it. (In fact, Ms Sangha's immediate response was to say that the claimant had not been dismissed, but that is irrelevant for present purposes.) The same was true of the first paragraph of the claimant's grievance of 27 May 2016 which we set out in paragraph 29 below.

27 We record here that Mr Harrison had (as shown by his oral evidence, when, unprompted, he said this) a very clear memory of the claimant saying to Mr Moore that he was a slimy snake and almost hitting Mr Moore. Mr Moore said that his meeting with the claimant had taken place in a designated meeting room which was on the floor above that on which their desks were situated (in an open plan office). Mr Moore was evidently somewhat shocked by the claimant's approach, and he remembered that the discussion between him and the claimant had continued as they had gone downstairs, back to their desks. There was a possibility that Mr Harrison had seen them continuing their discussion as they returned to their desks, and there was a possibility that Mr Harrison had been told about the exchange between the claimant and Mr Moore and that a "memory" had then been created in his mind of that exchange. Mr Moore could not remember whether or not he had discussed the

matter with Mr Harrison. In the end, we did not need to decide whether or not Mr Harrison had witnessed an exchange of the sort that he remembered between the claimant and Mr Moore, as we accepted Mr Moore's account of that exchange.

28 The claimant was on annual leave on and after Wednesday 25 May 2016, for the rest of that week.

29 On Friday 27 May 2016, the claimant sent to Ms Sangha the email and its enclosures at pages 1152 and 1176-1225. Nowhere in the document was it stated that it was a grievance. The opening part of it (page 1176) was simply in these terms:

> "Dear Sukie,
>
> On Tuesday 24th May 2016 at about 1200 noon, I attended a return to work interview with Rob Moore but RM confronted with all manner of aggression and threats and asked me to go and pack my bag and leave the building. He proceeded to walk me back to the first floor offices (from second floor meeting room) and stood around his desk area as I went to my desk, got my things and left the building.
>
> As you are aware, this is not an isolated incident as a result of which I've been suffering with stress for some time and the continuous head ache, chest pain and very little or no sleep is increasingly unbearable.
>
> Please do not hesitate to ask if you require additional information/ clarification. Sorry if there are bits missing here and there - and also if there are bits that you consider irrelevant.
>
> Regards,
> Abraham"

30 Ms Sangha's first response was in an email sent at 14:04 on 27 May 2016 (page 1174), which was in these terms:

> "Hi Abraham,
>
> Hope you are well. As per previous correspondence I can confirm I have received the 4 emails you have sent.
>
> I am in rugby on Thursday please could you make yourself available so we can have a chat with regards to the content.
>
> I have tried to call and left messages but have not had a response back from you.

Kind Regards,
Sukie"

31 The claimant did not respond until 2 June 2016 to Ms Sangha. That was only after she had sent an email on 1 June 2016 (page 1232) asking him to contact her urgently, having previously left two voicemail messages for him to the same effect. On 2 June 2016, the claimant was stated by his GP not to be fit for work because of "stress" (the "Statement of Fitness for Work" of that day was at page 1233). The Statement of Fitness for Work covered the period up to and including 16 June 2016. The claimant did not attend work on 17 June 2016, as evidenced by the email exchange between Mr Harrison and Ms Sangha of that day at page 1234. In fact, the claimant never did return to work before being dismissed for redundancy at the end of February 2017.

32 Initially, the claimant's absence was unauthorised, and Ms Taylor and Ms Sangha planned (see pages 1235-1245), with Mr Moore, to send the claimant letters stating that he was absent without leave and, if he did not respond appropriately to them, to take disciplinary action against him. On 29 June 2016, the claimant responded, sending in a statement of fitness for work covering the period from 16 to 30 June 2016 inclusive (pages 1246-1249). On the next day (30 June 2016) he sent a further statement of fitness for work, covering the period from that day to 14 July 2016 inclusive (pages 1250-1255). All of those statements of fitness for work stated that the reason why the claimant was not fit for work was "Stress".

33 The respondent arranged that the claimant was assessed by an occupational health practitioner. The assessment was conducted over the telephone, and was conducted by Ms Maureen Callaghan, whose job title was "Occupational Health Delivery Manager". She sent what she called (in her covering email dated 7 July 2016 at page 1264) an "OH Capability Advice Memo" to the claimant, Ms Sangha and Mr Moore. The Advice Memo was at pages 1271-1272 and it stated that there was an "underlying health problem" affecting the claimant's fitness to work in the form of "Stress and depression". By way of "Background", it stated this:

> "As you are aware Mr Adenekan is currently absent with symptoms of stress and depression and cites bullying and harassment at work as the trigger. He is under the care of her [sic] GP and receiving the appropriate treatment/ advice and has been referred for specialised therapy."

34 The body of the occupational health Capability Advice was in these terms:

> "• ***Is the employee medically fit for the post? If not when are they likely to be fit?***

Remains unfit for work at present due to the negative impact his symptoms are having on his daily functioning. I am currently unable to predict a return to fitness date.

Continuing medical intervention alone is unlikely to facilitate a full resolution of his condition. If it is possible to address the reported workplace issues, then there is a much greater likelihood of achieving a full recovery and successfully maintaining him in work. A support plan should ideally involve discussions between the employee and his management regarding his reported work concerns and ways explored to resolve them to the satisfaction of all parties.

• ***Is the employee likely to provide regular and effective service on return to work?***

With treatment/counselling and self help strategies the condition should improve and become manageable: However the condition can be prone to intermittent flare ups from time to time. With regards to sickness absence past sickness absence over the past 2 years is a key indicator of future sickness absence

• ***What reasonable adjustments need to be considered to keep the employee at work/assist the employee back to work? What is the likely duration of any restrictions to their normal tasks?***

A gradual rehabilitation back into the workplace/duties may be required, However as no return to work date can be estimated it is difficult to provide more specific guidance on the format and duration of that phased return to work

• ***Is the current reason for OH referral considered to be work related?***

During the OH consultation Mr Adenekan clearly cited work place bullying and harassment as the primary trigger for his condition. I understand HR are aware of his concerns.

Given the nature of the reported medical condition, it is not likely to fall within the criteria of the Equality Act (disability element), at this time, as it appears this is an acute episode which is unlikely to last for more than 12 months and this can be borne in mind with your considerations for future work adjustments.

OH Recommendations:

The manager should complete, in conjunction with the individual, a Work Impact Sheet in order to identify and address any potential work place issues. A copy of the completed document should be issued to the

individual and a copy retained in HR records

The implementation of the OH recommendations may be influenced by operational constraints and are ultimately sanctioned at the discretion of the management team. On receipt of this report please discuss its content, together with any suggested return to work date and phased return to work plan with your employee.

Review Arrangements

As there are no further OH actions required at this time I have closed the referral. Please seek further OH advice if necessary when a return to work date has been identified".

35 Ms Taylor then, on 8 July 2016, asked Ms Sangha to arrange a meeting with the claimant under the respondent's absence management procedure. Initially, they planned to hold the meeting at the claimant's home, but then decided that it should be held in a hotel. The claimant first responded on 13 July 2016 (pages 1296-1298). In the body of the letter that he sent under cover of the email at page 1296 (both of which documents were addressed to Ms Sangha and were not copied to Ms Taylor), he said this:

"I respectfully comment as follows:

1. I would like you to know that I feel greatly pained, pressured and deeply stressed by the insensitive nature of your request/ proposal as conveyed In your letter.
2. Please be aware that there is nothing in my life right now more important than my health. Whilst I have no doubt that a meeting to help support and assist employees to improve attendance would be worthwhile if conducted at the right time, unfortunately, improving attendance is not my no 1. Priority right now.

3. Unfortunately I am not ready for such a meeting at this time. Sorry but I believe I am not ready for a face to face meeting so that we can talk about why I am suffering from depression as a result of accumulation of events of bullying and harassment at work and unreasonable work demands and pressure.

4. If you consider that the proposed meeting cannot wait until I am well enough to attend meeting in person and talk about my absence, I would ask that the meeting be conducted entirely in writing.

Could you please fill out your sections of documents (that need

to be completed urgently) and forward to me so I can fill out necessary sections and return documents to you?

5. You are in receipt of the OH capability advice below. This was issued following your referral and a sickness absence consultation with OH on 6th July.

6. You are also in receipt of the following documents informing the company that my doctor believe I am not fit for work due to present condition. [The claimant had embedded into the Word document copies of the fitness (i.e. sickness) certificates covering the period from 2 June to 14 July 2016 inclusive referred to in paragraphs 31 and 32 above.]

7. While it is very re-assuring that Dr Jeremy Sayer (a consultant cardiologist) concluded after series of cardiac tests and investigation including CT coronary angiogram that my heart is in good health and the persistent chest pain in the chest area is not coming from the heart, I continue to suffer from chest pain and for which I am taking Naproxen.

8. Sorry but I am yet to be given an indication of when my mind and body would recover from the physical and psychological damage inflicted.

9. If you wish to consult my doctor and or seek further medical opinion to satisfy yourselves that accumulation of events of bullying and harassment at work and unreasonable work demands and pressure is the reason why I am suffering from depression, please feel free to do so.

10. If you have specific questions regarding the various events of bullying and harassment at work and unreasonable work demands and pressure (as per the 4no. email sent to you on 27th May – not attached herewith) please feel free to ask and I will send written response.

11. I would be grateful if you could please provide details of all steps taken by British Gas to investigate the reported grievance. It would help to know <u>why</u> Rob Moore and Peter Harrison behaved the way they did towards me.

12. Sorry but this is a totally new experience for me. I have never been this way before. I hope the nightmare would end soon."

36 Ms Sangha forwarded the email and the letter to Ms Taylor in the morning of 13

July 2016, with the message (at the top of page 1296): “Fyi im lost for words!”.

37 On 14 July 2016, the claimant emailed Ms Taylor and Ms Sangha a further fitness certificate covering the period from 14 July 2016 to 4 August 2016. Like the preceding certificates, that one stated that the reason for the claimant’s absence was “Stress”.

38 On 19 July 2016, Ms Sangha sent (by recorded delivery) the claimant the letter of that date at pages 1315-1316. It was in these terms:

> “I write in reference to your email dated the 13th July 2016. I am sorry to hear that you are still unwell. I confirm that I have received your letter attached to the email and thought it important to clarify why we requested the meeting. The attendance management process promotes employee health reviews as a support to the employee and also for the employer to be able to support a return to work, hence the request. I have attached the policy confirming the process as per your request. We would like to meet with you to discuss how you are feeling and how we can further support you, hence the request for the meeting.
>
> With reference to the emails you sent before you went absent we were also going to take this opportunity to discuss next steps in terms of a grievance. Any grievance would require a conversation to discuss the reasons for the grievance hence the suggestion of a meeting. This was also suggested in the OH report you received.
>
> I would really like to meet with you to discuss in more detail, I can assure you it is to support you during your absence but also to discuss the points you have raised in your emails prior to your absence. Please could you advise if you would be willing to have a meeting to discuss?
>
> In the interim if you have any queries feel free to get in touch.”

39 The claimant did not respond to Ms Sangha’s attempts to arrange a meeting, and the next time he contacted the respondent was on 5 August 2016 when he emailed (see page 1326) a further fitness certificate of that date (stating that the reason for his unfitness for work was “stress”), covering the period from 5 August to 2 September 2016 and enclosed a letter (pages 1333-1334) in response to her letter of 19 July 2016. He wrote that he had received her letter only on 1 August 2016, but in oral evidence he said that he had left it to his wife to collect from the post office any mail that was sent by recorded delivery, and we concluded that the letter was indeed sent to the claimant by the respondent either on or shortly after 19 July 2016. In any event, the main part of the letter at pages 1333-1334 was a simple repeat of the text that we have set out in paragraph 35 above (having been introduced by the words: “Sorry that I have to repeat in response to your request for a meeting to discuss because my

response remain as provided on 13th July below.”)

40 On 5 September 2016, the claimant sent an email (at page 1350) to Ms Sangha and Ms Taylor enclosing a fitness certificate covering the period from 1 to 15 September 2016 and on 16 September 2016 he sent another email (also at page 1350) enclosing a further such certificate, covering the period from 15 to 29 September 2016. Those fitness certificates also stated that the reason for the claimant’s unfitness for work was “stress”.

41 During that period, Ms Sangha sought to procure the referral of the claimant again to the occupational health service used by the respondent (see pages 1340-1342 and 1348), asking him on 7 September 2016 to say when was best for him and on what number he should be contacted. The claimant did not respond to that request.

The respondent’s announcement of an intention to close down the part of the business in which the claimant was employed

42 On 27 September 2016, the respondent proposed the closure of the Construction Services division in which the claimant was employed. That was done at a meeting of the employees in the division. Mr Toby Farrell, a Project Manager, on that day sent (under cover of the email at page 1362) a script to use when contacting employees in the division who were not present at the meeting, which, he wrote, should be used when speaking to the claimant if “the Occupational Health team” recommended trying to contact him.

43 Mr Harrison called the claimant, but the claimant did not answer his telephone, so Mr Harrison left a voicemail message. Mr Harrison also sent the claimant by email the written announcement of 27 September 2016 at pages 1633-1634.

