



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Nos: 4122844/2018

Held in Inverness on 4, 5, 6, 7, 10, 11, 12 and 13 February 2020

Members meeting Friday 20 March 2020

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**Employment Judge: Rory McPherson
Members Eddie McCall
Martha McAllister**

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Mrs Clare Stones

**Claimant
In Person**

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Civil Nuclear Police Authority

**Respondents
Represented by:
Mr D Stilitz QC
Counsel and
A Rathbone
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

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1. In relation to, what were identified as the Pre-Dismissal Claims in the Scott Schedule (SctSch):
 - a. Pre-Dismissal Claim (**SctSch Claim 8**): May 2012: the claimant's claims of cancelled parental leave (unfavourable treatment because of maternity under section 18 EA 2010, direct sex discrimination under section 13 EA

2010) does not succeed, this Tribunal do not have jurisdiction to consider same; and

5 b. Pre-Dismissal Claim (**SctSch Claim 9**): May 2012: the claimant's claims of Requirement to agree a payment plan in respect of overpaid maternity benefits (unfavourable treatment because of maternity under section 18 EA 2010, harassment under section 26 EA) do not succeed, this Tribunal does not have jurisdiction to consider same; and

10 c. Pre-Dismissal Claim (**SctSch Claim 10**): December 2014: the claimant's claims of Failure to offer training and shifts on return from maternity leave (unfavourable treatment because of maternity under section 18 EA 2010) do not succeed, this Tribunal does not have jurisdiction to consider same; and

15 d. Pre-Dismissal Claim (**SctSch Claim 11**): 2014: the claimant's claims of Failure to consider request for flexible working properly on return from maternity leave (harassment under section 26 EA 2010) do not succeed, this Tribunal does not have jurisdiction to consider same; and

20 e. Pre-Dismissal Claim (**SctSch Claim 12**): 2015: the claimant's assertion that there was a failure to conduct a health and safety investigation after Mrs Stones' first grievance (the legal basis of this claim is unclear) does not succeed, this Tribunal do not have jurisdiction to consider same; and

25 f. Pre-Dismissal Claim (**SctSch Claim 13**): December 2015: the claimant's claims of Removal from self-defence training preventing Mrs Stones from returning to work (discrimination arising from disability under section 15 EA 2010, failure to make reasonable adjustments under sections 20 and 21 EA 2010) do not succeed, this Tribunal does not have jurisdiction to consider same; and

30 g. Pre-Dismissal Claim (**SctSch Claim 19**): April 2016 onwards: the claimant's claims of Failure to provide a copy of the sick pay policy and failure to follow the sick pay policy (the legal basis of this claim is unclear) do not succeed, this Tribunal does not have jurisdiction to consider same; and

h. Pre-Dismissal Claim (**SctSch Claim 14**): April 2016: the claimant's claims of Being refused a career break, forcing Mrs Stones to take sick leave

which triggered the capability procedure (discrimination arising from disability under section 15 EA 2010) do not succeed, this Tribunal does not have jurisdiction to consider same; and

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- i. Pre-Dismissal Claim (**SctSch Claim 15**): August 2017: the claimant's claims that she was overpaid whilst on sick leave and then hassled to agree a repayment plan (unfavourable treatment because of maternity under section 18 EA 2010) do not succeed; and
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- j. Pre-Dismissal Claim (**SctSch Claim 16**): the claimant's claims that Mrs Stones was ignored for long periods while on sick leave and not kept up to date with developments (discrimination arising from disability under section 15 EA 2010) do not succeed; and
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- k. Pre-Dismissal Claim (**SctSch Claim 17**): the claimant's claims of Failure to provide funding for treatment of Mrs Stones' medical conditions (failure to make reasonable adjustments under section 20 and 21 EA 2010) do not succeed; and
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- l. Pre-Dismissal Claim (**SctSch Claim 18**): the claimant's claims of Failure to keep proper written records, such as welfare reports (the legal basis of this claim is unclear) do not succeed; and
- m. Pre-Dismissal Claim (**SctSch Claim 20**): the claimant's claims of being requested to repay overpaid sick pay whilst on sick leave and with no earnings (harassment under section 26 EA 2010, failure to make reasonable adjustments under section 20 and 21 EA 2010) do not succeed; and
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- n. Pre-Dismissal Claim (**SctSch Claim 21**): the claimant's claims of Information being withheld on job opportunities (unfavourable treatment because of maternity under section 18 EA 2010) does not succeed; and
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- o. Pre-Dismissal Claim (**SctSch Claim 22**): the claimant's claims of Discriminatory language used about Mrs Stones in email communications (unfavourable treatment because of maternity under section 18 EA 2010, direct sex discrimination under section 13 EA 2010) do not succeed.

i. **Dismissal claims:**

- 5 a. Dismissal-Related Claim (**SctSch Claim 1**): the claimant's claims of Failure to offer suitable alternative employment, failure to offer a phased return to work and/or additional breaks and refusal to consider a return to work in 2018 when Mrs Stones' health had improved (failure to make reasonable adjustments under sections 20 and 21 EA 2010) do not succeed; and
- b. Dismissal-Related Claim (**SctSch Claim 2**): the claimant's claims of Dismissal arising from disability (section 15 EA 2010) do not succeed; and
- 10 c. Dismissal-Related Claim (SctSch Claim 3): the claimant's claims of Dismissal for capability reasons when only physical problems were pregnancy related (unfavourable treatment because of maternity under section 18 EA 2010) do not succeed; and
- d. Dismissal-Related Claim (**SctSch Claim 4**): the claimant's claims of a flawed and rushed capability procedure aimed at dismissing Mrs Stones prior to the birth of her child (unfavourable treatment because of maternity under section 18 EA 2010) do not succeed; and
- 15 e. Dismissal-Related Claim (**SctSch Claim 5**): the claimant's claims of Maternity-related absences treated as sick leave, leading to dismissal (unfavourable treatment because of maternity under section 18 EA 2010) do not succeed; and
- 20 f. Dismissal-Related Claim (**SctSch Claim 6**): the claimant's claims of errors in final termination payments (harassment under section 26 EA 2010) do not succeed; and
- g. Dismissal-Related Claim (**SctSch Claim 7**): the claimant's claims of offer of pay in lieu of notice rather than termination of employment on expiry of notice (asserted as amounting to harassment under section 26 EA 2010) do not succeed.
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REASONS

Introduction

Preliminary Procedure

2. This claimant, Mrs. Stones presented her claim to the Tribunal on **Friday 16 November 2018** following her dismissal **Friday 16 November 2018**, having commenced Early Conciliation on **Monday 3 September 2018** and the ACAS certificate having been issued on **Monday 1 October 2018**, and in respect of which, it was understood that she asserted complaints including claims for
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- a. Unfair Dismissal, and
 - b. Disability Discrimination which were understood to be in terms sections 15 and 20 of the Equality Act 2010 (EA 2010) with the protected characteristic being disability; and
 - 10 c. Pregnancy and Maternity Discrimination under s 18 of the EA 2010, that the capability procedure leading to dismissal amounted to pregnancy and maternity discrimination; and
 - d. Failure to pay capability and sick pay.
3. The respondent (CNC) assert that the reason for dismissal was capability,
- 15 that there was a fair dismissal; and as preliminary matters
- a. in terms of Mrs Stones former status as an officer and employee of a constabulary maintained by virtue of an enactment in terms of s 200 of the Employment Rights Act 1996, (EA 1996) she did not have the right to bring a claim for unfair dismissal; and
 - 20 b. having regard to the date the ET1 was presented any events prior to 20 July 2018 were presented out of time.
- Further the CNC assert that they had not breached the relevant provisions of the Equality Act 2010 and further asserted that in relation to the asserted protected characteristic of disability, there was not concession that disability status, for any relevant period, was accepted.
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4. At **Preliminary Hearing on 22 January 2019** Mrs. Stones intimated that he she understood the argument that her claim for Unfair Dismissal was statute barred. CNC intimated that they would confirm whether disability was conceded and if so from what date and in relation to what, if any impairments.
- 30 In addition, issues were raised regarding clarity around specification of Mrs. Stones claims, beyond unfair dismissal.

5. At **Preliminary Hearing** on **7 March 2019**, CNC intimated that “*based on the cumulative effective of her impairments having a substantial effect on her day to day activities*” Mrs. Stones’ disability status was conceded in relation to the relevant period 2012 until November 2018.

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6. At **Preliminary Hearing** on **19 March 2019**, issues were again were raised regarding clarity around specification of Mrs. Stones claims, CNC observing that it appeared to them there were a number of claims including:

- a. Discrimination arising in consequence of disability (s15 of EA 2010)
- 10 b. Failure to Make reasonable adjustments (s20 & s21 of EA 2010);
- c. Pregnancy and Maternity Discrimination in relation to the dismissal on 16 November 2018 (s18 of the EA 2010); and
- d. Whether the termination payment was made in the correct amount; and
- e. Unlawful deduction of wages, in relation to asserted shortfall in sick pay
15 received by Mrs Stones.