44 The claimant’s evidence was that he did not receive that announcement until some time later, in the circumstances described below. However, whether or not he received the announcement at pages 1633-1634 or subsequent updates (such as that which was sent by Mr Rob Morton on 14 October 2016, at pages 1408-1410; that one was certainly sent to the claimant’s usual work email address) was of peripheral relevance only in the circumstance that he was not claiming unfair dismissal (having been dismissed before acquiring the right to claim unfair dismissal). As a result, we describe in these reasons only the events in the following months which are relevant to, or at least help to illuminate our reasons for our determinations of, the issues stated in paragraph 4 above. Before doing so we note, however, that at page 286, as part of the series of PowerPoint (or similar) slides that were used by Mr Smith in the consultation meeting of 14 October 2016, this was written:

“**Individual consultation process**

- Employees will be sent a letter formally inviting them to individual consultation meetings
  - letters can be handed or emailed to employees
  - they will be posted to those on maternity or long term sick leave".

45 The reference in that passage to sending letters by post to "those on maternity or long term sick leave" was almost certainly made solely to ensure that those who were absent and did not have access to their work emails were sent hard copies in the post.

46 On 17 October 2016, the claimant sent the email at page 1414 to Ms Sangha, copying it to Ms Taylor. It enclosed the letter at page 1435. The letter referred to the claimant's emails of 27 May 2016 as "the grievance raised against Rob Moore", and asked the respondent to "please take reasonable and practicable steps to address with immediate effect".

47 In a letter dated 21 October 2016 but (it appeared: see the next paragraph below) posted on 31 October 2016, Ms Sangha wrote to the claimant (page 1455):

> "I refer to your recent email relating to your grievance against Rob Moore. As you are aware we previously did try to arrange a meeting to discuss the various emails you sent however at the time you were unable to meet. We have also tried to arrange an employee health review to discuss your concerns and again you advised that you were not able to meet due to your health. As you are now in a position to discuss the emails sent, please can you raise a formal grievance summarising the reasons for your grievance and forward on to me."

48 The claimant had a copy of the envelope in which that letter was enclosed. It was sent by Special Delivery and was postmarked 31 October 2016. It had on it what looked like an official stamp (of a sort which none of us had seen before) saying that the date it had been "booked" was 1 November 2016. The claimant had written on the envelope by hand that he had received it on 7 November 2016. The claimant claimed not to have received many documents sent to him during the second half of 2016, including a number sent to email addresses which he plainly did use, since he sent emails from them. During his cross-examination, the claimant said that

48.1 he did not (as he was unable in his then-current mental condition to) listen to any voicemails from the respondent during that time: rather, his wife would do so and make a note of it and the caller's number and give it to him; and

48.2 "most" of the letters that the respondent sent to him were collected by his

wife from the post office after a card was put through their letterbox.

49 In addition, on 27 November 2016, in his email to Ms Sangha and Ms Taylor at page 1837 (to which we return below), the claimant wrote:

> "please do not be quick to assume that I am already monitoring emails. It may take me some time to get into monitoring my emails. So please remember to send all BG correspondences that require my attention to my home address."

50 Also, on 8 December 2016, the claimant wrote to Ms Sangha and Ms Taylor in another email (at page 2129; it was sent from his "econergy.co.uk" email address, although he said in evidence that he used only his "bghn.co.uk" email account in Outlook), to which we also return below:

> "Probably worth reminding you that I am not yet monitoring my emails. Please remember to send all BG correspondences that require my attention to my home address."

51 As a result of the factors to which we refer in the three preceding paragraphs above we concluded that the claimant deliberately (whether or not he did so in order to protect his then-delicate mental health it was not necessary to decide) declined to look out for communications from the respondent during the final three months of 2016. We also concluded, having heard and seen Mr Harrison, Ms Sangha and Ms Taylor give evidence, that if any of them told us that they had sent a document to the claimant, then they did so on the day and in the manner that they said they had done so by causing the document to be sent in the post (albeit that it might actually have been sent later than that day) or sending it by email, or by doing both of those things.

52 Going back to our chronological description of the events as we found them to have occurred, on 25 October 2016, Mr Harrison sent the claimant and the other members of the team in which he worked the email at page 1457, enclosing the document at pages 1458-1460 which was stated to be the respondent's answers to the questions that had been asked after the proposal to close down Construction Services had first been made known to the employees in that division. Mr Harrison sent that email as he had been elected an employee representative for the purposes of the statutory provisions concerning consultation on proposed redundancies. There were in the document at pages 1458 and 1459 respectively the following questions and answers:

52.1 "Subject – Reemployment":

Question: "Previously they have chosen people for new positions, is this going to be the same this time?"

Answer: “No there would be an application process”

52.2 Under the heading “General Question”:

Question: “Can you provide details of the mapping out process?”

Answer: “n/a as no mapped roles”.

53 At page 329, in row 16 of a document headed “FINAL Minutes of meeting 3: 31/10/2016”, there was this question and answer:

> “How will people know they are being mapped out of process? Mapping is not applicable as there is no proposed structure moving forward to be mapped into.”

54 The claimant sent Ms Sangha and Ms Taylor the email of 2 November 2016 at page 1544, with the subject line: “RE: Raised Grievance against Rob Moore - follow up”, and in the following terms:

> “Dear Sukie
>
> I would be grateful if you could please give me in writing the name of the person that I can apply to, to put the matter right.
> Sorry but I am concerned that you are unable/ unwilling to address hence.”

55 Ms Sangha replied four minutes later (also on page 1544):

> “Hi Abraham,
>
> I have sent you numerous letters which you haven’t responded to. I will forward you the latest correspondence which was sent by recorded delivery so you can respond accordingly.”

56 Later on that day, Ms Sangha called the claimant on the telephone, and he answered it. She did not refer in her witness statement to the conversation except to deny saying two things that he alleged she had said. In oral evidence, she said that she recalled speaking to him on 2 November 2016, and that several times she asked him if he was “still there”, as she was not sure that he was listening to her. She referred in paragraphs 103 and 104 of her witness statement to the two things that the claimant alleged that she had said, in the following terms:

> “103. Abraham also suggested that I shouted at him on the phone this day [i.e. 2 November 2016] and said to him: ‘you people cannot change, I

should have known' (page 1709 of Bundle 5). I did not know what Abraham was referring to - I did not say those words or any similar words to him.

104. I understand he also alleges that I said: 'a decorated monkey is still a monkey' during this telephone conversation - I had not heard this phrase until it was mentioned to me as part of these Tribunal proceedings; I did not say this to Abraham or anything like it and I have no idea why he would allege such a thing."

57 The claimant first asserted that Ms Sangha had called him a decorated monkey only on 8 May 2017, when (see page 3001, which was attached to the email at page 2985 from the claimant to Mr Smedley) pressing his appeal against his dismissal. When pressed in cross-examination, Ms Sangha strongly denied saying those words. We concluded that Ms Sangha had not said that a decorated monkey is still a monkey. We concluded that for the following reasons:

57.1 if she had indeed said those words, then it was inconceivable, bearing in mind the manner in which the claimant was ready and willing to complain about things that he did not like, that he would not have referred to them in the email at page 1709 in which he alleged that Ms Sangha had said to him "you people cannot change, I should have known";

57.2 Ms Sangha was evidently a highly experienced and competent human resources professional who would have known that the words would be likely to be offensive to the claimant as they had racial overtones; and

57.3 having seen and heard her give evidence, we accepted her evidence that she had not said those words.

58 In an undated letter (at pages 1685-1686) sent in an envelope postmarked 3 November 2016, and signed for by the claimant at 10:21 on 7 November 2016 (see page 1688), Mr Harrison invited the claimant to a consultation meeting concerning the proposed closure of the Construction Services division. The letter contained the following paragraphs:

"We are currently engaged in consultation with Employee Representatives. We also wish to consult with you individually about this potential redundancy and seek your feedback before we reach any final decision. In particular if you have any suggestions, in particular regarding alternatives to making your position redundant, or if you feel you need further clarification, please feel free to contact me or Linda Taylor / Sukie Sangha from HR.

A meeting has been arranged on 7 November 2016 at 3.00 at Rugby

office room 3 or a telephone conference could be arranged if preferred. The purposed of the discussion is to discuss the suggestions you may have and the current position. If you have any difficulty with this date and time, please let me know in advance."

59 The claimant did not respond to that letter in any way on 7 November 2016. On that day, however, Ms Taylor sent the claimant the letter at pages 1682-1683, the first paragraph of which was in these terms:

"Further to my emails of the 3rd and 4th November 2016 I write to confirm that Byron Pountney will be the Hearing Manager of your grievance. If you can advise the best contact details, or contact Byron direct so that a face to face meeting can be arranged to discuss your grievance."

60 The claimant acknowledged receipt of the letter from Mr Harrison part of which is set out in paragraph 58 above and the letter from Ms Taylor referred to in paragraph 59 above in an email dated 14 November 2016 to Ms Taylor (page 1739). She responded on the same day (on the same page):

"Can you please make contact with me to advise which telephone number Byron can contact you on to arrange a face to face meeting to discuss your grievance.

We also need to re-arrange your 121 with Peter Harrison in relation to the business proposal to wind-down Construction Services. Unfortunately, we do need to meet with you on a 121 basis, but given your current health situation, we can conduct this over the telephone or hold a meeting off site if this would make it easier for you. Can you please advise if this is acceptable to you and when you would be available to do this? I appreciate this is a difficult time for you, but this process needs to take place so you are aware of the potential impact on your role."

61 On 21 November 2016, the claimant wrote to Ms Sangha in his email at pages 1775-1776 that he did "not wish to have a 121 meeting with Peter Harrison" (page 1776). On the same page, he wrote:

" 4.0 Suitable Alternative Positions

4.1 I am concerned that I am being carefully excluded from suitable alternative positions and I have my doubts and worries about your honesty with particular regard to finding me alternative positions

4.2 Here below are some of the existing advertised vacancies by Centrica

-Distributed Energy Technical Expert – Windsor

-Heat Pump Specialist (Open) – Windsor

-O&M Operations Manager – (Windsor)

- Asset Manager (South West) – Windsor

-Asset Manager (North) – Windsor

4.3 Can I ask that you please let me know why you consider it unreasonable that I may be able to do the roles in the examples indicated as suitable alternative position above?

4.4 I should be grateful if you could please confirm the names and office location of the 'relevant directors' in Centrica and the HR with whom you have discussed suitable alternative positions.

4.5 If it is ok with you, can I ask that you please confirm what roles are available in Centrica UK/ International?

4.6 Can I also ask that you also please confirm the control measures / management tool that is in place to ensure that I am being given fair opportunity with regard to available suitable alternative vacancies?"

62 As for the matter of what the claimant termed his grievance (i.e. by which he meant his series of emails sent on 27 May 2016, to which we refer in paragraph 29 above), he wrote this on page 1775:

"2.0 Phone call to arrange face to face meeting to discuss grievance

2.1 As you are aware, this is presently being managed by ACAS as required.

2.2 Sorry but after my experience on Nov 2nd, 2016, I would be reluctant to engage in further telephone conversation at this time.

2.3 Never the less, if you have specific questions regarding the various events please feel free to ask and I will send written response."

63 On 24 November 2016, Ms Taylor sent the claimant, by email and letter, a response to that email of 21 November. After acknowledging receipt of that email, she wrote (see for example page 1795):

"There are two elements that we need to address:

1. Your Grievance

   In relation to your grievance, we have appointed Byron Pountney as the hearing manager. Ideally we would like to hold a face to face meeting with Byron so that he can explore your grievance in more detail but I note your reservations in that regard. Byron has contacted you by email so that he can ask any questions he may have about your grievance which you have indicated below is your preferred method of communication. However, you have not responded to this email and my letter requesting how you wish this to proceed. I note that you have also referred the matter to ACAS but this does not prevent the business from progressing the matter internally. Therefore as per my previous correspondence, can you advise when you are available for either a telephone call or face to face with Byron so he can progress with your grievance.

2. Redundancy Consultation

   As per my letter dated the 14th November 2016, we do need to re-arrange your 121 with Peter Harrison in relation to the business proposal to wind-down Construction Services which is now proceeding. We need to meet with you on an individual basis to discuss the proposals, how the proposals might impact your role and also to discuss re-deployment opportunities which might be available for you, some of which you have highlighted below [i.e. she was referring to the five roles set out in the email quoted in paragraph 61 above]. As you have indicated that you do not wish to attend a face to face meeting (which would be our preference) I have set up a teleconference for you with Peter on Monday 28th November 2016-11-24 [sic] and 10.00am [sic]. Please use the following dial in details ... It is in your best interests to attend this call and to engage with the consultation process as it is your opportunity to discuss your views on the proposals, to understand how you may be impacted and the alternative roles you have already identified so that any applications etc can be progressed."

64 In fact, after Ms Taylor had sent that communication to the claimant, Mr Pountney, on the same day, in his email at page 1810, informed her that he had not contacted the claimant by email.

65 On 27 November 2016, the claimant sent by email the fitness certificate dated

24 November 2016 at page 1851 (of which there was a clearer copy at page 59 of the claimant's bundle). It included this text:

> "[B]ecause of the following conditions:
>
> > stress & chest pains & panic attacks
>
> I advise you that:
>
> > you may be fit for work taking account of the following advice:
>
> If available, and, with your employer's agreement, you may benefit from:
>
> > a phased return to work
> >
> > altered hours.
>
> Comments, including functional effects of your condition(s):
>
> > fit now to consider phased return to work from December
> >
> > it would be helpful to change offices and initially work part time hours".

66 The email enclosing that certificate was at pages 1837-1838. Its body started with this text:

> "**Phone call to arrange face to face meeting to discuss grievance**
>
> - Please accept this as confirmation that I have no further interest in applying to anyone within BG to put the matter right. Sorry if it was not clear enough from the response as email of 21/11/2016 under same heading that I have no further interest in applying to anyone within BG to put the matter right.
>
> - With regard to BG's interest to progress the matter internally, I would respectfully ask BG to please refer to my emails of 06/11/2016, 02/11/2016, 17/10/2016, 05/08/2016, 13/07/2016, 02/06/2016, 27/05/2016 (4no. emails), 28/4/2016 and 12/04/2016 to enable furtherance of this interest. If you have specific questions regarding the various events, please do not hesitate to ask and I will endeavour to provide written response in a timely manner.
>
> - Sorry but I cannot find the said email from Byron in my inbox. I will continue to converse by email but please do not be quick to assume that I am already monitoring emails. It may take me

> some time to get into monitoring my emails. So please remember to send all BG correspondences that require my attention to my home address."

67 At the top of the next page, the claimant wrote:

> "**<u>121 meeting with Peter Harrison</u>**
>
> - I am greatly concerned by your insistence that I have a meeting with Peter Harrison especially because you are aware that Rob Moore and Peter Harrison are the cause of my mental and physical illness.
>
>   Please be assured that I remain 100% committed to discussing how your proposal might me etc. [sic] However due to your insistence that the meeting has to be with Peter Harrison, I am forced to ask that the meeting be conducted entirely in writing."

68 On 29 November 2016, Ms Taylor responded (see page 1867) to that email of the claimant:

> "In relation to your grievance I acknowledge that you do not wish to progress the matter internally anymore. Can you please confirm whether this means that you are dropping the grievance altogether? If not, I will ask Byron to look at the written communications from you thus far and ask him to pose questions to you via email.
>
> In relation to your individual 121, I note your points in relation to Peter. I have assigned Mark Bishop to conduct your 121. Mark will telephone you on Friday 2nd December 2016 at 11.00am."

69 On 30 November 2016, Ms Taylor (as recorded by her in her email to the claimant of that day at page 1909) spoke to "Occupational Health" to get advice on the fitness certificate contents set out in paragraph 65 above. It appears from the handwritten notes on that email, made by Ms Taylor, on, it appears, the following day, that she spoke to "Jill at My-Health", who had said that there needed to be a management referral. The handwritten note continued:

> "Jill has spoken to him + she will ring him back today.
>
> This means a report would be updated onto Workday".

70 "Workday" was the software package which was used by the respondent at that time for recording personnel information such as absences from work.

71 The person referred to in that note as "Jill at My-Health" was Jill Douglass, with

whom Ms Taylor had the following email exchange (at pages 1954-1955) on 2 December 2016:

71.1 “Hi Linda

I hope you are well. I was unable to contact you yesterday.

Regarding the query we discussed yesterday, there was no indication from my telephone call with your employee, that he would be unable to take part in the telephone consultation that you have arranged for today.”

71.2 “Hi Jill, thank you for your email.

Did you speak with Abraham yesterday and has he agreed to the management referral? Could you please let me have an update?”

71.3 “Hi Linda

No, I have not been able to speak with Abraham, I left a message, but he has not returned my call.”

71.4 Hi Jill, Ok thanks. He has a planned telephone 121 today at 11.00am so it will be interesting to see if he accepts that call.”

72 On the day before, i.e. 1 December 2016, the claimant emailed Ms Sangha and Ms Taylor (page 1971), asking for a copy of the “27th September briefing pack” and “any other relevant document that I ought to have seen prior to attending the 121 meeting”. He continued:

> “Assuming that I receive the said pack on or before Tuesday 6th December, I would suggest that we re-arrange for Thursday December 8th, 2016. That way I would also have some time to go through and prepare. I hope this is ok.”

73 Ms Taylor sent those documents to the claimant on 5 December 2016 (the letter was at page 1965 and listed the enclosed documents), and on 6 December 2016 she spoke to Jill Douglass, as stated in paragraph 82 of her (Ms Taylor’s) witness statement, which we accepted (although the final page reference should have been to 2122 and not 2123):

> “On 6 December 2016, I emailed Jill to ask whether she had had a chance to speak to Abraham as I knew she was due to assess his capability to speak with Sukie and engage with us (page 2123 of Bundle 6). Jill replied to say that she had spoken with him the week before, however he had not wanted to engage with her and she had uploaded an AMR (which I

believe was an absence manager report) to Workday to confirm this (page 2122 of Bundle 6). I also told her that Abraham's GP had advised a phased return to work and that assistance would be needed to facilitate this (page 2123 of Bundle 6)."

74 The "uploaded ... AMR" was at page 1942, and it concluded thus:

> "We have now made contact Abraham Adenekan following the notification of their absence via Workday however, they have advised us that they do not wish to engage with this process.
>
> If you would like to discuss this further, please do not hesitate to contact MyHealth Management Advice Line on 03311 5771336, Option 3."

75 The documents which Ms Taylor sent to the claimant in advance of his one-to-one meeting consisted of (the parties agreed) approximately 120 pages. The claimant did not participate in the proposed telephone interview with Mr Bishop of 8 December 2016. He stated his reason for not doing so in an email of that date (pages 2129-2130), which was that he was not ready to do so and was "going through the documents as fast as [he could]". As for the grievance investigation, he wrote this:

> "As mentioned in my email of 27th November (see below), although I have no further interest in applying to anyone within BG to put the matter right, I am willing to assist BG investigation to be able to clarify the facts.
> I would be grateful if you could please confirm when I can expect BG to let me know the outcome of its investigation."

76 On 12 December 2016, the claimant wrote to Ms Taylor (page 2131) that he was still going through the documents and was going to update her again on Monday 19 December 2016. He also wrote this:

> "As you are aware, Jill Douglas (Healthcare -RM) called me on 30/11/2016 and 02/12/2016.
>
> My response to her questions included the following:
>
> - I confirmed that Rob Moore and Peter Harrison are the cause of my mental and physical illness
> - I confirmed I am on the following medication : Co Dydramol, Citalopram 20mg tablets, Diclofenac gel
> - I confirmed that although I have some fears about whether I can but I am willing to try.

> I have also submitted a written request to obtain transcript record of our telephone conversations of 30/11/2016 & 02/12/216. This was considered necessary due to Jill's unwillingness to make available to me copy of her report to British Gas."

77 It was Ms Taylor's clear and firm evidence that she (and therefore the respondent) had not received any kind of report from Ms Douglass about the claimant's health, and that they had received by way of information about Ms Douglass' conversations with the claimant only the emails and documents referred to in paragraphs 71, 73 and 74 above. In that regard, we saw that on 20 December 2016, in her letter to the claimant of that date at page 2256 (to which we return below), Ms Taylor wrote this:

> "On the issue of your return to work, I have not received a report from Jill the OHA, but she has confirmed that there is no medical reason why you cannot engage with the 121 process."

78 We also noted the content of the document (which the claimant had obtained from the occupational health service provider via a subject access request) at pages 2941-2942, and we did not see anything in it which was inconsistent with the documents to which we refer in paragraphs 71, 73 and 74 above, or which suggested that the occupational health service provider had ever prepared an occupational health report for the respondent other than that of 7 July 2016 of which there was a copy at pages 1271-1272.

79 The claimant was adamant that he had said the things that he set out in his email of 12 December 2016 at page 2131 (set out in paragraph 76 above), but nowhere was there any record of the questions to which those answers were given. The first two answers were capable of having been given in connection with the question whether the claimant was able to attend the planned 1-1 meeting. The third answer was capable of having been given to a number of questions: it was not clear from it what the claimant was "willing to try". In any event, none of the answers suggested that they resulted in the creation of an occupational health report, or that the information which Ms Taylor said Ms Douglass had given to her was recorded anywhere other than in the documents referred to in paragraphs 71, 73 and 74 above.

80 We therefore concluded on this issue of what the respondent received and whether or not it had withheld an occupational health report from the claimant that the respondent at no time received any document other than those to which we refer in paragraphs 71, 73 and 74 above and that none of those were a report of the sort that the claimant claimed he had not been given.

81 Returning to the chronological sequence of events, on 14 December 2016, Ms Taylor sent the email at page 2200 to the claimant. It was in these terms:

"I can confirm that you have now received all of the documents relating to the process. Collective consultation for Construction Services has now concluded and we are currently in the process of concluding 121 processes with your colleagues. Whilst I am mindful that you are presently off sick, we do need to progress your 121 meetings. To this end I have asked Mark Bishop to conduct your first 121 with you at 11.00 am on Friday, 16th December. Mark will call you on 07789 572950. During this call you will have the opportunity to discuss with Mark some of the questions you have raised in your email to me around the proposal and impact etc.

In terms of you having access to the BG intranet, you will need to raise a request through IS, however we have set up BG laptops on our project sites plus in Rugby office should you wish to travel and access there.

On the issue of your return to work, I have not received a report from Jill the OHA, but she has confirmed that there is no medical reason why you cannot engage with the 121 process. As for your grievance Byron Pountney has read all of your correspondence in relation to this and has a number of questions that he would like to ask you. Can you please let me know how you wish to proceed in order to bring this issue to a conclusion? Do you wish Byron to contact you direct to discuss this?"

82 On 16 December 2016, Mr Bishop telephoned the claimant three times but (as he recorded in his email of that day to Ms Taylor at page 2217) did not speak to the claimant, who did not answer the calls. The claimant then, on 19 December 2016, wrote to Ms Taylor the email at pages 2225-2226. The email contained this text:

"1. Mark Bishop's phone calls on Friday 16 December

Mark Bishop MB confirmed this morning that you instructed him to call me on Friday 16 December for a 21 [sic] meeting with me. This was a surprise to me as I had no such agreement with you and would respectfully ask that you please desist from such acts.

Fact is I am yet to hear from you following my emails of 8th December and 12th December 2016 below.

2 Update on documents received on 5th & 6th December

I should be grateful If you would please confirm when I can expect to receive response to my comments including my request for access to the Intranet – as per my email of December 12th.

Please be assured that I am committed to going through the documents

and will provide further update as soon as you I receive response [sic] to my comments / requests.

Sorry but I consider responding to my comments including getting access to the Intranet an essential part."

83 The first time that the claimant stated in clear terms that he had not been able to gain access to the respondent's Intranet was 12 December 2016, as could be seen from the email at the bottom of page 2200 and the part of its enclosure at page 2215.

84 Ms Sangha's last day at work for the respondent was 14 December 2016, so she was subsequently no longer involved in the events. Ms Taylor's witness statement described, in paragraphs 95-98 the relevant events following receipt of the claimant's email of 19 December 2016 at pages 2225-2226. We accepted the evidence in those paragraphs, which were in the following terms:

"95. On 20 December 2016, I emailed Abraham to thank him for his email dated [19] December 2016 and also to explain that his 1-2-1 meeting still needed to go ahead (page 2253 of Bundle 6). I therefore explained that Mark would conduct Abraham's first 1-2-1 meeting on 23 December 2016 and that the meeting would give Abraham a chance to discuss points he had raised in his emails regarding the proposal to wind down Construction Services and the impact of this. I also sent Abraham a letter which set out the same information as my email. I copy of this letter can be found on page 2256 of Bundle 6.

96. Also on 20 December 2016, Byron emailed me to say that given that his own role was now at risk of redundancy, he wondered whether there was a conflict of interest in him dealing with Abraham's grievance and asked for my opinion (page 2292 of Bundle 6).

97. On 23 December 2016, I received a lengthy email from Abraham in response to my letter which I had sent on 20 December 2016. He highlighted that he was having trouble with accessing the British Gas intranet page, he asked for Byron's questions in relation to his grievance to be forwarded to him and he asked if he could finish reviewing the documents that I had sent to him on 5 December 2016 before his 1-2-1 consultation meeting took place. He also reminded me that all correspondence should be sent to his home address. Details of Abraham's email are set out on pages 2286 - 2289 of Bundle 6.

98. Also on 23 December 2016, Mark emailed me to say that he had not been able to carry out Abraham's 1-2-1 meeting that was due to take

place that day as he had had to go home sick (page 2263 of Bundle 6). At this point in the process, the majority of people who were at risk had been made redundant – very few were remaining in Construction Services by this point."

85 On 5 January 2017, Ms Taylor sent a number of communications to, or relating to, the claimant, the majority of the detail of which (bearing in mind the issues stated in paragraph 4 above) is not material. What is relevant is that in one of the communications, (the letter at page 2290, which was sent by email and by recorded delivery), Ms Taylor confirmed that the claimant's position was at risk of redundancy and informed him that a meeting had been arranged with "Chris" on 12 January 2017, "to discuss the suggestions you may have and the current position". That the claimant should have known that the "Chris" to whom she referred was clear from the fact that she had referred to "Chris Bennett" as the intended consultor on behalf of the respondent in her email of the same date at page 2285, where she had written:

> "Unfortunately Mark Bishop has also left the business so your 121's will be conducted by Chris Bennett. I attach formal notification for your attention."

86 On 9 January 2017, the claimant sent Ms Taylor a further fitness certificate. The email enclosing the certificate was at page 2364, and a clear copy of the certificate was at page 65 of the claimant's bundle. It was in the same terms so far as relevant as that of 24 November 2016 which was at page 59 of the claimant's bundle (as reproduced in paragraph 65 above), except that under the words "Comments, including functional effects of your condition(s)", there were these words (only):

> "Needs to discuss return to work arrangements".