It was agreed that CNC would produce a table (described as a Scott Schedule) setting out the claims CNC understood Mrs Scott was insisting upon and thereafter Mrs Stones would respond. Orders were set out reflecting this process.

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7. In terms of Judgment dated **Tuesday 2 April 2019**, sent to the parties **Friday 5 April 2019**, the Unfair Dismissal claim was dismissed for want of jurisdiction and an application by Mrs. Stones to amend her claim was refused.

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8. On **Wednesday 24 April 2019** CNC provided a table of claims (within what was described as a Scott Schedule) and Mrs. Stones responded providing her Further and Better Particulars utilising the CNC “Scott Schedule” table and following a list Mrs. Stones provided her response, on **Wednesday 3 July 2019**, confirming the claims within the CNC Scott Schedule.

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9. At **Preliminary Hearing** on **6 August 2019** it was agreed that the Mrs. Stones had set out her case in greater details in the table (referred to as a Scott Schedule for ease). It was agreed that the matter should proceed to a Final

Hearing and the witness statements would be utilised by both Mrs. Scott and CNC. CNC's position remained, as set out in its ET3 that claims now articulated in the Scott Schedule Table by Mrs. Scott, having regard to the date the ET1 was presented (rather than date of the articulation of the claims within the Scott Schedule Table) were presented out of time.

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10. On **Thursday 16 September 2019** the Tribunal issued an order issued which set out that; *“not later than 3 weeks before the hearing the parties shall mutually exchange witness statements... to contain all of the evidence to be given by each witness, including that to be given by the parties themselves, and including page references to relevant documents.... statements should include “particulars containing the full details in chronological order(set out in short numbered paragraphs) of all events or incidents which are relied upon or relevant, including in particular; (a) the date of each event or incident, (b) the persons involved and (c) what happened and what was done or said in each case... these statements will be “taken as read”: once the witness has confirmed the terms of his or her statement, under oath, The Tribunal will proceed immediately with cross examination and then re-examination appropriate.”*

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11. The following claims are the the 22 claims asserted for the Final Hearing listed in date order (rather Scott Schedule order as set out in Joint Bundle Volume 1 p177 to p224)

I. Pre-Dismissal Claims:

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- a. Pre-Dismissal **Claim 8**: In **May 2012**: cancelled parental leave (unfavourable treatment because of maternity under section 18 EA 2010, direct sex discrimination under section 13 EA 2010); and
- b. Pre-Dismissal **Claim 9**: in **May 2012**: Requirement to agree a payment plan in respect of overpaid maternity benefits (unfavourable treatment because of maternity under section 18 EA 2010, harassment under section 26 EA 2010); and

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- c. Pre-Dismissal **Claim 10**: in **December 2014**: Failure to offer training and shifts on return from maternity leave (unfavourable treatment because of maternity under section 18 EA 2010); and
- 5 d. Pre-Dismissal **Claim 11**: in **2014**: Failure to consider request for flexible working properly on return from maternity leave (harassment under section 26 EA 2010); and
- e. Pre-Dismissal **Claim 12**: in **2015**: Failure to conduct a health and safety investigation after Mrs Stones' first grievance (the legal basis in Tribunal of this claim remained unstated); and
- 10 f. Pre-Dismissal **Claim 13**: in **December 2015**: Removal from self-defence training preventing Mrs Stones from returning to work (discrimination arising from disability under section 15 EA 2010, failure to make reasonable adjustments under sections 20 and 21 EA 2010); and
- g. Pre-Dismissal **Claim 19**: in **April 2016** onwards: Failure to provide a copy of the sick pay policy and failure to follow the sick pay policy (the legal basis of this claim is unclear); and
- 15 h. Pre-Dismissal **Claim 14**: in **April 2016**: Being refused a career break, forcing Mrs Stones to take sick leave which triggered the capability procedure (discrimination arising from disability under section 15 EA 2010); and
- 20 i. Pre-Dismissal **Claim 15**: in **August 2017**: Mrs Stones was overpaid whilst on sick leave and then hassled to agree a repayment plan (unfavourable treatment because of maternity under section 18 EA 2010); and
- j. Pre-Dismissal **Claim 16**: Mrs Stones was ignored for long periods while on sick leave and not kept up to date with developments (discrimination arising from disability under section 15 EA 2010); and
- 25 k. Pre-Dismissal **Claim 17**: Failure to provide funding for treatment of Mrs Stones' medical conditions (failure to make reasonable adjustments under section 20 and 21 EA 2010); and
- 30 l. Pre-Dismissal **Claim 18**: Failure to keep proper written records, such as welfare reports (the legal basis of this claim in Tribunal remained unstated); and

- m. Pre-Dismissal **Claim 20**: Being requested to repay overpaid sick pay whilst on sick leave and with no earnings (harassment under section 26 EA 2010, failure to make reasonable adjustments under section 20 and 21 EA 2010); and
- 5 n. Pre-Dismissal **Claim 21**: Information being withheld on job opportunities (unfavourable treatment because of maternity under section 18 EA 2010); and
- 10 o. Pre-Dismissal **Claim 22**: Discriminatory language used about Mrs Stones in email communications (unfavourable treatment because of maternity under section 18 EA 2010, direct sex discrimination under section 13 EA 2010); and
- i. **Dismissal claims:**
- 15 h. Dismissal-Related **Claim 1**: Failure to offer suitable alternative employment, failure to offer a phased return to work and/or additional breaks and refusal to consider a return to work in 2018 when Mrs Stones' health had improved (failure to make reasonable adjustments under sections 20 and 21 EA 2010); and
- 20 i. Dismissal-Related **Claim 2**: Dismissal arising from disability (section 15 EA 2010); and
- j. Dismissal-Related **Claim 3**: Dismissal for capability reasons when only physical problems were pregnancy related (unfavourable treatment because of maternity under section 18 EA 2010); and
- 25 k. Dismissal-Related **Claim 4**: A flawed and rushed capability procedure aimed at dismissing Mrs Stones prior to the birth of her child (unfavourable treatment because of maternity under section 18 EA 2010); and
- l. Dismissal-Related **Claim 5**: Maternity-related absences treated as sick leave, leading to dismissal (unfavourable treatment because of maternity under section 18 EA 2010); and
- 30 m. Dismissal-Related **Claim 6**: Errors in final termination payments (harassment under section 26 EA 2010); and

- n. Dismissal-Related **Claim 7**: Offer of pay in lieu of notice rather than termination of employment on expiry of notice (harassment under section 26 EA 2010); and
- 5 12. Parties were notified by letter dated 6 September that the Final Hearing would take place from over 10 days from Monday 3 February 2020. Prior to the commencement of the Final Hearing CNC issued its Skeleton Written Argument to Mrs. Stones who similarly provided her own written Skeleton Argument. CNC in addition provide a Cast List and list of Acronyms. Both were available to the Tribunal at the commencement of the final Hearing. The
- 10 evidential hearing commenced on **Tuesday 4 February** and concluded on **Thursday 13 February 2020** following which parties having agreed that written submissions were appropriate, parties were:
- a. permitted until **Friday 21 February 2020**, or as otherwise agreed between the parties, to exchange their respective full written submissions (the
- 15 primary written submissions), addressing all matters which have been the subject of the final hearing, including but not restricted to matters of jurisdiction, and were
- b. directed that no later than **Friday 28 February 2020**, or as otherwise agreed, they may if so advised, they may supplement their primary written
- 20 submissions with supplementary written submissions addressing matters not previously addressed in their primary written submissions but raised by other party in their primary written submission; and
- c. thereafter to provide by e-mail, in written form, **Friday 28 February 2020**
- 25 issue their respective final written submission to the Tribunal and each other, addressing the Tribunal on all matters relevant for this Final Hearing including their position on any relevant findings of fact and law which the Tribunal are invited to make in relation to the issues addressed in this final hearing; including but not restricted to matters of jurisdiction.
- 30 13. The Tribunal's private deliberation took place at the Members' Meeting on **Friday 20 March 2020**, being the earliest mutually available date for the full panel of the Tribunal.

14. For CNC there was an identified existing issue of time bar in relation to claims asserted by Mrs. Stones (raised at para 62 to 64 of the ET3). In particular, that this related to whether there was any discriminatory conduct extending over a period and/or whether it would be just an equitable to extend the limitation period as set out in s123 of the EA 2010.
15. No agreed chronology of events was provided to the Tribunal.
16. No agreed joint medical report was provided.

Issues for the Tribunal

17. **Time limit / limitation issues**
- a. Questions for the Tribunal were:
 - b. Were Mrs Stones' complaints presented (the relevant date being the ET1 rather than the date the claims were articulated within the Scott Schedule) within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 (EA 2010) always having regard to the operation of s.207B(3) of ERA 1996 which provides that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted; s.207B(4); and
 - c. Dealing with this issue would involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc; and
 - d. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before date **Wednesday 20 July 2018** was potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.
18. **In relation to Disability Discrimination:**
- CNC having conceded on the issue of Mrs. Stones' status was conceded in relation to the relevant period 2012 until November 2018, issues which would

otherwise be before the Tribunal in terms of s6 of the EA 2010 and Schedule 1 Determination of Disability, would not arise:

- a. whether did the claimant have a physical or mental impairment at the at the relevant time; and
 - 5 b. did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities; and
 - c. if so, is that effect long term? In particular, when did it start and (has the impairment lasted for at least 12 months /is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months? do not arise; and
 - 10 d. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- 15 19. The heads of claim raised in terms of the EA 2010 include **s13 (direct discrimination), s15 (discrimination arising), s 18 (pregnancy and maternity discrimination), s20, 21 (disability discrimination) and s26 (harassment).**
- 20 20. **EA 2010, section 13: direct discrimination because of disability:**
- a. It is not in dispute that the respondent dismissed the claimant
 - b. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
 - 25 c. The Tribunal was not directed to comparator's hypothetical or otherwise.
 - d. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?
21. **EA 2010, section 15: discrimination arising from disability**
- 30 a. Did the respondent treat the claimant unfavourably as follows (no comparator is needed), by dismissing the claimant?
 - b. Did the respondent treat the claimant unfavourably, that is did the respondent dismiss the claimant because of the sickness absence?

- c. If so, has the respondent shown that the unfavourable treatment of dismissing the claimant was a proportionate means of achieving a legitimate aim?
- d. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

22. **EA 2010, sections 20 & 21: reasonable adjustments for disability**

- a. Did CNC know or could it reasonably have been expected to know that Mrs Stones was a person with a disability?
- b. A "PCP" is a "*provision, criterion or practice*". Did CNC apply a PCP, and if so, what was the form of the PCP, to Ms. Stones
- c. Did the application of that PCP put Mrs Stones at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.
- d. If so, did CNC know or could it reasonably have been expected to know that Mrs Stones was likely to be placed at any such disadvantage?
- e. If so, were there steps that were not taken that could have been taken by the CNC to avoid the disadvantage?
- f. If so, would it have been reasonable for CNC to have to take those steps at any relevant time?

23. **EA 2010 s18 Pregnancy & Maternity Discrimination).**

- a. Did CNC treat the Mrs Stones unfavourably, and in what way?
- b. Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?
- c. Was any unfavourable treatment: [because of the pregnancy or of illness suffered as a result of it; because the claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave]?

24. **EA 2010 s 26 harassment related to disability**

- a. Did the respondent engage in conduct (and what was the conduct)?

- b. If so, was that conduct unwanted
- c. If so, did it relate to the protected characteristic of disability
- d. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant
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- e. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (Whether conduct has this effect involves taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)
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25. **Remedy**

If the claimant succeeded, in whole or part, the Tribunal would be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded, that could include if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination or unfair dismissal, what reduction, if any, should be made to any award as a result?

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20 **Evidence**

26. The Tribunal heard evidence from the claimant Mrs. Clare Stones who provide a witness statement which she supplemented with oral evidence, her husband Mr David Stones who provided a witness statement and who's evidence was accepted without cross examination. In addition, a witness statement for Mrs. Stones' family friend Philip Kelly who was not in attendance and witness statement was accepted as statement of Mr Kelly without cross examination. Witness evidence on behalf of CNC was also provided via witness statements, each of which was taken as read in accordance with Tribunal order of 16 September 2020. Each of the following witnesses confirmed their witness statement at the Final Hearing and were thereafter subject to cross examination and re-examination, **Caroline Ashfield CNC HR Health & Wellbeing partner, Chief Inspector Andrew**
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5 **Brotherston, Chief Constable Simon Chesterman, CNC HR Business Partner Nigel Couzens, Chief Inspector Hazel Deans, Temp Chief Inspector Patrick Green, Dr Manual Fernandez CNC's Occupational Physician, Deputy Chief Firearms Instructor Stephen Jack, Inspector Simon Johns, Helen Jordan CNC HR and Superintendent Martin O'Kane.** It was accepted that **Lorraine Holloway** was unable to attend and her witness statement was accepted in her absence as it was supplemented with responses to 11 questions which Mrs. Stones provided to CNC to put to Ms. Holloway during the period of, though not within, the Final Hearing. The
10 Tribunal concludes that each of the witness for CNC gave straightforward and honest evidence. The Tribunal found the evidence of Dr Fernandez both compelling and straightforward.

15 27. Mrs. Stones broadly gave honest evidence reflecting her views of CNC as did David Stones. The Tribunal however preferred the evidence of the CNC witnesses as being wholly straightforward to that of Mr and Mrs. Stones where ever there was there was disputes of fact.

20 28. The Tribunal was also referred to four volumes of a Joint Bundle and a Supplementary Bundle.

25 29. Both Mrs Stones and CNC submitted written opening statements. Those were regarded as supplementary Written Further and Better Particulars summarising the respective parties' analysis of the Factual Matrix. While there was no Joint Chronology the Respondent had set out a Chronology of Events.

30 30. Mrs Stones GP Record Notes from 3 July 2012 were contained within the Joint Bundle. Those entries to which the Tribunal was directed are narrated below in the findings of fact.

31. Mrs Stones Occupational Personnel records held by CNC together with other CNC documentation relating to Mrs Stones were contained within the Joint Bundle. Those entries to which the Tribunal was directed are narrated below in the findings of fact.

32. Both the claimant and respondent's representatives provided written closing submissions having been provided the opportunity to provide supplementary written submissions reflecting matters raised in their opponent's submissions.

Findings in fact

1. The claimant Mrs Clare Stones' (Ms Cragg as she was then) employment as a warranted Authorised Firearms Police Officer (AFO) with Civil Nuclear Police Authority (CNC) at Dounreay nuclear site, situated on the north coast of Caithness, commenced on **Monday 31 March 2008**.
2. The CNC is a statutory armed police force created by s 52 of the Energy Act 2004, whose primary function is the protection of civil nuclear sites. The geographical jurisdiction of CNC set out by s 56 of the Energy Act 2004. The vast majority of CNC officers have AFO status and it has recently implemented a model to ensure that as many of its officers can be deployed as AFO's. Officers of CNC are both officeholder and employees. They are deployed to protect nuclear sites where mandated to do so by the Office for Nuclear regular.
3. CNC officers require to remain up to date with firearms training to retain AFO status and satisfy a number of health requirements.
4. CNC officers who are pregnant are removed from firearms duties and precluded from attending firearms training due to potential for lead contamination while on maternity leave.
5. In order to maintain AFO status, CNC officers require to undergo regular Firearms Training known as IFC (Initial Firearms Course). IFC training is supervised Chief Firearms Instructor (CFI) at within a Firearms Training Unit (FTU). IFC training takes place at designated and sites designed for such training.

- 5 6. Prior to IFC training an officer will require to undergo a physical capability fitness assessment known PST (Personal Safety Training), the PST is designed to be physically challenging and designed to reflect the role of CNC officers in the protection of civil nuclear sites.
- 10 7. Prior to taking part in an IFC and or PST, a Physical Activity Readiness Questionnaire (PAR-Q) requires to be completed. PAR-Q forms are designed to be completed by the specific officer who will undertake the training. For logistic reasons including, but not restricted to considerations of timing, PAR-Q forms are not always personally completed by the specific officer, in which case another officer would complete the form by telephoning the officer who is scheduled to attend the training thereby enabling that officer to take part. Where at least 3 out of the 13 health questions on the PARQ form are answered yes, an officer will require to undergo a medical assessment prior to taking part in a PST or IFC. While the PARQ form has a section for the officer to sign, a signature will not always be required, for instance where the number of positive responses to the health questionnaire are such that a medical assessment is required.
- 15 20 8. CNC officers who do not undertake the training for whatever reason as classed are Non-deployable as Firearms Officers until such training has taken place.
- 25 9. CNC officers may be assessed by CNC's Risk Assessment Panel (RAP) to consider whether there are risks to an officer maintaining Authorised Firearms Officer (AFO) status for instance for medical reasons.
- 30 10. CNC officers may be assessed by CNC's Redeployment Panel to identify a redeployment opportunity for an officer who for medical and other reasons it would not be appropriate to maintain as an Authorised Firearms Officer/would not be able to complete a PST. The opportunities with CNC for such redeployment are limited reflecting its specific role.