87 The claimant responded to Ms Taylor's letter of 5 January 2017 at page 2290 referred to in paragraph 85 above in the email of 12 January 2017 at pages 2363-2364. So far as relevant, he wrote this:

> "I note that you have chosen to replace Mark Bishop with Chris. I am concerned by this development and would be grateful if you could please confirm who Chris is. Also please confirm how and why he has been chosen to replace Mark Bishop. Sorry but I do not know which Chris this is. Sorry but I feel such a meeting should not be with anyone who is connected with the reasons for my illness."

88 The claimant also proposed the re-scheduling of the meeting that was proposed for 12 January 2017 to "the week commencing 23rd January 2017, at the earliest".

89 The proposed meeting of 12 January 2017 went ahead without the claimant present, since (as Ms Taylor said in paragraph 113 of her witness statement) (1) it had already been re-arranged four times, (2) all documents and correspondence had already been sent to the claimant, (3) “Occupational Health had confirmed that there were no health reasons that would prevent [the claimant] from attending the ... meeting”, and (4) the claimant “had been told in advance of the ... meeting that, if he did not attend, it would go ahead in his absence”. Ms Taylor told the claimant those things in a letter of 12 January 2017 (page 2377), in which she also told him that the second one-to-one meeting was going to take place on 18 January 2017. She enclosed with that letter the completed checklist at page 2376.

90 That second individual consultation meeting took place again without the claimant present. Mr Bennett called the claimant to enable him to participate in the meeting by telephone, but the claimant did not answer the call. As a result, Mr Bennett left the claimant a message saying that the next individual consultation meeting was going to take place on 25 January 2017. Ms Taylor on 18 January 2017 emailed Jill Douglass (page 2411), asking her whether she knew of any reason why the claimant could not be available for the individual consultation meetings.

91 On 19 January 2017, the claimant sent the email at page 2421, among other things asking that the respondent allowed two weeks between meetings to enable him to “absorb and reflect”. He enclosed a document with that email setting out 13 queries (pages 2430-2433), the first 12 of which were expressly a repeat of previous queries and the final one of which was the expressly new one of asking for two weeks between meetings. Ms Taylor responded to each query pithily in her email of 23 January 2017 at page 2456. In response to the claimant’s query about him returning to work (query number 7), she wrote this:

> “As there is an ongoing situation in which you refuse to work for Peter Harrison or Rob Moore we do not have any other suitable line managers for you to report to, As the Construction Services business is now being wound down we have been progressing with formal 121’s.”

92 In paragraph 124.4 of her witness statement (which we accepted), she said this in addition about the claimant’s query about the possibility of him returning to work:

> “The Construction Services business was almost closed by that point and so there would not have been any work for Abraham to have done. Furthermore, I was unsure whether Abraham was in fact well enough to return since his fit note for January stated ‘stress, panic attacks and chest pains’ but indicated he may be fit for work. He had also refused to engage fully with Occupational Health (as well as with me) and so I had limited information from them on which to base decisions. In fact, by 2 February

> 2017, Abraham provided a further fit note which stated he was not fit for work (which gave the conditions as 'depression, chest pains, panic attacks')."

93 On 24 January 2017, the claimant sent Ms Taylor the email at page 2483, informing her that as a result of her failure to respond to his email of 19 January 2017, he had that evening submitted a claim of race and disability discrimination. In fact, Ms Taylor had responded to the claimant's email of 19 January 2017. In any event, the claimant now said that he wanted all future meetings to be held with him face-to-face, but not at the respondent's Rugby office.

94 On 25 January 2017, Ms Taylor sent the claimant the email at pages 2495-2496, among other things informing him that the intended meeting of 25 January 2017 with Mr Bennett would now take place at a hotel nearby the respondent's Rubgy office on 30 January 2017. On 29 January 2017, the claimant sent Ms Taylor the email at page 2509. In it, he wrote this:

> "5. Sorry but Chris Bennett is connected with the reason for my illness and I do not want to have such a very important meeting with him – with real life consequences at stake.
>
> 6. If it has to be conducted by a Chris, I would of course have no problem with Chris Taylor for example.
>
> 7. Assuming that you insist on Chris Bennett conducting the meeting, I would ask that it be conducted entirely in writing."

95 In fact, Mr Bennett's only connection with the claimant was that he had on (it appeared) at least one occasion during the first months of 2016 made a criticism of the claimant's performance. (It appeared that that was to be gleaned from an email embedded into the claimant's grievance: the one at the bottom of page 1203.)

96 The claimant did not participate in the intended meeting of 30 January 2017, and on that day Ms Taylor spoke to Ms Fiona Gardener, a Complex Case Manager at the occupational health service provider, and asked her to find out whether there were any medical reasons preventing the claimant from attending a meeting with the respondent. Ms Taylor also responded (at pages 2530-2531) to the claimant's email of 29 January 2017, saying that as the respondent was not aware of any reasons why Mr Bennett should not conduct the meeting, the third and final individual consultation meeting would take place on 6 February 2017 with Mr Bennett at a named hotel near Rugby. In that email, she said this:

> "Your individual 121 will be conducted by Chris Bennett as we are not

aware of his involvement in any previous issues you have had – you have never raised this before. We have also been in touch with Occupational Health and I have asked them to contact you so we fully understand your medical situation. The last advice we received in December was that there was no medical reason why you couldn't participate in the 121 process, In fact their advice is that it is in your best interest for us to continue with this process.

...

I will send you a copy of this email together with the invitation to the 3rd 121 meeting. Please be aware that if you fail to attend this meeting we will hold this in your absence and conclude the consultation process as you are leaving us with no other options due to your lack of engagement in this process."

97 Critically as far as the claimant's grievance was concerned, Ms Taylor told us this (in paragraph 135 of her witness statement, which we accepted):

"Also on 2 February 2017, I emailed Abraham to ask him whether he still wished to pursue his grievance as we had not had any response from him in relation to Byron's questions about his grievance. I asked him to respond to me confirming whether he still wished to pursue his grievance by 10 February 2017 (page 2556 of Bundle 6). Abraham did not respond by this deadline. We therefore took no further action in relation to his grievance. Due to the time that has passed and the numerous opportunities we had given to Abraham, I felt we had to draw the line somewhere."

98 Ms Gardner sought to speak to the claimant on 2 February 2017, but (as she informed Ms Taylor in the email of that date at page 2555) he did not answer his telephone so she left him a voicemail message asking him to call her back and saying that she would try to contact him again. Ms Gardner reported that the claimant had called her earlier that week but she was on another call and when she rang him back, he did not answer the call so she had at that time also left a message.

99 On 5 February 2017, the claimant sent (see page 2578) a copy of the sickness certificate covering the period from 2 February 2017 to 2 March 2017 of which there was a clear copy at page 69 of the claimant's bundle. For the first time, there was in a fitness certificate written by the claimant's GP a reference to "depression".

100 The claimant did not attend the meeting arranged for 6 February 2017 with Mr Bennett. On that day, Ms Gardner emailed Ms Taylor with the advice (on page 2572) that while "any kind of management process is inherently likely to be

stressful for an employee", it was "generally considered better for this to go ahead as promptly as possible, since a long delay can be detrimental to an individual's mental health as this would allow anxiety and apprehension to increase". Ms Gardner said that she had called again and left another message for the claimant to call her back.

101 Also on 6 February 2017, the claimant sent Ms Taylor by email copies of the two documents at pages 2547 and 2563, which were from an organisation called Equiniti and stated that Equiniti had been "advised that you left Centrica on 31 January 2017." The documents related to the Centrica Share Incentive Plan. Ms Taylor then (as she said in paragraph 140 of her witness statement, which we accepted) emailed a colleague, asking why Equiniti had written to the claimant at that point, and was informed by the colleague that she (the colleague) thought that it was because the claimant was on "a list of leavers across the division which was basically a spreadsheet with details of where each person was in the redundancy process." The colleague continued by saying (as recorded by Ms Taylor in paragraph 140 of her witness statement) that "When someone was set as a leaver, it would trigger certain administrative actions such as the letters from Equiniti which may have triggered the letters being sent to" the claimant.

102 On 8 February 2017, Ms Taylor sent the claimant the detailed letter at pages 2654-2657, among other things recapping the acts of the respondent towards the claimant in the redundancy consultation process and in regard to his grievance. The whole of the letter was material, but we refer here only to the following passage:

> "I have attached copies of the Grievance Policy, Portal F document, Redundancy Policy for your information as you say you have not received the various emails in which they were attached.
>
> In relation to the individual consultation process, you had not made reference to Chris Bennett being part of the reason for your absence (or that he was in some way connected to your grievance) until 29th January 2017. You had only mentioned Rob Moore and Peter Harrison in the context of your grievance and this is why they have not been involved in your consultation process and why Mark Bishop was asked to conduct your 121's. I had previously explained that your consultation had been passed to Chris Bennett as Mark has left the business.
>
> As you have indicated that Chris Bennett is also connected to your grievance we have arranged for a further 121 to take place at 10.00am on Thursday 16th February 2017 at The Mercure St Albans, Watford Road, St Albans. AL2 3DS. The meeting will be chaired by Wayne Smith. As you have previously indicated you do not wish to attend your office location of Rugby, we have once again booked a room at the Mercure hotel. We

have incurred costs in hiring hotel rooms for several meetings where you have failed to attend at no or short notice, please make every effort to attend this meeting."

103 The claimant then, on 14 February 2017, asked if the meeting with Mr Smith could be held at his (the claimant's) home address. The respondent agreed, and the meeting occurred as planned on 16 February 2017 at the claimant's home address. Mr Farrell (the Project Manager to whom we refer in paragraph 42 above) attended the meeting with Mr Smith. Among other things, it was Mr Smith's evidence that Mr Farrell tried to show the claimant how to get onto the respondent's Intranet via the laptop owned by the respondent which the claimant had had in his possession throughout the period from 27 May 2016 to 16 February 2017. It was Mr Smith's evidence that the claimant refused to let Mr Farrell do that. The claimant denied that, but Mr Farrell had made a note afterwards, of which there was a copy at pages 2768-2771 which Ms Taylor gave evidence she had received on 17 February 2017. We accepted that evidence of Ms Taylor, and we therefore accepted that the notes at pages 2768-2771 were contemporaneous notes of Mr Farrell. We also concluded that they were likely to be accurate, since there was in box 3 a note that the claimant had told Mr Smith and Mr Farrell that he was recording the meeting, and the claimant accepted in oral evidence that he had said that. However, the claimant also accepted in oral evidence that he had not in fact been recording the meeting, so that he had told Mr Smith and Mr Farrell an untruth in that regard.

104 The most important part of the notes was box 14, where this was recorded:

"Wayne asked Abraham how we should move on from this and whether Abraham had any further questions
Abraham had 2 remaining questions

1. One was around transitional roles. When Toby enquired as to what Abraham meant by transitional roles it was established that Abraham was under the impression a selection process had been used to decide which staff to be retained in transitional roles until close down in June. Wayne explained that this was not the case with the majority of staff, with no meaningful work leaving at end of December 2016. Those remaining are working to complete live projects.

2. Redeployment. Abraham asked how he was supposed to apply for roles. Wayne explained that this was via the internet accessible "Jobs Board" (www.myopportunitiesincentrica.com) referring to the 5 roles he had highlighted earlier, he said "I didn't think I needed to apply". He was working on the assumption that since his CV was on file he would be automatically be placed into the 5 roles he had expressed

interest in. Toby also forwarded on an email (to neckson3.@btinternet.com) from the Centrica Central resourcing team giving Abraham his log on details to the Jobs Board to ensure he had access."

105 The outcome of the meeting was stated in the next box, namely that since there were "no suitable alternative roles" for which the claimant had applied successfully, the claimant had to be dismissed for redundancy and would be given pay in lieu of notice as there was no meaningful work for him to do in Construction Services. Mr Smith's response to the proposition that the claimant could have been redeployed by him to a job in another part of Centrica's operations, including to any one of the jobs identified by the claimant as being suitable (initially five, and subsequently seven) was that that was not how Centrica or the respondent operated: rather, it was at most to give a redeployee preferential treatment in accordance with the group's redeployment policy. We set out the relevant part of that policy below, but here we record that Mr Smith told us that his expertise was that of a gas engineer. He said that he could nevertheless see that the job advertisement for the role of DETE (at page 2872F) required the following qualifications or competencies:

"• Degree level electrical engineer or equivalent OR City & Guilds/HNC in a related recognised trade with significant experience in deriving customer solutions
• Base level of competency in all of the following technologies: CHP; Diesel and gas standby generators; solar PV installations; building management controls; HVAC systems; lighting, ground source heat pumps; biomass boilers; energy efficiency measures; battery storage (optional): fuels cells (optional)
• Expertise in at least two of the following technologies: CHP; Diesel generators; gas generators; solar installations; building controls; energy efficiency measures; battery storage (optional); fuels cells (optional)
• IPMVP accreditation or working knowledge of the protocol".