11. Mrs Stones did not request a copy of CNC's sick pay policy, Had Mrs Stone requested a copy of same the Tribunal is satisfied that it would have been provided to her.
- 5 12. The Tribunal is satisfied, on the evidence adduced, that there was no material failure on the part of CNC to maintain contact with Mrs Stones at any material time.
- 10 13. CNC has created a process whereby officers may identify themselves to CNC as disabled within the meaning of the Equality Act 2010 by the completion of a form, identifying what, if any reasonable adjustments the officer considers are appropriate. The model was designed to offer support to its employees. While CNC did not notify Mrs Stones of that process, this was not unfavourable treatment because of anything arising in consequence of Mrs Stones disability. The absence of Mrs Stones knowledge of the CNC process did not otherwise create a detrimental impact on Mrs Stones. The process was not operated by CNC, in relation to Mrs Stones, as a required step or gateway in relation to the application of Equality Act 2010.
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- 20 14. CNC has a system of unpaid Career Breaks. In order to be granted a Career Break an Officer will require to apply. Granting of a Career break is discretionary to CNC. During any one year an officer will require to operate under what are described as Keep In Touch days (KIT). KIT days are paid. CNC have discretion to consider funding of medical assessments of its serving officers, subject to recommendations from its Occupation Health advisers and physicians. While CNC operates to a budget for medical assessments, that budget does not reflect a fund of an allocated sum of money for each of its officers which CNC will spent up to. However, CNC will not fund any medical assessment for any officer who is a career break, as they would not be regarded as a serving officer during that break.
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15. CNC officers who have ceased to be eligible for regular pay, may be paid a sum of money calculated by reference to the pension would they would

receive. While theoretically funded from their pension, this would not deplete the pension which the officer would ultimately be entitled to.

5 16. Prior to a termination of employment which requires a monetary payment, CNC requires to identify the cost and seek provisional draw down facility funding from the Treasury. The seeking of such provisional drawn down funding does not amount to an attempt to mislead the Treasury nor does it predetermine the outcome of any process. The process is designed to ensure that should a possible outcome arise CNC can arrange to make
10 prompt payment accordingly without what may otherwise be an effective delay. In the event that a termination does not take place the prearranged draw down facility would not be called upon.

15 17. From 2008, on the evidence adduced, Ms Cragg (as she was then) worked to a 40-hour shift pattern split with CNC over 4 days Monday to Thursday.

20 18. On **Saturday 29 May 2010** Ms Cragg' first child was born and her **first period** of maternity leave commenced (**The First Period of Maternity Leave -V**). Ms Cragg returned to her AFO role in April 2011.

25 19. On **29 August 2011** Ms Cragg commenced her **second period** of maternity leave (**The Second Period of Maternity Leave**), this being the date identified from the chronology provided by CNC, it not having been subject to dispute.

30 20. In **January 2012** Ms Cragg suffered a loss of consciousness while at home which resulted in her sustaining injury. In March 2015, Mrs Stones described to Dr O'Leary Consultant neurologist that had been suffering from gastroenteritis, was taken to hospital where she was assessed and discharged and it was diagnosed as "*a simple faint*" (as recorded in the March 2015 Dr O'Leary Medical Report).

21. On **Wednesday 21 March 2012** Ms Cragg submitted a written request to CNC that, at the conclusion of her **Second Period of Maternity Leave** (due to end **Sunday 26 August 2012**), she take the outstanding leave which she calculated would have would accrued at 42 days together with 26 weeks parental leave (reflecting the age of her children) (**the March 2012 Request for Annual Leave and Parental Leave**) . Further Ms Cragg proposed that she would return to work for the period **22 April 2013 to 30 May 2013** after which she would *“then consider taking a career break”*.
22. In May 2012 Mr A Brotherston became CNC Operation Unit Commander at the Dounreay plant.
23. By letter issued **Tuesday 22 May 2012**, Ms Cragg was notified by CNC’s outsourced payroll provider **Logica UK (LU) (the LU 22 May 2012 letter)**, that she had been paid an overpayment of salary (**the 2012 Overpayment**). **LU** set out that they *“act as payroll agents for”* CNC *“... and our records show you were inadvertently overpaid the sum of £5529.4 (gross)”* and that the *“error occurred due to your maternity leave from 29/08/2011 not being applied. This has resulted in full pay being received since 27/02/2012 when your 26 weeks Occupational Maternity Pay should have ceased. From this date only statutory maternity should had be applicable. On behalf of”* **LU** *“... may I extend our sincere apologies for this unfortunate error...”*. **LU** confirmed that the 2012 overpayment required to be paid to CNC.
24. On **Monday 28 May 2012**, Ms Cragg upon receipt of **LU**’s letter, immediately contacted **Inspector BL of CNC (IBL)**, who was based at Dounreay. **IBL**’s emailed Ms Cragg, same date referencing her concern over the **2012 Overpayment** explained that he had advised CNC HR that it was *“quite probable that you will not be back at work for more than a month in the next X number of years due to a pending career break”*. Ms C Ashfield within CNC’s HR on being told of the overpayment described that that this *“was yet another”* issue with the out sourced payroll provider **LU**, additional to those which had occurred *“over recent years”*.

25. On **Thursday 30 May 2012** Ms Cragg emailed IBL indicating that she believed that CNC's HR had miscalculated the holiday entitlement. Ms Cragg commented *possible that my calculations are wrong and I may have lost track... I don't trust HR*". Ms Cragg expressed the view that a member of CNC's HR had taken a dislike to her and that he had concerns that her situation was being discussed in HR's office. Ms Cragg confirmed that it was her intention to repay the 2012 overpayment and that she was looking to *"sort out this error, which ultimately was caused by HR and Payroll, not me."* In discussions with IBL, Ms Cragg proposed that she return from Maternity Leave early on Tuesday 12 June 2012, further that she would repay the **2012 Overpayment** over a period of 3 months being June, July and August 2012. The Tribunal are satisfied that the error which resulted in the 2012 Overpayment was not caused by the actions of CNC. The overpayment was made at LU. LU apologised for same to Mrs Stones, in the LU 22 May 2012 letter. The Tribunal are satisfied, so far as relevant, that Mrs Stones made a genuine offer to repay the 2012 Overpayment in May 2012.

26. On **Friday 1 June 2012**;
- a. IBL confirmed to Ms Cragg that, reflecting its then resources, CNC were not in a position to accommodate what Ms Cragg had by this point suggested as an earlier than planned return work (**being Tuesday 12 June 2012**) arising from **the 2012 Overpayment**, than the **Sunday 27 August 2012**, as this would be *"surplus to shift"*. IBL suggested that Ms Cragg that she *"consider proceeding on annual leave as soon as possible... You will be getting paid for this annual leave and accruing additional annual leave together with pension rights. We can then look to see the shortfall and perhaps take you back for the period outstanding to enable you to earn sufficient funds to repay the overpayment made to you"*.
 - b. C Ashfield e-mailed IBL setting that;
 - i. CNC were seeking to establish to correct position in respect of leave and PH entitlement;

- j. it was understood that the officer that didn't want to look at repayment through annual leave but was now seeking to bring forward her return from maternity to mid-June in order to repay the 2012 Overpayment through salary during June, July and August; and
- 5 k. the question was whether CNC at Dounreay could accommodate "*what training need to be undertaken and is the officer fit to undertake the training, can Duty Planning plan the officer*" into those months.
- a. IBL confirmed to Ms C Ashfield that he had advised Ms Cragg that a return earlier than her return date in August could not be accommodated by CNC, commenting that the duty management had been scheduled and due to resources "*we cannot carry her. She is non deployable (firearms)*" and identified that it was now Ms Cragg's proposal that she come back for 3 months "*before continuing with A/leave, paternity leave and then career break. I have emailed her this afternoon with these comments and have advised her to move to annual leave asap to enable her to be paid. This can then be used to help pay off the company debt so to speak. I await her response*".
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The Tribunal is satisfied that the term "*non deployable*" was not an act of discrimination, and was not a discriminatory term. It referred to, the factual position that AFO officers require to undergo annual firearms training, such training was not immediately available to be provided for such an early return, CNC having anticipated that Mrs Stones return to work date was in August 2012. The proposal that Mrs Stones move to annual leave was not an act discrimination, it reflected a pragmatic non- discriminatory proposal.

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25 27. On **Saturday 2 June 2012** Ms Cragg (as she was then) married Mr Stones.

28. The existing **Second Period of Maternity Leave- D** was due to end **Sunday 27 August 2012**.

30 29. On **Thursday 19 July 2012** following a **Non-Work-Related Matter (NWRM)**, Mrs Stones required to obtain a Fit Note from her GP confirming that she required to be absent from work for a period of 4 weeks (the **July 2012 4 week Fit Note**) due to **Stress/Non NWRM**, which she submitted to CNC.

The Tribunal does not consider it necessary to set out, the Non-Work-Related Matter (NWRM), in the more detail in all the circumstances.

5 30. On **Friday 27 July 2012** Mrs Stones described her condition to Inspector Linda Smith (ILS) during a Telephone Welfare Contact the **NWRM**.

31. On **Monday 13 August 2012** Mrs Stones, obtained a GP Fit Note, confirming she was not fit for work, for a period of 4 weeks (the **August 2012 4 week Fit Note**), due to **Stress/ NWRM**, which she submitted to CNC.

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32. **Sunday 27 August 2012**, was the date that the **Second Period of Maternity Leave** had been scheduled to end.

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33. On **Tuesday 25 September 2012** Mrs Stones, obtained a GP Fit Note, confirming she was not fit for work for a period of 4 weeks (the **September 2012 4 week Fit Note**), due to **Stress/ NWRM**, which she submitted to CNC.

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34. On **Tuesday 16 October 2012** CNC issued a letter addressing "*general unrest and dissatisfaction*" to each CNC officer and employee at Dounreay.

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35. On **Monday 22 October 2012** ILS sought to make contact with Mrs Stones for a Welfare Contact, in connection with the disclosed reason absence Stress/NWRM. Mrs Stones responded by e-mail describing to ILS that she had "*a number of different issues going on in her life at this time, she is not sleeping and feels physically and emotionally exhausted.*"

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36. On **Thursday 25 October 2012** Mrs Stones obtained a GP Fit Note, confirming she was not fit for work for a period of 4 weeks (the **October 2012 4 week Fit Note**), due to **Stress/ NWRM**, which she submitted to CNC.

37. The Tribunal accepts, and it is understood that it is not in dispute that Mrs Stones remained unable to attend work thereafter due to **Stress/ NWRM**, for the rest of 2012 and further in Jan and February 2013.

38. On **Monday 18 Feb 2013** during Welfare Contact by telephone Inspector Linda Smith (ILS) with Mrs Stones Reason for absence "*Stress /Pregnancy*" Mrs Stones advised that she was expecting her third child and that on the advice of her GP it was "*unlikely that she will be able to return to work before her baby arrives*" and it was her intention to formally apply for maternity leave following an appointment for scan on 20 February 2013.
39. On **Thursday 28 February 2013**, Mrs Stones obtained a GP Fit Note confirming she was not fit for work for a period of 8 weeks (the **October 2012 4 week Fit Note**), due to **Stress/Pregnancy**, which she submitted to CNC.
40. From **22 April 2013 to 30 May 2013** was the period, Mrs Stones had proposed in her **March 2012 Request for Annual Leave and Parental Leave**, as the "*compulsory month*" she would to work following her **Second Period of Maternity Leave**, after taking annual and other leave.
41. The Tribunal accepts, and it understands that it was not in dispute, reflective of the evidence adduced, that Mrs Stones remained unable to attend work, commencing her **Third Period of Maternity Leave** in June 2013
42. In **November 2013** Mrs Stones suffered a second episode of loss of consciousness. In March 2015, Mrs Stones described to Dr O'Leary Consultant neurologist that it occurred while at her home and she believed it may have related to a bug and sustained a black eye and nose bleed (as recorded in the March 2015 Dr O'Leary Medical Report).
43. No direct evidence was adduced before the Tribunal relating to the **Third Period of Maternity Leave** before March 2014.
44. On **Sunday 30 March 2014**;
- a. Mrs Stones requested an update from Ins F as to the status of her outstanding Parental Leave request.
 - b. Insp F confirmed to Mrs Stones that she was; on Maternity Leave until Thursday 12 June 2014; followed by 2 Rest days; on Paternity Leave

from Monday 16 June 2014 until Thursday 4 September 2014; followed by 3 Rest Days Friday 5 September to Sunday 7 September 2014; followed by Annual Leave from Monday 8 September 2014 to Thursday 11 December 2014, with further Rest Days being Friday 12 December to Sunday 14 December 2014 . Ins F further confirmed Mrs Stones duties, although not published at that stage, were scheduled to reflect her working from **Monday 15 December 2014** with a work pattern of 4 days on (7am to 5pm) and 3 days off.

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10 45. On **Monday 31 March 2014**, at CNC's Divisional Health Committee (**DHC**), Chaired by CI Brotherston, Insp F reported back on his contact with Mrs Stones confirming that she at the time on Maternity Leave which would be followed by Paternity Leave and that Mrs Stones was *"not due back into the workplace until December 2014... and understands that she is to attend a*
15 *firearms training course - IFC "when she returns."*

46. **Sunday 15 June 2014** was the last day of the **Third Period of Maternity Leave.**

20 47. On **Monday 16 June 2014** CNC's DHC recorded that Mrs Stones was *"hopeful to attend an IFC ... closer to her home. She is aware that modular IFC will prolong the amount of time before she will be fully qualified for firearms. Insp F... has confirmed that there are no opportunities as yet for an IFC at Dounreay, however he will check again once the Dounreay range is open... A smooth return to work is to be planned at this stage, with her*
25 *return anticipated for December 2014. It was agreed that prior to her return this officer is to be referred to" CNC's Occupational Health Doctor "OHD, then for the case to be presented to a" CNC panel, known as a RAP established to whether an officer is capable of being deployed as an AFO*
30 *known as RAP "due to the nature of her illness prior to maternity leave and then for the officer to attend an IFC. These stages are to be put into place before her return".*

48. **In so far as the matter is before the Tribunal:**

- a. The Tribunal is satisfied that options for Mrs Stones anticipated return in 2014 were being appropriately considered.
- b. The Tribunal is satisfied that Mrs Stones was aware that she was required to undergo an IFC by at least June 2014.
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- c. The Tribunal do not consider that the proposal that Mrs Stone attend an IFC was unfavourable treatment because of Mrs Stones absences as officers require to attend IFC's. In so far as the proposal that Mrs Stones attend an IFC from at least June 2014, was unfavourable treatment because of Mrs Stone's absences which arising in consequence of Mrs Stone's disability, the Tribunal is satisfied that it was proportionate means to achieve a legitimate aim. In particular, the Tribunal is satisfied that the use of annual or other refresher training for an Authorised Firearms Officer, which role entails both the carrying and use of firearms within CNC including have regard to CNC's statutory role in the protection of civil nuclear sites, in all the circumstances was reasonably necessary to do so.
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- d. The Tribunal is satisfied that CNC's decision in July 2014 that Mrs Stones was to be considered by a RAP Panel, was unfavourable treatment because of Mrs Stones absences and lack of prognosis arose in consequence of Mrs Stone's disability; however, the Tribunal is satisfied that it was proportionate means to achieve a legitimate aim. In particular, the Tribunal is satisfied that the, assessment of capability to act as an Authorised Firearms Officer, which entails both the carrying and use of firearms within CNC including have regard to CNC's statutory role in the protection of civil nuclear sites, in all the circumstances was reasonably necessary to do so.
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- e. In so far as the proposal that Mrs Stones was to attend an IFC from at least June 2014, was because something arising from Mrs Stones absence on Maternity Leave, the Tribunal is satisfied that it was proportionate means to achieve a legitimate aim. In particular, the Tribunal is satisfied that the use of annual or other refresher training for an Authorised Firearms Officer, which role entails both the carrying
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and use of firearms within CNC including have regard to CNC's statutory role in the protection of civil nuclear sites, in all the circumstances was reasonably necessary to do so.

- 5 f. The Tribunal is satisfied that the decision that Mrs Stones was to be considered by a RAP was not something arising out of Mrs Stones Maternity Leave status or otherwise something arising from her having been pregnant and or having had a child.

10 49. On **Monday 21 July 2014** CNC's DHC recorded that Mrs Stones "*wishes to carry out her training in one block and hopeful to have it closer to her home as opposed to*" CNC's training site in Surrey "*She is aware that she will require a site induction and bronze training. As of 6 July PS, STONES submitted a sick note from her doctor for three weeks for chicken pox, although as she is on parental leave she will not be paid sick pay. It was*
15 *agreed that as much as possible should be in place prior to her return to work in order to allow for a smoother transition. It was considered whether a RAP should be arranged for this officer due to the nature of her sickness prior to her maternity leave...Insp Ferguson to gain dates for training for when*" Mrs Stones "*returns from parental leave and to complete an action plan*".

20 50. On **Wednesday 13 August 2014** Mrs Stones e-mailed CNC HR department a letter dated **10 August 2014** which set out:

25 "*I am ...coming to end of a period of Maternity and Parental Leave, I am trying to plan my return to work in advance to ensure I can made appropriate childcare arrangements for*" and describes her husband' employment and where he is based but indicated when she returned to work at the CNC location she had been based she would require to consider whether her children remain at the family home or whether they would travel to her workplace, describing that she will require to know what shifts and annual
30 leave she will be allocated. She described that "*I am very much aware that I will need to period of training and learning the role again. I am also aware that there is an expectation for all officers to carry firearms. I have asked what the firearms training will involve, whether there will be a requirement for me to go away and do the training. It is not practical for me to go to*" the

training site in Surrey “ as I would not be able to travel home at weekends and see my children, but I have no objections to doing the course at” CNC’s site Cumbria “ My return to work is due to be the middle of December. If there is a course around this time or a little earlier, I am happy to change my leave in order to attend

I would also like to formally request that I may allowed to have a flexible working pattern after the completion of a firearms course (I know the firearms course will be full time so it makes sense for me to remain full time until after the course) If there is a long delay between December and a course however I would like to have a flexible working arrangement in place sooner..

... the role I will be returning to will be duty sergeant this will require me to work 12 hour shifts in line with other officers. I am aware other part time officers work a variety of shift. The normal full time pattern is of 4 days worked and 4 rest days. May I respectfully request that I be allowed to work half hours and do a 4 days worked 12 days off patterns as some other officers do?”