106 He said that when he reviewed that and looked at the curriculum vitae of the person that the respondent's parent company hired for the job (which was at pages 3868-3869), "it was quite evident that the person would need a substantial electrical qualification in order to perform this role", and that that meant someone who "either has a degree level qualification or a vast amount of practical experience dealing with electrical services as opposed to building services". He said that mechanical and electrical engineering are separate subsets of construction engineering. Among other things, he also said that the business that he was involved in was primarily a biomass business and a construction business, and that the advertisement for the role of DETE came from a distributed energy business. When we asked him what that meant, he said this:

> "Ten years ago everyone wanted solar panels on their roof, but now the tariffs are not so good so they are looking for batteries to store the energy. They (i.e. Centrica) were looking for persons with specific knowledge in energy efficiency."

107 When asked what was meant by "IPMVP accreditation", he clarified that it was short for "International Performance and Verification Protocol" and that having either that accreditation or working knowledge of it was "critical" and that the reason for that was this:

> "When you go into a building with an old power and heating system, you are going to ask how much stripping it out is going to cost you; this tool tells you how much you are using now and how much you would be using in the future. All parties should look at it as there are lots of systems installed where you don't get the savings you think you should have. And that tool helps to solve the conundrum."

108 We pause to record that in cross-examination, when the claimant was asked whether he knew what IPMVP stood for, he said "Not now." When asked if he knew what it was, he said that he knew that it was a "a standard; basically a standard that we would [have needed to comply with]" but that he did not remember it currently as he had been working in a different industry for some time by the time of the hearing before us. He did remember, however, that IPMVP was "an industry standard".

109 Returning to Mr Smith's evidence, he was asked also about the role of Heat Pump Specialist and he said that at the time when he was considering whether the claimant should be dismissed, the respondent was unable to find information regarding that role. It was, however, later identified by the respondent, and Mr Smith was able to say by looking at the documentation relating to it (the advertisement for it was at pages 2913-2915) that "they were looking for someone who had vast experience of heat pumps". He also said that he was not aware that the Construction Services division ever needed a heat pump specialist. He said that "if we had needed someone we would have gone external", i.e. the Construction Services division would have employed an external contractor to do the work. We note here that the claimant said in cross-examination that he was personally involved in doing detailed design work for heat pumps, and that if there was a heat pump on any construction site that he visited in his role as an engineer for the respondent then he would inspect it.

110 Returning to Mr Smith's evidence, he said also that "in real life if somebody wants a job in an organisation the size of British Gas, all the tools are there", i.e. the job vacancy website and pages on the Intranet were accessible by anyone in the position of the claimant (i.e. whether or not the claimant had immediate access to the Intranet, the same information was accessible via the

internet), and that he would have expected someone at the claimant's grade of Level 6, or, in fact, anyone else, to use those tools. We accepted that evidence.

111 Mr Smith's oral evidence (which we accepted) was that he did not recall the claimant speaking to him about his (the claimant's) mental or physical health or at any time saying that he was disabled and should accordingly be treated more favourably than a normal redeployee. He did, however, vaguely recall the fact that the claimant had been said by an occupational health adviser in July 2016 to be suffering from depression being discussed, but when it was put to him in cross-examination that he should have borne that in mind when considering on 16 February 2017 whether or not the claimant should be dismissed, he said that before it was possible to "move that forward", it was necessary to have a return to work programme. He also said that if the person in question had raised a grievance then it was necessary to "follow that process", and if there was in existence occupational health advice then there was a need to communicate with the individual in order to work out a return to work programme. Thus, there was a need for the claimant to engage in person with the respondent. The only way in which that was going to occur in the circumstances was if the claimant had a physical meeting to discuss his grievance, or an individual consultation meeting to discuss the proposal to dismiss him for redundancy, or both.

112 When asked about the possibility of the claimant returning to work in December 2016 or January 2017, Mr Smith said that they were during that period "right in the middle of the closure of the business". As a result, the business was simply in the process of having individual consultation meetings with the staff for whom there was no more work. Ultimately, the only thing that could have happened to avoid the claimant's dismissal for redundancy was for him to be employed in another part of the operations of Centrica. Mr Smith was adamant (and we accepted his evidence in this regard) that the claimant's medical condition (whatever it was) had nothing whatsoever to do with his decision that the claimant's contract of employment should be terminated. Rather, it was the complete lack of work to be done by a person in the position of the claimant in the Construction Services division which was the reason for the claimant's dismissal. If and to the extent that Mr Smith knew that the claimant had made a claim of race and disability discrimination, it had, he said (and we accepted) nothing to do with the decision to dismiss the claimant.

113 The claimant was informed of, and exercised, his right to appeal against that decision. After being given oral notice of his dismissal by reason of redundancy, the claimant sent the email of 16 February 2017 at page 2713-2714. It contained a slight expansion of the factual basis for his grievance.

114 At the claimant's request, his appeal against his dismissal was determined on paper only. It was determined by Mr Smedley. He carried out a very careful and thorough analysis of the claimant's stated reasons for appealing. He told us

(and we accepted) that he had felt completely free to determine the appeal in the claimant's favour, and he would have had no hesitation in doing so if he had felt that it was necessary to do so. Mr Smedley's detailed reasons for rejecting the claimant's appeal were in his letter dated 19 July 2017 of which there was a copy at pages 2944-2958 (and, without handwritten comments on it, at 3138-3155). The documents of which he took account were in the bundle at pages 2959-3137.

115 Mr Smedley, when asked by the claimant to accept that the claimant was disabled at the time that he (Mr Smedley) determined the appeal, said that he had paid particular attention to the occupational health report at pages 1271-1272, and that he had taken away from that in particular the fact that it was the clear view of the occupational health adviser who had written that report that the claimant was not suffering from a disability within the meaning of the EqA 2010.

116 When Mr Smedley was reminded that the claimant had stated in row 18 of his table setting out his grounds of appeal, at page 3003, that he had claimed that there had been a "failure to make [a] reasonable adjustment ... following [a] disability related absence", and that "Redeployment into [a] suitable alternative role would have made it possible to remain in employment", Mr Smedley said this (or words to this effect):

> "It was one of a number of items that I considered and I did not receive any evidence that supported [the proposition] that disability was a factor. There was, however, something formal on record as opposed to someone saying it was a belief. I would not just accept an opinion of an individual expressing a claim; it would have to be supported by evidence. I could only act on what I saw.
>
> I had asked the questions and looked for the evidence. I was receiving full responses to the questions that I was asking. I was being engaged with [by the claimant] quite comprehensively. So, I was struggling to understand if there was an issue that I was not seeing. I am not an expert on stress but very often people shut down and withdraw. That was not so here; so there was no clue suggesting that the organisation needed to step in and do something different, as what I saw was a lot of engagement. The claimant was talking about jobs but not applying for them. Nothing suggesting to me that the individual was incapable of applying."

117 We record here that the claimant accepted in cross-examination that he was not incapable of applying for the posts which he identified as being potentially suitable: his disability did not affect his ability to apply for those jobs.

118 Mr Smedley's letter included (at pages 3150-3151) a response to the allegation

that when the claimant's redundancy was confirmed verbally, British Gas was unable to confirm the status of the five roles identified by the claimant in his email of 21 November 2016 (to which we refer and of which we set out the relevant extract in paragraph 61 above). At page 3151, Mr Smedley wrote this:

> "You first mentioned roles in your email dated 21 November 2016, although you were not able to explain to me how you became aware of them. Whilst you have consistently raised lack of access to the BG redeployment site (www.myopportunitiesincentrica.com) as a barrier to redeployment opportunities, I can see that this was provided to you in person by Wayne Smith on 16 February 2017, followed up by his letter of the same date.
>
> Three of the roles listed above were still open at that time, the last of which closed on 20 March 2017. However, although you were provided with the know-how to access the advertisements and to apply for these roles, you chose not to.
>
> Given the number of applicants for each role [and they were set out in the table at the top of page 3151], the date the adverts closed, the access provided to you throughout and your failure to apply for any of them, I do not believe that the status of the seven roles would have had any bearing on your redundancy."

The respondent's deductions of pension contributions from the claimant's pay

119 The claim stated in paragraph 4.1.4 above was advanced by the claimant in relation to deductions from his pay of pension contributions (i.e. his own) and in relation to the failure (as he alleged, by reference to documents which he obtained from the administrator of the respondent's defined contribution pension scheme, Standard Life) to pay the full amount of the respondent's pension contributions.

120 The first of those two claims was that the respondent had wrongly treated the statutory sick pay which the claimant was paid in the months of June, July and August 2016 as not being pensionable so that instead of making the deduction of 5% from that pay and paying it to Standard Life, it had paid the claimant the remuneration subject to the deduction of income tax and (if applicable) national insurance contributions.

121 The second of the claims was made by reference to a document at page 3237. That document was, said the claimant, obtained by him from Standard Life, who administered the respondent's pension scheme. If it was correct then it showed that there were anomalies in relation to the pension contributions made to the pension fund in that at all times other than in June, July and August 2016, two equal payments were made to the scheme, and those payments

were regular. Thus, on page 3237, for May 2016, two payments of £253.62 were shown but in June, payments of £253.62 and £246.99 were shown, in July payments of £253.62 and £225.32 were shown, and in August payments of £245.14 and £231.31 were shown.

122 Neither party was able to put before us any direct evidence about the reason or reasons for those different payments, but the evidence of Mr Powell on behalf of the respondent (which we accepted) was that the amounts paid to the claimant's pension fund were calculated by payroll software (provided by SAP) and there was no human input into that action. However, it was the respondent's case (put by Mr Purnell on instructions and by reference to a screenshot put before us on Wednesday 4 December 2019) that in fact there had been no underpayment by the respondent of contributions to the claimant's pension fund. That screenshot showed that in August 2016 the amount paid by the respondent by way of pension contributions was £504.59, and that the employee's pension contribution was £250.97. That showed, we concluded, that the employer's contribution was in fact £253.62. That was borne out by the claimant's pay slip for that month, at page 3233, which showed that £253.63 (the correct amount) was paid by the employer into the claimant's pension fund. In addition, the claimant's pay slips for June and July 2016 (at pages 3232 and 3231 respectively) showed the payment of £253.63 by way of the employer's pension contributions. The payslips at pages 3220-3222 (which were in a slightly different form from those at pages 3231-3233) showed the same thing.

The events of 2018 which led to the claim identified in paragraph 4.1.8 above

123 The fact that the claimant's pension fund received full contributions after August 2016 up to the end of the claimant's employment, in February 2017, reflected the fact that the respondent's payroll staff had failed to realise that the claimant was absent because of sickness during the whole of that period. As a result of that failure, the claimant was paid his pay in full until the end of his employment with the respondent. In fact, he had a contractual entitlement to be paid sick pay of no more than six months' at full pay and six months' at half pay during any year of employment. His sickness absence had started on 2 June 2016 and therefore his contractual entitlement to full pay had ended on 1 December 2016 minus the number of days that he was absent from work on account of sickness in April 2016. Thus, he had been paid twice his contractual entitlement for some months.

124 That fact was discovered during July 2018 as a result of Ms Julie Thomas, an employee of the respondent who was responsible for dealing with the claimant's employment tribunal claims, making inquiries about the claimant's salary for the purpose of responding to the claims. A witness statement made by Ms Carol Stanley was put before us, but she was unable to give evidence because of illness. The respondent therefore adduced oral evidence from Mr Powell, her line manager, who corroborated her (unsigned) witness statement.

Paragraphs 1-5 of Ms Stanley's witness statement were in the following terms:

1. I am employed by British Gas and I work as a Payroll Collections Administrator in its Collections Team.

2. The Collections Team is responsible for managing any overpayments relating to former employees. We are based in Hattersley, Manchester and, during Summer 2018, we were made up of just myself and my colleague, Catherine Howbrook.

3. My involvement in this Tribunal claim is that the Collections Team arranged for Centrica People Services ('CPS') to send a letter dated 25 July 2018 to the Claimant requesting repayment of over-paid salary which he had received (pages 3912 - 3913).

4. CPS is operated by a third party (Alight Limited) which carries out HR administration tasks on behalf of Centrica plc.

5. This letter was sent as part of the normal procedure we follow when an over-payment of salary has been identified by the Payroll team. When this letter was sent, neither me, nor my colleague Catherine were aware that the Claimant had brought existing Tribunal claims or alleged discrimination against British Gas and / or any of its employees. This letter was sent to the Claimant as part of our standard process for contacting ex-employees who have been over-paid based on payroll records."

125 The amount of the repayment sought was stated initially as being over £7,000, then it was £4,237.56 and then, finally, it was £4,002.60. However, as stated in paragraph 2 above, the respondent subsequently declined to press for the repayment of the latter (or any) sum. We accepted the evidence of Mr Powell that the reason for the demand for repayment and the manner in which it was made was as stated by Ms Stanley in paragraphs 3-5 of her witness statement, set out in the preceding paragraph above.

The respondent's relevant policies

Redeployment policy

126 The respondent's redeployment policy (applicable in the event of redundancies) was at pages 162-164. At pages 163-164, there was this passage:

"**Selection Process**

The normal assessment and selection process will be applied if you are in a redeployment situation and the following will be taken into account:

- You will be considered before other applicants for advertised roles. This means that you and all other candidates will be interviewed at the same time but that first consideration will go to you;

- You will not be appointed into roles where there are any shortfalls in the required skills/experience and where it would not be practical to train/develop you in a reasonable period of time taking into consideration business requirements and available resources;

- You will not be appointed into a role where another redeployee has skills or experience more closely matched to the requirements of the role;

- If you are returning from maternity leave and you are in a redundancy situation, you will be given priority over other applicants in relation to a suitable and available position."