51. On **Tuesday 19 August 2014** Mrs Stones received an e-mail from CNC officer S Jack in CI Brotherton’s absence on leave “Thanks for the attached letter... The process for progressing flexible working pattern has changed recently and to be approved at higher levels. Can I ask that you bear with us until the OUC returns on 1/09/2014 when he will be able to initiate the process. As I am due to transferred out of the OPU within the next couple of weeks it would be improper of me to progress this in the bosses absence”.

52. On **Monday 1 Sept 2014** CI Brotherton (the OUC) returned from leave. It was CI Brotherton practice, on return from leave, reflective of the volume of e-mail which would be built up during such a period to delete without reading same. It was CI Brotherton’s experience that any emails requiring a response would be followed up, to delete emails received in the leave period. The Tribunal regards Mr Brotherton as credible and honestly stated what had occurred. The Tribunal is satisfied that CI Brotherton decision to delete emails, without reading, on his return was not unfavourable treatment

because of anything arising in consequence of Mrs Stone's disability or was otherwise something arising from a protected characteristic.

53. On **Monday 15 Sept 2014** CNC's DHC noted in relation to Mrs Stones, that
5 *"Insp F has ordered ... uniform for her return to work she is aware she is to complete a site induction. She has expressed interest in remaining on section. No dates have been confirmed for training as she needs to be cleared as fit for duty by OHD, and then a RAP (Risk Assessment Panel) to be held"*.

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54. On **Wednesday 17 Sept 2014** Mrs Stones, as described in her subsequent January 2015 Grievance, travelled from her home to Dounreay for an Occupational Health *"appointment while on annual leave and at own expense"* and as no one from CNC was available to accompany her the
15 *"receptionist took me to the surgery... The appointment took two hours and all appeared well with my tests... I also asked the nurse if my 2x loss of consciousness episodes would be of detriment despite an otherwise clean bill of health. She did not know and said she would need to ask the physician who had left for the day.... After my 2 hour medical I was collected by Inspector F who took me to the police control building.... I asked (Insp Brotherston) if he has read my letter... He said he knew nothing about it. I explained it was sent to the both the generic Inspector box and Inspector Jack who was in charge of the time... He told me he had a problem with his server and lost all his e-mails do did not get my letter. I explained briefly that*
20 *I was looking for part time hours on a 4 (day) on 12 off pattern."*
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55. On **Tuesday 23 Sept 2014** CI Brotherston e-mailed Mrs Stones (cc Insp Ferguson) *"I have received the below today which I am sure will be of interest to you. At this time I am unsighted whether there are alternative dates available within the current FTU (Fire Arms Training Unit) to facilitate your return to the role of AFO. However I am aware that you have already discussed this with Insp F... who I am confident will try to identify training dates for you at the earliest mutually beneficial opportunity. I have advised*
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the duty planning manager that you are open to either working four days or four nights as part of your shift pattern”

5 56. On **Tuesday 21 October 2014** CNC’s Temporary Duty Planning Manager **Karen Tadd** emailed Mrs Stones apologising for the delay in responding to her request explaining that they were exceptionally busy and *“to cut a long story short on your return on 15 December 2014 you will be working Days to allow you catch up on everything then from January 2015 yourself and ... will be working ... 2 Days and 22 Nights, Unfortunately there is no flexibility*
10 *for either of you to work 4 of one shift. Sorry.”*

15 57. On **Friday 24 Oct 2014** CNC’s DHC considered Mrs Stones position noted that *“Dialogue has been opened with the officer. She applied for flexible working. Her original FWA (fourdays shifts) cannot be accommodated however an alternative has been suggested. On OHD telephone referral is to be arranged in relation to the officer’s absence prior to maternity leave.”* Actions from this DHC included; Insp F to speak to Mrs Stones about her availability for training, and Insp F to liaise with Occupational Health to arrange a telephone referral for Mrs Stones.

20 58. On **Wednesday 19 Nov 2014** CNC’s HR Co-ordinator wrote to Mrs Stones confirming that her request for flexible working been approved, to commence Saturday 10 January 2015.

25 59. On **Monday 1 December 2014**, it is asserted by CNC that Mrs Stones case was discussed at a Risk Assessment Panel. The documentation was not available. The Tribunal accepts that, owing to the period of time which has elapsed, and it not previously having been identified that this document was of any import, CNC have been unable to locate a record of this RAP meeting
30 document produced. The Tribunal considers that had Mrs Stones brought a Tribunal claim within 3 months of her January 2015 Grievance such a record would have been readily recoverable.

60. On **Monday 8 December 2014** Mrs Stones issued a (A form) memo to Duty Section Commander following her attendance at CNC's local Occupational Health and set out "*I have today attended an Occupational Health appointment to see DR Morris with a view to being signed fit for work and fit for firearms duties... He appears happy that the loss of consciousness is explained by a vaso vagal reaction. He now needs however, to write to my GP to get my medical records and then to the force doctor Fernandez to see if he is happy with me returning to work, or whether he requires further testing regarding the loss of consciousness*". The Tribunal was not taken to any report Dr Morris following this attendance. No findings in fact are made as to its content.

61. On **Monday 15 December 2014** Mrs Stones returned to work, initially operating on a Full Time basis before being due to move to part time in Jan 2015 "*I have enjoyed being back today and catching up with people. I am doing 4 x12 shifts as discussed and agreed prior to my return... it is impossible for me to work now until the 10th January as I have not made any plans for childcare as I did not think I needed to and my husband will not be able to take time off over this period and at such short notice*".

62. On **Tuesday 13 January 2015** Insp L Paton Mrs Stones' line manager emailed CNC HR C Ashfield indicating that Mrs Stones was keen to have the IFC completed before August 2015 2015 her eldest daughter was due to start school at that point and asking whether Mrs Stones could be pencilled in for IFC in May 2015 and she would prefer to take her children to the CNC site in Surrey for firearms training "*I believe the IFC commences in May 2015. Would it be possible for*" Mrs Stones "*to be "pencilled in"... please look at finding out whether the expenses for this will be covered and also childcare costs... please find out what PST training is required*".

63. On **Wednesday 14 January 2015** Mrs Stones completed a CNC Written Grievance Form describing events since January 2012 (the **January 2015 Grievance**). Mrs Stones described that she felt that she had been treated unfairly whilst taking maternity leave and raises in including overpayment of

salary and recovery process alleging sex discrimination and delays in organising fire arms training.

5 64. On **Friday 16 January 2015** The **January 2015 Grievance** was received by CNC. Divisional Chief Inspector Hazel Deans is asked by CNC to investigate Mrs Stones' January 2015 Grievance.

10 65. On **Thursday 12 Feb 2015** CNC's Occupational Health Doctor at Dounreay referred Mrs Stones to Dr Colin O'Leary Consultant Neurologist to determine whether she is able to return to AFO duties due to 2 reported episodes of loss of consciousness.

15 66. From **Thursday 12 February 2015** Mrs Stones attended the CNC's Occupational Health Department in Dounreay and was "*assessed at unfit for work they have been given the following advice a) to contact their GP*". Mrs Stones recorded on the CNC Self Certification form that her first day of absence would be Friday 13 February 2015 and she recorded the reason for absence as "*situational anxiety*".

20 67. In **February 2015**, as identified in the **May 2015 Grievance Outcome**, Mrs Stones was reallocated parental leave entitlements and duty time due to sickness and for time spent completing forms as part of the grievance outcome.

25 68. On **Wednesday 11 February 2015** DCI H Deans met Mrs Stones to discuss the **January 2015 Grievance**. Mrs Stones was accompanied by friend who is also a CNC Police Federation (trade union) representative Ian Muir. DCI Deans identified several heads of the January 2015 Grievance being;

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- a. she had been treated unfairly by CNC whilst taking maternity leave and this amounted to sex discrimination; and
 - b. delay in arranging outstanding training; and
 - c. pay issues, DCI H Deans noted that the May 2012 overpayment in relation to Mrs Stones was as a result of an error by CNC's payroll provider LU, however she further described a June 2014 overpayment

arising as HR had not been notified that Mrs Stones was due to commence parental leave from 16 June 2014; and

- d. Parental leave issues; and
- e. Annual leave issues; and
- 5 f. Flexible working request; and
- g. Lack of welfare contact

The Tribunal considers that Mrs Stones who was accompanied, was in a position to raise such claims as she considered relevant and which she had already identified within her January 2015 Grievance, within 3 months less
10 on day of the **January 2015 Grievance**. The Tribunal considers that had Mrs Stones brought such a Tribunal claim within 3 months, of the **January 2015 Grievance, documentation** including the CNC record of the RAP meeting in December 2014 would have been readily recoverable.

15 69. **Friday 14 February 2015** was the last date of Mrs Stones' period of self-certified sick leave due to "*Situational anxiety*".

20 70. On **Monday 17 March 2015** Mrs Stones was assessed by Dr Colin O'Leary, and reports to Dr Morris OHC of CNC, to investigate her loss of consciousness and suggests her episodes were consistent with gastroenteritis "*There is no indication at this stage for further investigation. I consider*" she "... *is no more likely than anyone else to experience a fainting episode during the course of her work*".