127 Under the heading "Vacancy Identification" on page 163, immediately preceding the passage set out in the preceding paragraph above, there was this passage:

> "Although the suitability of alternative positions will ultimately be decided by the Company, it is the responsibility of you and your manager to try to identify potentially suitable vacancies. Vacancies will be identified through the normal vacancy advertising process (advertisements being available through MyWorld) and you will be given priority consideration.
>
> In order to assist us to identify suitable roles, you should search for suitable internal vacancies on MyWorld. To assist you with this, you can set up job alerts under the My Opportunities section in MyWorld:
>
> http://intranet/C5/C1 on%20am%20looking%20for%20a%20job/default.aspx
>
> This enables you to get the latest job alerts delivered to your inbox as they are advertised.
> Please note, your alerts will not be active until you click on the link in the confirmation email that you receive."

128 There was in that policy no reference to the possibility of giving priority to the redeployment of a person with a disability, although there was a reference to the next policy to which we refer below (the "Manager's guide to disability") in the first bullet point on page 162, which was in these terms:

> "There are separate policies and procedures that may be referred to

depending on the reason for the redeployment:

- Medical or Ill health - refer to the Group Managers' Guide to Disability Discrimination Act and the appropriate Managing Attendance policies and procedures".

Manager's guide to disability (165-178)

129 The Manager's guide to disability was plainly a guide to the law. It was not prescriptive. It gave on page 172 as examples of adjustments which might be required by an employment tribunal:

"• Transferring the person to fill an existing vacancy (we should offer employees with disabilities redeployment in preference to others). This might also involve reasonable retraining.

- Altering the employee's working hours, ie a phased return to work, allowing someone to work different hours to fit in with the availability of their carer, reduced work allocation."

130 Those bullet points were clearly intended to apply where an employee with a disability needed to be for example redeployed because of that disability.

Avoidance of Harassment and Bullying in the Workplace Policy (pages 197-205)

131 The respondent's "Avoidance of Harassment and Bullying in the Workplace Policy" stated under the heading "Formal process" on page 203:

"If you want to make a formal complaint:

...

- We will ensure you're not required to work with the alleged harasser until the matter Is resolved. This could involve a transfer to another department. We will discuss the proposed options with you".

The claimant's contract of employment

132 Clause 13.2 of the claimant's contract of employment was in these terms:

'The Company may at its sole and absolute discretion pay basic salary alone (as referred to in the "Salary" clause above, at the rate in force at the time such payment is made) in lieu of any unexpired period of notice (less all deductions the Company is required by law to make).'

The parties' submissions

The claimant's submissions

133 The claimant relied in a number of places in his closing submissions on what might be regarded as unguarded or ill-judged comments made by several of the respondent's witnesses in emails written before the claimant was dismissed. Those emails were at pages 1279-1280, 2161, and 2225. At pages 1279-1280 there was an email exchange between Ms Taylor and Ms Sangha of 8 July 2016 which started with Ms Taylor saying this:

> "Hiya, just thinking about this, I wonder whether we ask CT to escort you on this home visit? I am very nervous about us two going into his home!! Or we meet him at a local hotel and we book a meeting room?"

134 In addition, in her next email, Ms Taylor said: "surely we can force a meeting next week ... he must be available surely???".

135 At page 2161 Ms Taylor had written to Mr Smith in an email dated 13 December 2016: "He has just really peed me off. I might send Abraham the Job Descriptions ... that would be fun!! I know he's not a QS but it would be worth a laugh", and Mr Smith had replied: "Why not!". However, that email was part of a chain which started at 2167, and all of the emails from then onwards (up to and including the one at the bottom of page 2161: they had to be read in reverse) were about the role of quantity surveyor and had nothing to do with the claimant. The person who had "peed" Ms Taylor off was clearly not the claimant.

136 At page 2225, Ms Taylor had written to Mr Smith in response to the claimant's email of 19 December 2016 which we set out in paragraph 82 above:

> "This guy is an idiot!
>
> I'm loosing [sic] the will to live with it."

137 The claimant's submissions relied on a combination of the policies referred to in paragraphs 126-131 above. He also relied heavily on the proposition that he had not received various communications from the respondent, but we had difficulty understanding on what basis he submitted that the fact (if it was such) that he had not received those communications supported the claims that he was in fact pursuing. The claimant's detailed submissions in his skeleton argument which we treated as his main witness statement included that it was reasonable for the respondent to

137.1 follow its own harassment and bullying in the workplace policy

137.2 transfer the claimant to a different business unit (necessarily under a different line manager, in fact, although that was the subject of a separate submission)

137.3 conduct a meeting in writing as requested by the claimant

137.4 "follow its own Manager's guide to disability"

137.5 "allow phased return to work"

137.6 "redeploy into an existing vacant role"

137.7 "separate return to work from redundancy process. Return to work of a disabled employee should not require a redundancy consultation meeting."

137.8 'waive requirement to apply for role. The Manager's Guide to disability does not include anything about applying the "normal assessment and selection process" (p. 165-178 in bundle)'

137.9 "take into consideration that I was unwell and provide key information by letter"

137.10 "provide grievance questions by letter instead of email"

137.11 "send invitation to 16.12.2016 individual consultation meeting by letter instead of email"

137.12 "inform me that I was a redeployee by letter instead of email"

137.13 "follow its own grievance policy. It was reasonable to provide grievance outcome. It was reasonable to postpone the decision to dismiss pending the outcome of grievance"

137.14 "agree 1 out of 5 roles is a suitable alternative"

137.15 "agree 1 out of 7 roles is a suitable alternative"

137.16 "offer me an existing vacant role"

137.17 "waive requirement to apply for role. It was reasonable to have properly assessed me for role by some other means before dismissing me."

137.18 "to redeploy into an existing vacant role"

137.19 “not to have dismissed me”

137.20 “have allowed me to serve notice period in employment. Dismissing with notice would have allowed me time to facilitate internal transfer during the notice period”, and

137.21 “properly investigate dismissal appeal and not uphold decision to dismiss”.

138 We pause to observe that there was in those submissions a certain amount of repetition by the putting of the same point in a number of ways. We have not set out or referred to all of the claimant’s submissions because, given our findings of fact and our understanding of the law, they were not all material. In addition, a number of the submissions concerned what were in reality peripheral issues, bearing in mind that the nub of the claimant’s claim was that he should have been redeployed without having to apply for an alternative post.

139 Similarly, the claimant had identified, on pages 30-33 inclusive of his written closing submissions, 22 separate provisions, criteria or practices (“PCPs”) which he said had been applied by the respondent, namely:

139.1 “Failure to follow its own harassment and bullying in the workplace policy”

139.2 “Requirement to work in Rugby”

139.3 “Requirement to work with the same line management structure that was the cause of my absence”

139.4 “Insistence/ requirement that I attend meeting in person or on telephone with Peter Harrison, Byron Pountney, Chris Bennett”

139.5 “Failure to follow its own Manager’s guide to disability”

139.6 “Requirement to return to work full time straight away following long term disability related absence”

139.7 “If not redeployed, I was at risk of not being allowed to return to work”

139.8 “Reliance on redundancy consultation process for a disabled employee to facilitate his return to work”

139.9 “The application of redundancy process without consideration that I was a disabled employee needing redeployment / Requirement to attend redundancy consultation meetings in order to facilitate

redeployment"

139.10 "Requirement to apply for a role in order to be transferred / redeployed"

139.11 "Practice of expecting employee to have received and or read emails, regardless of whether they are absent from work, have reported not receiving emails and or whether the email had actually been delivered to the employee inbox"

139.12 "Practice of not allowing reasonable time between date letter is posted and when I am expected to attend a meeting and or take action on content of letter"

139.13 "Failure to follow its own Grievance policy / provide grievance outcome and or afford opportunity to appeal outcome"

139.14 "An arrangement adopted by Respondent in failing to agree 1 out of 5 roles is a suitable alternative"

139.15 "Requirement to discuss with line manager if suitable role is identified"

139.16 "An arrangement adopted by Respondent in failing to agree 1 out of 7 roles is a suitable alternative"

139.17 "Not offering any existing vacant position"

139.18 "Requirement to compete with external candidate for a role in order to be redeployed / transferred to facilitate retention in employment"

139.19 "If not redeployed, I was at risk of being dismissed"

139.20 "Dismissal"

139.21 "Practice of Dismissal with pay in lieu of notice / if not serving notice in employment, I could not be considered for role", and

139.22 "If appeal is not properly investigated, I was at risk of having dismissal upheld".

140 As for the claim of wrongful dismissal, that was pressed on pages 26-27 of the claimant's written closing submissions. The claimant sought a finding that he had been wrongfully dismissed on 31 January 2017. He had also included these two paragraphs:

140.1 "Respondent has not provided evidence that it was entitled to dismiss me without notice."

140.2 "I suffered consequential loss arising from Gunton extension?"

The respondent's submissions

141 Mr Purnell made submissions on the law and, separately, on the facts and the application of the law to the facts. Of most significance in relation to the claim of a failure to make a reasonable adjustment concerning redeployment was Mr Purnell's submission that (1) the respondent had applied only one provision, criterion or practice ("PCP") potentially within the meaning of section 20 of the EqA 2010 in regard to redeployment, namely that the claimant was required to apply for an alternative post if he wanted to remain in the employment of the respondent, and (2) the claimant had not been put at a disadvantage by that requirement, as he had (as he had accepted in oral evidence) been able in practice to comply with it. In regard to the possibility of returning to work in December 2016 and January 2017, it was Mr Purnell's submission that the respondent had applied a PCP of requiring an employee on long-term sick leave to engage with the occupational health team regarding the formulation of a return-to-work plan, and that the application of that PCP had not put the claimant at a substantial disadvantage as compared with non-disabled employees. In both cases, as a result, Mr Purnell submitted, no duty to make reasonable adjustments had arisen under section 20 of the EqA 2010.

142 As for the claim of a breach of section 15 of the EqA 2010 by demanding overpaid salary, Mr Purnell submitted that that was not unfavourable treatment as a result of something arising in consequence of the claimant's disability as it was "exactly the same as in any case of overpayment", but that if that was not accepted as a proposition, then it was "objectively justifiable for [the respondent] to utilise the automatic collections process described in Stephen Powell's witness statement in order effectively to administer its payroll system in circumstances where it employs over 30,000 people, notwithstanding the risk that from time to time employees might receive an automatic notification of a salary overpayment about which they had previously been unaware."

143 Mr Purnell's submissions on the applicable law were of considerable assistance, and we accepted them with one or two minor exceptions, to which we refer in the following section below, where we state our understanding of the applicable law.

<u>The law</u>

144 Because of our findings of fact stated above, we did not need to consider all of Mr Purnell's closing submissions on the law. We state below only what we considered to be the key statutory provisions and applicable case law.

Section 136(2) of the EqA 2010

145 Section 136(2) of the EqA 2010 provides that if there are facts from which a court could decide, in the absence of any other explanation, that a person contravened any provision of that Act, then the court must decide that that contravention occurred unless that person "shows" that he/she/it did not contravene that provision.

146 There is much case law concerning the application of that provision, and we record here only that (1) we accepted what Mr Purnell said in paragraphs 8-11 of his closing submissions on the law and (2) we bore it in mind that in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 or victimisation within the meaning of section 27 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred. That is the result of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

Section 15 of the EqA 2010

147 Section 15 of the EqA 2010 provides:

> "(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."

148 That section requires a tribunal to ask

148.1 whether the claimant's disability caused, led to the consequence that there was, or resulted in, "something", and

148.2 if so, whether the respondent treated the claimant unfavourably because of that "something".

149 In determining whether or not there was unfavourable treatment for that purpose, it is necessary to take into account the decision of the Supreme Court in *Williams v Trustees of Swansea University Pension and Assurance Scheme*

[2018] UKSC 65, [2019] ICR 230. Mr Purnell submitted that it had the effect that "a disabled person who is treated *advantageously* in consequence of his disability, but not as advantageously [as] he might have hoped, will not have a valid claim for discrimination under s.15 (at § 20)".

150 That was, we concluded, a potentially misleading summary of the effect of paragraph 20 of the judgment of Lord Carnwath in *Williams*. In that paragraph, Lord Carnwath set out paragraphs 48 and 49 of the judgment of Bean LJ in the Court of Appeal in that case. Paragraph 49 was more relevant to this case, and was in these terms:

> 'No authority was cited to us to support the view that a disabled person who is treated advantageously in consequence of his disability, but not as advantageously as a person with a different disability or different medical history would have been treated, has a valid claim for discrimination under section 15 subject only to the defence that the treatment was a proportionate means of achieving a legitimate aim. If such a claim were valid it would call into question the terms of pension schemes or insurance contracts which confer increased benefits in respect of disability caused by injuries sustained at work, or which make special provision for disability caused by one type of disease (for example cancer). The critical question can be put in this way: whether treatment which confers advantages on a disabled person, but would have conferred greater advantages had his disability arisen more suddenly, amounts to "unfavourable treatment" within section 15. In agreement with the President of the Employment Appeal Tribunal I would hold that it does not.'