25 71. On **Sunday 4 May 2015** Mrs Stones completed the CNC withdrawal of Grievance form "*I accept providing the following are dealt with...*" (**May 2015 Withdrawal of Grievance Form**) withdrawing the **January 2015 Grievance**, Mrs Stones expressed reservations that those matters which she regarded as outstanding would not, as she indicates she was advised,
30 be resolved within 12 months. Mrs Stones described that issues around firearms training could not be planned due to outstanding issues including around compensatory time off and paid leave. Mrs Stones described that she had at that time been advised that a modular course was possible during her regular working patterns and had been advised to provide dates for

availability but described that she did not know when she would be available until all time off had been allocated and scheduled matters.

72. The Tribunal considers that standing;

- 5 a. the extent to which Mrs Stones considered matters were outstanding and
- b. her concern that matters would not be resolved within, what she suggests was a proposed time frame of 12 month

it would have been open to Mrs Stones to raise such claims as she considered relevant including those identified within her January 2015 Grievance, within 3 months less one day of the **May 2015 Withdrawal of Grievance Form**. The Tribunal notes in this regard that at the final Hearing Mrs Stones' position was that the outcome was good but she could not say that it was "*fully implemented*". The Tribunal considers that had she brought a Tribunal claim within 3 months, of the **May 2015 Withdrawal of Grievance Form**, documentation including the CNC record of the RAP meeting in December 2014 would have been readily recoverable. The Tribunal concludes, on the evidence adduced that Mrs Stones made a conscious decision not to pursue Tribunal claim at this time. In all the circumstances it is not just and equitable to extend the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 (EA 2010) to matters preceding **Sunday 4 May 2015**.

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25 73. On **Thursday 7 May 2015** CNC Divisional Risk Assessment Panel considered Mrs Stones position "*in essence the RAP is to assess the officer's fitness following both a Neurological matter and situational Anxiety issue for return to AFO training is required*". Dr Fernandez advised Mrs Stones' had been confirmed as fit for all duties. The Tribunal accepts CNC's evidence that **Thursday 7 May 2015** was the first meeting of the RAP. The Tribunal accepts that the RAP was advised that Mrs Stones was fit for all duties. The Tribunal, however, notes that as at 7 May 2015, and as Mrs Stones set out in memo on Friday 15 May 2015, she was not due to return to work until April 2016.

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74. On **Friday 15 May 2015** Mrs Stones submitted a memo (A Form) providing dates of availability for firearms training, requesting that this begin in **April 2016** and stating that she is flexible about the location of the training. *“having initially been informed I would need to do the full course in two x four week block in”* CNC’s training site in Surrey *“I have now been advised that this is not my case and that I would be able to do a modular course to fit in with my part time working pattern... Due to time owed I will not be returning to Dounreay until 2nd April 2016. I will need to complete PST training before commencement of Initial Firearms Course. If a PST Course can be accommodated on my first clock of 4 shifts, this would mean I will be able to commence firearms training from 18 April 2016... I have no preference where the course takes place and am prepared to travel to any firearms unit to receive the training... I would like a response by end of June 2015 as to where and when the course is to take place.”*

75. On **Tuesday 15 September 2015** Mrs Stones attended the CNC Dounreay Site Occupational Health Medical carried out by CNC’s Occupational Health Nurse;

- a. CNC Occupational Health Nurse set out that *“At the last medical examination on 15 September”* Mrs Stones was *“found fit to carry out work in the following fields Police...”*
- b. The Occupational Health Nurse recorded, in relation to audiometry result *“advised to see GP”* and *“Eustachian tube dysfunction diagnosed”*.
- c. On the CNC Official Health Questionnaire, Mrs Stones ticked Yes, in response to the specific questions following the headline question *“Have you experienced any of the following since your last examination or in the last 12 months”*
 - Heart or circulation problems- Yes - Reynaud’s in hands;
 - any blood disorders - Yes – raised antibody ... unknown cause;
 - Skin problems – Yes – hives, swelling on face and limbs;
 - Neck /back/ joint problems- Yes – swollen joints in conjunction with above

- d. On the CNC Official Health Questionnaire, Mrs Stones ticked Yes, in response to the Questions following the headline statement “*Additional Information*”
- Are you on long term medication (tablet, inhalers etc)? - Ticked Yes
 - Are you awaiting any medical, surgical or alternative medical treatment or investigation? – Ticked Yes
 - General. Since your last assessment have any close family members received a significant medical diagnosis- Ticked Yes
- e. Mrs Stones completed the Periodic Health Surveillance Questionnaire (used by Dounreay Occupational Health) responding to the following headline question “*Do you have or have you ever experienced any of the following since commencement of your present work*”
- An illness necessitating a visit to GP or hospital- Ticked Yes
 - Has any new medication been prescribed for you- Ticked Yes.
 - Any change in psychological- Ticked No
 - Any Injury- Ticked No
 - Have you required to take any sick leave- Ticked No
- f. Within the Respiratory and Skin Questionnaire Mrs Stones Circled Yes in response to the Headline Question “*Do you have or have you ever had any of the following?*”, on the specific question of “*Eczema, Dermatitis Psoriasis, Allergic skin rashes e.g. urticaria...*” Circled Yes and for additional information set out- “*unknown cause of urticarial*” Under the headline of Additional Information Mrs Stones Circled Yes to the following questions
- *Have you ever seen a dermatologist* - Circled Yes – and for additional information set out “*awaiting 7/10/2015*”
 - *Have you ever received skin treatments*- Circled Yes – and for additional information set out “*Antihistamine – special shower emolument*”
- g. Mrs Stones signed the CNC pro forma Declaration (consent) form on which included the statement she agreed that Occupational Health
- i. may disclose medical records to the CNC nominated Chief Medical Officer (CMO) where necessary upon request,

- ii. provide the outcome of her medical to the manager, HR officer/PSP trainer/fitness specialist as appropriate and that she did not wish to see it before it was sent
- iii. may contacting her GP/Specialist for a report where required; and
- iv. release information gained to CNC for discussion at a Risk Assessment Panel where required to determine her suitability for employment

The Tribunal is satisfied that the completion of that proforma consent did not have the effect of placing before CNC, Mrs Stone's medical documentation which documentation would be otherwise protected by medical confidentiality. In particular the Tribunal is satisfied that this proforma form did not have the effect of placing all medical documentation before any CNC Risk Assessment Panel (RAP), absent the medical member of the RAP considering it was required, in order for the RAP to determine suitability for employment.

76. Between on or about Tuesday **27 October 2015** and Friday **30 October 2015** Mrs Stones travelled to and attended CNC's leadership course in England, as arranged by CNC.

77. On **Wednesday 4 November 2015** during Inspector L Paton's Welfare Contact with Mrs Stones noted that she was *"currently taking parental leave, change of rest day allocation, PHR's and annual leave until April 2016... has been declared fit for firearms training and full duties at work.... has attended her medical in September 2015...attended the second part of the Leadership course and enjoyed it... shall be attending PST initial course in December 2015"* she further noted in relation to welfare requirements that Mrs Stones *"has signed off the grievance on the proviso that her firearms training is delivered as promised"* and that Mrs Stones was *"currently consulting a doctor regarding an autoimmune issue which is being treated with antihistamine ..., has not required to be signed off work. This is currently being investigated... has no welfare issues at this time"*.

78. On **Tuesday 10 November 2015** CNC's DHC noted Mrs Stones position and recorded that *"FTU training cannot be organised until it is clear that Mrs Stones is fit to train. She is currently requiring PST catch up training. PST"* (Personal Safety Training) *"is currently planned from 8/12 until 12/12. Following that progress can be made with the modular IFC dates... has also informed L that she is being tested for an auto-immune condition. Her mother suffers from Lupus. If... diagnosed with an auto-immune condition there will require to be a follow up OHD referral.... This will determine any concerns around her ability to do her job now and in the future"*.

79. The Tribunal is satisfied that an e-mail from Insp Paton on **Monday 23 November 2015** was neutrally responding to information provided in connection with the dates of the PST /IFC course which Mrs Stones was to attend, the e-mail set out *"I am no longer"* Mrs Stones' *"line manager"* her *"line manager is now A/Insp Paul Brown I shall e-mail "her" and appraise her of this information regarding PST initial course and see if she would be available to attend in February 2016"*. On the evidence adduced the Tribunal is satisfied that this email confirmed that Mrs Stones' line manager had changed to Insp P Brown and that the date for the PST had provisionally changed from 8 to 12 December 2015 to February 2016.

80. On **Tuesday 8 December 2015** the required **PARQ (2/1473)** form for Mrs Stones to attend PST and IFC was completed by Insp Brown via a telephone call between Ins Brown and Mrs Stones (the December 2015 PARQ) form. The first page of the PARQ form has 13 questions which are designed to be answered Yes or No.

So far as relevant, the responses set were as follows:

- a. Question 4. *Do you get headaches, dizziness, fainting spells or do you lose consciousness?* The Yes column was marked with an X by Insp Brown, reflecting Mrs Stones having said yes to the question set out.
- b. Question 5. In the past 12 months have had you to refrain from taking/only undertake limited physical activity under the advice of a

doctor- The No column was marked with an X by Insp Brown, reflecting Mrs Stones having said no the question set out.