151 The effect of *Williams* was most clearly and succinctly stated in paragraph 28 of the judgment of Lord Carnwath, which was so far as relevant in these terms:

> 'It is necessary first to identify the relevant "treatment" to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that. By contrast in *Malcolm* [2008] AC 1399 , as Bean LJ pointed out [2018] ICR 233, para 42, there was no doubt as to the nature of the disadvantage suffered by the claimant. No one would dispute that eviction is "unfavourable". Ms Crasnow's [Ms Crasnow was counsel for the claimant] formulation, to my mind, depends on an artificial separation between the method of calculation and the award to which it gave rise. The only basis on which Mr Williams was entitled to any award at that time was by reason of his disabilities. As Mr Bryant [counsel for the respondent] says, had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. It is unnecessary to say whether or not the award of the pension of that amount and in those circumstances was "immensely favourable" (in Langstaff J's words). It is enough that it was not in any sense

"unfavourable", nor (applying the approach of the Code) could it reasonably have been so regarded.'

152 In *Pnaiser v NHS England* [2016] IRLR 170, Simler P (as she then was) sitting in the Employment Appeal Tribunal ("EAT") gave (in paragraph 31 of her judgment) the following guidance about the manner in which the question whether there has been unfavourable treatment for the purposes of section 15 of the EqA 2010 should be addressed:

"In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707 , *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893 , as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having

regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that “a subjective approach infects the whole of section 15” by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, ‘discriminatory motivation’ and the alleged discriminator must know that the ‘something’ that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the ‘because of’ stage involving A’s explanation for the treatment (and conscious or unconscious reasons for it) and the ‘something arising in consequence’ stage involving consideration of whether (as a matter of fact rather than belief) the ‘something’ was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the ‘something’ leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram’s construction, and there

would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

153 As Mr Purnell submitted, another judgment of Simler P in the EAT provided clarification in regard to whether or not there has been unfavourable treatment within the meaning of section 15 of the EqA 2010. That is the case of *Charlesworth v Dransfields Engineering Services Ltd* UKEAT/0197/16/JOJ, where Simler P made it clear that it may in some cases be necessary (or at least lawful) "to draw a distinction between the context within which the events occurred and those matters that were causative", and then to conclude that the "something" that caused the claimed unfavourable treatment was no more than "the context within which the events occurred".

Section 20 of the EqA 2010; reasonable adjustments

154 Section 20 of the EqA 2010 provides so far as relevant:

"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."

155 There is much case law concerning the application of that provision or its statutory predecessors (the first of which was section 6 of the Disability Discrimination Act 1995 ("DDA 1995")). One important case was that of *Archibald v Fife Council* [2004] ICR 954, where the House of Lords held (quoting from the headnote):

"that the circumstances where a section 6 duty arose included an

employee becoming incapable of fulfilling their job description so as to become liable to be dismissed, and the step envisaged by section 6(3)(c) of transferring the employee to "fill an existing vacancy" was capable of extending to the placing of that person in the same or a higher grade post without competitive interview, if that was reasonable in all the circumstances" (emphasis added).

156 Mr Purnell submitted that the decision of the EAT in *Secretary of State for the Department of Work and Pensions v Alam* [2010] ICR 665 showed that the duty to make an adjustment does not arise "until the employer knows or ought reasonably to know that the individual in question is disabled **and** is likely to be placed at a substantial disadvantage because of their disability." The ruling in that case (which Mr Purnell correctly submitted was to be found in paragraphs 17 and 18 of the judgment of Lady Smith) was based on section 4A(3)(b) of the DDA 1995, which was in these terms:

> "Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know … (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."

157 That provision was re-enacted in paragraph 20 of Schedule 8 to the EqA 2010. The discussion in paragraphs L[405]-[406] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") shows that the ruling in *Alam* remains applicable.

158 Mr Purnell also submitted (in paragraph 20 of his closing submissions on the law) that:

> 'A one-off application of a process or policy cannot reasonably be regarded as a "practice". A PCP in most cases requires evidence of some more general repetition, applicable to others than the person suffering the disability (*Nottingham City Transport Ltd v Harvey* [2013] Eq. L.R. 4 per Langstaff P at §18-20)."

159 That was in our view an accurate statement of the effect of the relevant case law, with the caveat that the key is that a PCP need only be applicable to all employees of the employer, irrespective of whether or not the PCP has actually been applied previously.

160 Mr Purnell drew our attention also to the decision of the Court of Appeal in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 where, in paragraph 14 of his judgment, Laws LJ said that "an adjustment which is either excessive or inadequate will not be reasonable".

161 In *Wade v Sheffield Hallam University* UKEAT/0194/12/LA, HHJ McMullen QC

held that it would not be a reasonable adjustment to disapply the essential ingredients of a job.

162 In *NTL Group v Difolco* [2006] EWCA Civ 1508, in paragraph 13 of his judgment (with which Waller and Leveson LJJ agreed, but paragraph 13 was in fact obiter), Laws LJ said this:

> ‘Moreover, as it seems to me, it is critical to have in mind the fact that the respondent [i.e. the claimant in the employment tribunal] chose in the event not to apply for the Teesside job. [That was a full-time job, and because of the claimant’s disability, she was not able to work full-time.] Mr Cohen [counsel for the employer] submits (supplementary argument paragraph 13) that an employer is not obliged:
>
> > “… to make any adjustments to a role to remedy the substantial disadvantage of a disabled potential candidate before that candidate has applied for the job”.
>
> As a proposition this seems to me to have much force. If the mere fact of advertising for a full-time job can constitute an arrangement for the purposes of the DDA [i.e. the Disability Discrimination Act 1995] then on the face of it it would potentially discriminate against the whole innominate class of possible disabled applicants for the job. That, it may well be thought would be a reductio ad absurdum.’

Victimisation; section 27 of the EqA 2010

163 Section 27 of the EqA 2010 applies where an employer subjects an employee or former employee to a detriment because the employee has done a “protected act”, which clearly includes the making of a claim to an employment tribunal that the employer has breached one or more requirements of the EqA 2010. It also includes an assertion that the employer has breached, or may in the future breach, a provision of the EqA 2010.

164 We took into account in considering what was a “detriment” for this purpose, the following paragraph (L[484.02]) in *Harvey*:

> ‘Once the existence of the protected act, and the less favourable treatment (or under the EqA 2010 the ‘detriment’) have been established, in examining the reason for that treatment, the issue of the respondent’s state of mind therefore is likely to be critical, and in assessing this it is necessary to consider the judgments of the House of Lords in the cases of *Nagarajan v London Regional Transport* [1999] IRLR 572, [1999] ICR 877, and *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, [2001] ICR 1065, and to the same effect, the Court of Appeal in *Cornelius v University College of Swansea* [1987] IRLR 141 ... In

considering these cases however it is important to have regard to the warning of the House of Lords in the later case of *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] IRLR 540, [2007] ICR 841 in which it was emphasised that under the victimisation provisions it was primarily from the perspective of the alleged victim that one determines the question whether or not any 'detriment' had been suffered, and it is not proper to judge whether or not a particular act can be said to amount to victimisation from the point of view of the alleged discriminator. As Lord Neuberger held: 'of course, the words "by reason that" require one to consider why the employer has taken the particular act … and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused detriment, one must view the issue from the point of view of the alleged victim.'

The law of wrongful dismissal

165 There is in *Harvey* this helpful paragraph (A[477]):

> "The assessment of damages is upon the basis of contractual entitlement as opposed to what the employee may have earned but to which he had no contractual entitlement. There is, however, one exception to this at common law. If the contract incorporates a disciplinary procedure or some other administrative process which must be followed before notice of termination may be given validly, the time such a process may have taken, had it been followed, may also be added to the notice period itself when determining the period in respect of which damages are to be assessed; this possibility first arose from the case of *Gunton v Richmond-on-Thames Borough Council* [1980] IRLR 321, CA and can also be seen in *Focsa Services (UK) Ltd v Birkett* [1996] IRLR 325, EAT and *Dietmann v Brent London Borough Council* [1988] IRLR 299, [1988] ICR 842, CA. In the jargon, it tends to be known as the '*Gunton* extension'."

Our conclusions

166 Taking them in turn (but in a slightly different order from that in which they appear in paragraph 4 above), our conclusions on the claimant's claims were as follows.

(1) The claim of a breach of section 15 of the EqA 2010 by failing to allow the claimant to return to work in December 2016

A discussion

167 We have set out (in paragraph 65 above) the advice of the claimant's GP about his possible return to work in December 2016. In our view while there was at

that time a possibility that the claimant could in theory have returned to work, it was not practicable for him to return to work at Rugby for three reasons: (1) that the business based there (i.e. the business in which the claimant was employed to work) was closing down, (2) the claimant's unwillingness to be managed by Mr Harrison or Mr Moore, and (3) the absence of any other manager to whom he could report there. Thus, the only way in which the claimant was going to be able to return to work was by him being given work to do in a different business of the respondent. However, the claimant was a relatively senior employee with specific professional skills, and in our view failing to simply deploy the claimant to another workplace (i.e. without having a discussion with him about how and where he was going to "return to work") was a proportionate means of achieving a legitimate aim. There were several legitimate aims in play here. One was complying with the respondent's duty of care to the claimant in regard to his mental health. Another was the need to ensure that the claimant was not employed to do work which he was not competent to do.

168 What the respondent sought to do was to engage with the claimant by having a meeting with him. Necessarily that meeting was going to have two purposes: (1) to consider with the claimant in person what he could realistically hope to do by way of work, where that work could be done, and for how many hours per week; and (2) to consult with the claimant about the closure of the workplace at Rugby and how he might remain employed by the respondent. It was in our view impossible otherwise in practical terms to "consider [a] phased return to work from December" as advised by the claimant's GP in the fitness certificate quoted in paragraph 65 above.

Conclusion on claim 1

169 Accordingly, in our view the claimant was not treated unfavourably within the meaning of section 15 of the EqA 2010, or, if he was, then the failure to permit him to return to work without a meeting in person was a proportionate means of achieving a legitimate aim.

(3) The claim of a breach of section 15 of the EqA 2010 by failing to allow the claimant to return to work in January 2017

170 If we had had any doubt about the correctness of our conclusion on claim 1, then it would have been dispelled by what was said in the fitness certificate of 5 January 2017 at page 65 of the claimant's bundle, which was, as stated in paragraph 86 above: "Needs to discuss return to work arrangements". That meant in our view inevitably a meeting in person, which the claimant persistently refused to have. Accordingly, for same reasons as those for which claim 1 did not succeed, claim 3 did not succeed.

(2) The claim of a breach of section 15 of the EqA 2010 by failing to provide the claimant a copy of occupational health assessments of 30 November 2016 and 2 December 2016

171 Claim 2 in our view was not made out because we came (see paragraph 80 above) to the clear conclusion that no written report of any occupational health assessment was created by MyHealth after making contact with the claimant on 30 November 2016 and 2 December 2016.

(4) The claim of a breach of section 15 of the EqA 2010 by failing to pay the claimant the full amount of the 5% contribution to his pension to which the claimant was entitled

172 The fourth claim was of a failure to pay to the claimant's pension fund the full 5% of his basic salary for the three months of June, July and August 2016. In our view that claim was unfounded because there was (see the first sentence of paragraph 122 above) no evidence before us that any person was responsible for causing the sums to be paid into the claimant's pension fund during those months to be inaccurate "because of" the claimant's absence from work on account of sickness.

173 If, however, that conclusion was wrong, then the claim failed on the facts. In regard to the employer's pension contributions, the claimant's payslips showed (as stated in paragraph 122 above) that the full amount of the employer's contribution was in fact made in each of those months. If that was correct, then the Standard Life-provided document at page 3237 was inaccurate, or alternatively it showed that a mistake had been made by Standard Life in its allocations of financial credits to the claimant's pension pot. In those circumstances, we were satisfied on the balance of probabilities that if the claimant's Standard Life pension fund contained less money than it should have done, that was not a result of the respondent's acts, or even of its software, but of the acts of one or more persons acting on behalf of Standard Life, or alternatively of Standard Life's software. If that conclusion was mistaken, however, then in our view the claimant had not proved on the balance of probabilities that the respondent was responsible for any shortfall in the money allocated by Standard Life to the claimant's pension fund, and his claim in that regard had to fail for that reason alone.

174 In so far as the claim related to a shortfall in the claimant's own pension contributions, there was no unfavourable treatment within the meaning of section 15 of the EqA 2010, as the claimant received the amounts net of income tax and he was able to pay those amounts into his pension fund and obtain a refund of the income tax that he had paid on those amounts.

175 We observe here that if we had concluded that there had been an underpayment of the respondent's own pension contributions, then we would

have been minded to conclude that it was not unfavourable treatment within the meaning of section 15 because (1) the claimant could have sought the missing contributions by simply asking the respondent for them and the respondent might then without difficulty have paid them to Standard life, and (2) in our view section 15 is not, or should not, be concerned with minutiae.

(5) and (6) The claim of a breach of section 15 of the EqA 2010 by failing to offer the claimant the role of DETE or Heat Pump Specialist

176 In our view, there was no unfavourable treatment within the meaning of section 15 of the EqA 2010 as a result of the respondent's failing to offer the claimant the role of DETE or Heat Pump Specialist. That was because the claimant would not have been offered those roles, and nor would anybody else, without having first applied for the role and been interviewed for it. There was therefore in the failure to offer the claimant either of those roles no unfavourable treatment because of something arising in consequence of the claimant's disability. If that was wrong and there was unfavourable treatment through the failure to offer the claimant the roles, then it was a proportionate means of achieving a legitimate aim, the aim being to ensure that the role was suitable for the claimant and that the claimant was suitable for the role.

(7) The claim of a breach of section 15 of the EqA 2010 by dismissing the claimant

177 The claim of a breach of section 15 of the EqA 2010 by dismissing the claimant failed on the facts. The claimant was dismissed because of redundancy and because he was not redeployed. That failure to redeploy the claimant and therefore his dismissal was (for the same reasons as those stated in the preceding paragraph above) not unfavourable treatment because of something arising in consequence of the claimant's disability and/or the reason why the claimant was dismissed was that he had not applied for any alternative role and requiring him to apply for an alternative role was a proportionate means of achieving a legitimate aim, the aim being to ensure that the role was suitable for the claimant and that the claimant was suitable for the role.

(8) The claim of a breach of section 15 of the EqA 2010 by reason of initially seeking the repayment of overpaid salary

178 The claim of a breach of section 15 of the EqA 2010 as a result of the making of a demand for the repayment of overpaid salary was in our view not unfavourable treatment, since it was, as submitted by Mr Purnell, "exactly the same as in any case of overpayment". We could not see how it could properly be said to be unfavourable treatment within the meaning of section 15 of the EqA 2010 to demand the repayment of overpaid salary.

179 If, however, that was wrong, then the demand for repayment was a

proportionate means of achieving a legitimate aim, it being in our view impossible to say that it was not a legitimate aim to recover overpaid salary, and the only way to seek to do so is to ask for it back in the way in which that occurred here.

(9) The claim of a breach of section 20 of the EqA 2010 by failing to allow the claimant to return to work in December 2016 and January 2017 and then dismissing him

The claimant's claimed PCPs

180 The PCPs relied on by the claimant are set out in paragraph 139 above. We repeat them here and state our conclusions as to whether they were PCPs within the meaning of section 20(3) of the EqA 2010.

180.1 "Failure to follow its own harassment and bullying in the workplace policy". There may have been no such failure as the claimant never invoked the policy as he first alleged that he had been bullied and harassed on 27 May 2016 and after that he was not well enough even to consider returning to work until 24 November 2016, by which time Construction Services was being wound down and his dismissal by reason of redundancy was proposed. However, in any event, this was not a PCP; if it occurred, then it was a one-off instance, and therefore not a PCP.

180.2 "Requirement to work in Rugby" There was no such requirement imposed on the claimant.

180.3 "Requirement to work with the same line management structure that was the cause of my absence". It is true that the respondent took the stance that the claimant would, if he returned to work at Rugby, have to report to Mr Harrison or Mr Moore, but the claimant was not required, after 27 May 2016, to work with either of them. The claimant's grievance was stated by him (as we record in paragraph 46 above) on 17 October 2016 to be "the grievance raised against Rob Moore". Once the claimant (on 27 November 2016) objected in clear terms to Mr Harrison conducting the first individual consultation meeting in relation to his proposed redundancy, Ms Taylor two days later changed the consultor (see paragraphs 65-68 above) to Mr Bishop. (The first time that the claimant had objected to Mr Harrison conducting the meeting was on 21 November 2016 in the email at page 1776, where the claimant merely said that he "did not wish to have a 121 meeting with Peter Harrison": see paragraph 61 above.) Thus, on the facts, no PCP in the form of a requirement to work with the same line management structure that was the cause of the claimant's absence was applied.

180.4 "Insistence/ requirement that I attend meeting in person or on telephone with Peter Harrison, Byron Pountney, Chris Bennett" The respondent did not insist on the claimant attending a meeting with Mr Harrison (see the preceding paragraph above), and the claimant was not put at a disadvantage by comparison with persons who were not disabled by being required to attend a meeting with Mr Pountney or Mr Bennett, in the circumstances that (1) there was no connection between Mr Pountney and the claimant's absence from work, and (2) such connection as there was between Mr Bennett and that absence was (see paragraph 95 above) that the claimant had referred in his grievance of 27 May 2016 to Mr Bennett as having been critical of his performance on one occasion, which was not such as to put the claimant at a substantial disadvantage for the purposes of section 20.

180.5 "Failure to follow its own Manager's guide to disability" The guide is no more than a statement of an understanding of the law relating to disability. In any event, its focus was the situation where an employee was unable to continue to do his or her job because of a disability. There was no PCP here of a failure to follow the guide. If there had been such a failure, then it would have constituted a one-off instance, and it would therefore not have been a PCP for the purposes of section 20.

180.6 "Requirement to return to work full time straight away following long term disability related absence" The respondent did not here require the claimant to return to work full-time. The respondent sought to have a meeting with the claimant to discuss the claimant's circumstances and how, if at all, his dismissal for redundancy could be avoided. At that meeting, the claimant would have been able to discuss the possibility of him being redeployed, initially on a part-time basis.

180.7 "If not redeployed, I was at risk of not being allowed to return to work" That is not a PCP.

180.8 "Reliance on redundancy consultation process for a disabled employee to facilitate his return to work" The respondent sought to have a meeting with the claimant in the manner and for the purpose stated in paragraph 180.6 above. That did not put the claimant at a substantial disadvantage in comparison with persons who were not disabled.

180.9 "The application of redundancy process without consideration that I was a disabled employee needing redeployment / Requirement to

attend redundancy consultation meetings in order to facilitate redeployment" The respondent sought to have a meeting with the claimant in the manner and for the purpose stated in paragraph 180.6 above. That did not put the claimant at a substantial disadvantage in comparison with persons who were not disabled.

180.10 "Requirement to apply for a role in order to be transferred / redeployed" We accepted that that PCP was applied.

180.11 "Practice of expecting employee to have received and or read emails, regardless of whether they are absent from work, have reported not receiving emails and or whether the email had actually been delivered to the employee inbox" We could not see how the claimant was put at a substantial disadvantage as compared with employees who were not disabled by the respondent expecting him to read his emails, especially bearing in mind that he himself sent a number of communications (of which some were lengthy) by email during the whole of the relevant period. Thus, the practice in question was not a PCP for the purposes of section 20.

180.12 "Practice of not allowing reasonable time between date letter is posted and when I am expected to attend a meeting and or take action on content of letter" The respondent did not apply such a practice, as shown by its frequent postponement of meetings at the claimant's request, and that by at the latest 12 January 2017 the claimant had had ample time to absorb the content of the communications concerning the closure of the Construction Services business and its effect, namely that he was going to need to apply for alternative employment if he was going to remain in the employment of the respondent.

180.13 "Failure to follow its own Grievance policy / provide grievance outcome and or afford opportunity to appeal outcome" There was no such failure. The respondent did its best to consider the grievance by seeking to understand what it was about by seeking clarification of it from the claimant in person and then, when the claimant declined to have a meeting in person to discuss it, by seeking such clarification in writing. Having given the claimant many such opportunities to give such clarification, the respondent, in the knowledge that the Construction Services division was being wound down so that there was no question of the claimant returning to work with Mr Moore or Mr Harrison, ceased actively to consider the claimant's grievance when the claimant appeared to have ceased to press it. In any event, the claimant was not in this regard put at a substantial disadvantage as compared with employees who were not disabled. Thus, there was here in our view no failure by the respondent to follow its own

grievance procedure. If there had been such a failure, then it would have constituted a one-off instance, and it would therefore not have been a PCP for the purposes of section 20. The failure to provide a grievance outcome was also a one-off instance and necessarily led to a failure to afford an opportunity to appeal the outcome which was of course also a one-off instance. Thus there was in this regard no application of a PCP within the meaning of section 20.

180.14 "An arrangement adopted by Respondent in failing to agree 1 out of 5 roles is a suitable alternative" The respondent did not "fail to agree 2 out of 5 roles is a suitable alternative". The respondent required the claimant, as it required all other potential redeployees, to apply for any role that he identified as being suitable. The claimant was able to comply with that requirement. Accordingly, the claimant was not in this regard put at a substantial disadvantage as compared with employees who were not disabled.

180.15 "Requirement to discuss with line manager if suitable role is identified" The respondent did not require the claimant to discuss any suitable role that he identified. He was free to apply for any such role without discussing it with his line manager.

180.16 "An arrangement adopted by Respondent in failing to agree 1 out of 7 roles is a suitable alternative" The same analysis, expanded to cover seven rather than five roles, as that which is stated in paragraph 180.14 above, applies here.

180.17 "Not offering any existing vacant position". This was actually a PCP of not offering any existing vacant position without an application made by the employee and a consideration of whether the role was suitable for the employee and the employee was suitable for the role.

180.18 "Requirement to compete with external candidate for a role in order to be redeployed / transferred to facilitate retention in employment" The claimant would, if he had made an application for any other role in the respondent's operations, have been given priority consideration as a redeployee (see the first bullet point in the redundancy policy set out in paragraph 126 above.) This claimed PCP added nothing to the one identified in the preceding paragraph above.

180.19 "If not redeployed, I was at risk of being dismissed" This was a PCP of dismissing redundant employees who were not redeployed.

180.20 "Dismissal" This PCP added nothing to that which we identify in the preceding paragraph above.

180.21 "<u>Practice of Dismissal with pay in lieu of notice / if not serving notice in employment, I could not be considered for role</u>" The respondent had such a PCP, but it did not put the claimant at a substantial disadvantage as compared with employees who were not disabled.

180.22 "<u>If appeal is not properly investigated, I was at risk of having dismissal upheld</u>" The respondent did not have a PCP of not properly investigating appeals. In any event Mr Smedley's investigation was thorough.

<u>Was there a failure to make a reasonable adjustment?</u>

(1) Possible return to work in December 2016 and/or January 2017

181 If the claimant was going to return to work during December 2016 or January 2017 then, given that there was no further work for him to do in Construction Services, he was going to have to return to work in another part of the respondent's operations. In our clear view it would not have been reasonable to place the claimant in any other role without (1) an application having been made by him for it, (2) a proper assessment of his suitability for it, (3) an assessment of the effect on his health of doing so, and (4) an assessment of how his return to work could be facilitated. Since the claimant did not engage with the respondent by attending such a meeting during December 2016 and January 2017, there was no failure by the respondent to make a reasonable adjustment in relation to the claimant's return to work at that time.

(2) Redeployment

182 In dismissing the claimant in the circumstance that he failed to apply for any alternative role, the respondent did not fail to make a reasonable adjustment. It was not a reasonable adjustment simply to place the claimant in another role without (1) an application having been made by him for it, (2) a proper assessment of his suitability for it, (3) an assessment of the effect on his health of doing so, and (4) an assessment of how his return to work could be facilitated.

(10) The claim of direct discrimination against the claimant because of the protected characteristic of disability through failing to offer him either the DETE role or that of Heat Pump Specialist

183 The reason why the claimant did not receive an offer of alternative employment was that he had not applied for any such employment. Therefore the failure to offer the claimant either the DETE role or that of Heat Pump Specialist had nothing whatsoever to do with him being disabled.

(11) Victimisation

184 The respondent's failure to allow the claimant to return to work in December 2016 or in January 2017 was the result of his failure to attend a meeting to discuss the possibility of him returning to work. That failure had nothing to do with the fact that the claimant had done a protected act in the form of indicating an intention to make a claim of a breach of the EqA 2010.

185 The respondent did not fail to provide the claimant a copy of occupational health assessments of 30 November 2016 and 2 December 2016, as (see paragraph 80 above) no written report of any occupational health assessment was given by the occupational health service to the respondent.

186 Mr Smith's decision that the claimant should be dismissed was, we were entirely satisfied by his oral evidence, especially given the closure of the Construction Services division, in no way affected by the fact that the claimant had done a protected act. For the sake of completeness, we record here that we did not see in the emails referred to in paragraphs 133-136 above anything that caused us to think that Mr Smith had any kind of animus against the claimant. The emails were almost all sent by Ms Taylor. Mr Smith's response to Ms Taylor's suggestion (in the email set out in paragraph 135 above) that the claimant was informed about a quantify surveyor vacancy was seen by us as no more than a polite response to an expression of ironic humour. However, in any event, we did not see that email as indicating in any way that Mr Smith intended to victimise the claimant within the meaning of section 27 of the EqA 2010.

187 Mr Smedley's decision to dismiss the claimant's appeal had, we were satisfied, nothing whatsoever to do with the fact that the claimant had made a claim to an employment tribunal of a breach of the EqA 2010. His reason for dismissing the appeal was so far as relevant solely that the claimant was redundant and had not applied for any possible alternative role.

(12) The claim of wrongful dismissal

188 The claimant's claim of wrongful dismissal was incomprehensible. It was clear from all of the evidence before us (including the claimant's own) that he had not been dismissed on 31 January 2017. The letters from Equiniti referred to in paragraph 101 above were triggered automatically by reason of the claimant being treated as a leaver and were evidence that he had had at least a month more of employment than he might otherwise have had. In addition, it was inconsistent to claim wrongful dismissal on both 31 January 2017 and 28 February 2017, which appeared to be what the claimant was doing.

189 As for the possibility of a "Gunton extension", that was not articulated in the claimant's submissions, and we could not see any basis on which it could be

argued that the claimant's contract of employment should (by reason of the application of the law of contract) have been terminated any later than it was.

190 In addition, there was an express power to give pay in lieu of notice (see paragraph 132 above), so there was no valid claim for any unpaid benefit during the period after 28 February 2017.

In conclusion

191 For all of the above reasons, none of the claimant's claims succeeded. As a result we did not need to, and did not, consider whether time should be extended in any case where the claim was on its face out of time.

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Employment Judge Hyams

Date: 12 December 2019

Judgment sent to the parties on

20th December 2019

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For the Tribunal Office