- 5 c. Question 6. *Do you regularly take any drugs or medicines including over the counter medication?* The Yes column was marked with an X, by Insp Brown, reflecting Mrs Stones having said yes to the question set out.
- d. Question 13. *Are you aware of any changes to your health since your last successful AFO medical?* The Yes column was marked with an X by Insp Brown, reflecting Mrs Stones having said yes to the question set out.

The Tribunal notes that;

- 10 a. Question 5 on the PARQ form specifies it only relates to the preceding 12 months.
- b. Question 4 on the PARQ is not qualified by reference to any time limit. The question set "*Do you get headaches, dizziness, fainting spells or do you lose consciousness*", unlike Question 5, is not restricted to the events
- 15 of the previous 12 months.

As set out above, the context of Question 4, unlike the subsequent Question 5, is not time limited to the preceding 12 months. A correct answer to the question set (as it may more fully be expressed) of whether Mrs Stones ever had at any time in the past, ever lost consciousness, would

20 have been; yes. It not in dispute been accepted by Mrs Stones that on 2 occasions prior to December 2015 she had lost consciousness.

The Tribunal does not accept Mrs Stones' suggestion that the PARQ form which is dated as completed 8 December 2015 was fabricated at a later date by Insp Brown including after January 2016 when Mrs Stones suffered

25 a third period of unconsciousness, or otherwise does not reflect Mrs Stones' honest answers to the questions set out. The Tribunal notes Mrs Stones' comparison with the assessment by CNC's Occupational Health Nurse reflecting Mrs Stones' answers on 15 September 2015. The Tribunal however notes that the Question 4 on the PARQ did not appear in the

30 questions set before Mr Stones on 15 September 2015. Had that question be set out, again without limit of time, to Mrs Stones on 15 September 2015 she would have similarly answered yes.

The second page of the PARQ form provides that where the answer to any of the 13 questions on the first page is Yes *“please provided additional detail/explanation below”*

Mrs Stones advised Insp Brown, as set out in the form at 4a.

5 *4a) I suffer from Chronic Urticaria and Chronic Angioedema- swelling of joints and skin with no known cause at present- currently under investigation and suffering at present with swelling above the eyes causing some headaches*

In relation to 4b) Mrs Stones advised Insp Brown,

10 *4b) I also suffer with Vasovagal reaction which is untreatable, sudden loss of blood pressure can cause fainting and collapse, was investigated in March with a visit to a doctor in Glasgow, causes are explained and CNC are aware, suffered with 1 occurrence since March about 3 weeks ago.*

15 While the Tribunal accepts that Mrs Stones does not, at this Final Hearing some 4 years later, believe she made the comment recorded by Ins Brown on 8 December 2015, the Tribunal accepts the evidence of Insp Brown which is consistent with the contemporaneous document which he completed. After the period of time which has elapsed, Mrs Stones is mistaken in her recollection of what she told Insp Brown during the telephone call on
20 Tuesday 8 December 2015.

It is observed that Mrs Stones attended Dr O’Leary Consultant Neurologist in Glasgow in March 2015 as set out above.

25 The Tribunal is satisfied that the form was completed on Saturday 8 December 2015 by Insp Brown reflecting Mrs Stones’ answers to the questions within the PARQ form.

6) Currently taking the following medications (lists 5)

13) I also now suffer with Eustachian tube dysfunction since attending my last CNC medical.

30 The Tribunal notes that Mrs Stones confirmed on 15 September that she was advised to see her GP reflective of the audiometry result. It is accepted by CNC that the PARQ form was not sent to Mrs Stones for her to sign. As there were 3 positive responses to the 13 questions on page 1 there was no requirement for the December 2015 form to be signed. In particular the 3

positive responses required that CNC arrange for further medical assessment. In so far as the issue is before the Tribunal, the cancellation of the December 2015 training was unfavourable treatment because of something arising in consequence of Mrs Stones' disability, specifically arising from the health declarations recorded by Insp Brown, the cancellation of scheduled training, pending medical assessment, was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to the health and safety implications of sending an officer to training which is designed to be physically challenging and structured around the statutory role of the CNC and was reasonably necessary to do so.

81. On **Monday 14 December 2015** Insp Brown confirmed in an e-mail to Mrs Stones that he was pleased that her expenses had come through. On the evidence adduced the Tribunal is satisfied, that this referred Mrs Stones cancellation expenses in respect of the cancellation of the December 2015 training following the completion of the PARQ form. Insp Brown further intimated that he hoped that CNC's Occupational Health would be in touch "very soon" but requested that if she didn't hear from them "*please get in touch so I can chase it up.*"

82. On **Wednesday 16 December 2015** Mrs Stones attended in Inverness for examination Dr L Macfarlane Consultant Dermatologist, this consultation having been arranged by Mrs Stones GP (**the December 2015 Dermatologist Report**). The headline to the letter was "*Urticaria and possible angioedema Unexplained medical symptoms of headache, fatigue and weakness*" (the headline diagnosis). In Dr Macfarlane's report, issued to Mrs Stones GP, the consultant dermatologist's confirmed that the majority of her symptoms were unexplained commenting that "*I did try to get to the bottom of what was really worry her. What struck me today is that the majority of her symptoms are as yet medically unexplained. She told me she feels tired all the time, with a permanent headache and feeling of muscle weakness... She is also very troubled by fatigue, finding it difficult to get back*

to work because of this and also describes muscle weakness. She also feels her fingers can go sausage-like at times. Again I feel her anxiety may heightened... She was a little tearful today... I would not wish to suggest her symptoms are psychosomatic without having excluded organic disease, but as a Dermatologist I am not best to take that forward".

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83. On **Thursday 17 December 2015** CNC's DHC reviewing Mrs Stones' position noted that Firearms Training Unit "training cannot be organised until it is clear that ... is fit to train. She is currently requiring PST training." reference was made to existing scheduled PST training which "PST is currently planned on 9 10 and 11 December. Following that progress can be made with the modular IFC dates. When completing the PARQ" she had "... answered yes to three questions and was deemed not fit to complete the PST training that had been organised" and she had "also informed ... that she is being tested for an auto-immune condition. Her mother suffers from Lupus. If ... diagnosed with an auto-immune condition there will require to be a follow up OHD referral.... This will determine any concerns around her ability to do her job now and in the future." Karen Towers CNC's Occupation Health Manager, who attended this meeting advised that based on the content of the December 2015 PARQ that Mrs Stones should be referred to CNC's Occupational Health.

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84. On **Wednesday 23 December 2015** Mrs Stones' GP drafted what was said to be a routine referral to immunology at Western Infirmary/Gartnavel Glasgow (there being no specific immunology service within the geographic area Mrs Stones resided at) and which was issued on **Tuesday 16 Feb 2016**, describing that "she developed further symptoms of joint discomfort and swelling affecting her left wrist then hands, knees and ankles. The joint symptoms subsided but she went onto develop a recurrent feeling of throat irritation and recurrent swelling irritation of the forehead together with a feeling of being run down and flu'y and a great sensitivity to loud noise and tingling in her hands... My own feeling is that she may well have ongoing immunological dysfunction to be accounting for her symptoms".

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85. On **Friday 8 January 2016**, Mrs Stones submitted Form A to CNC requesting a 12-month career break to commence Friday 2 April 2016 (her **January 2016 Career Break Application**), under cover of her e-mail “*I attach simply request for a 12 month career break. I am conscious not to be shown a returning to work on the duty planning scheduled before a career breaks commences as I don't want to cause anybody unnecessary inconvenience. Hence why I have emailed the request to you. A copy is in the post along with the expenses from for the cancelled December Hotel*” (2/1499), Mrs Stones set out that she believed she was “*taking TOIL until 2 April and should still have a small amount to carry over*”. Mrs Stone further described that CNC’s Occupational Health had not yet been in touch “*so hopefully a career break will give them a chance to decide what they would like from me. The Urticaria and Angioedema have not gone away and the cause remains unknown. If OHD require me to see a specialist to try and establish the cause of my suitability to train, I am happy to do this. I would like this all to be resolved with OHD before my return to work for the sake of both the unit and myself*”. The Tribunal concludes that Mrs Stones had decided that she would take a career break before return undergoing further training in order that she could return, against her own recognition of the uncertain prognosis.

86. At a date in **February 2016** Mrs Stones suffered an episode of loss of consciousness.

87. On **Tuesday 16 February 2016** Karen Towers had a telephone consultation with PS Stones to discuss the three medical declarations, in the December 2015 PARQ, as set out in the Management Discussion on **Tuesday 22 March 2016**. The tribunal considers that at least as at this date the implication of the December 2015 PARQ on the training and requirement for further medical assessment was apparent to Mrs Stones. In any event Mrs Stones was aware in December 2015 that she was unable to attend the PST training. Had Mrs Stones wished to challenge the PARQ, including the 3 positive (yes)

medical declarations it would have been reasonably practicable for Mrs Stones to have presented a complaint to the Employment tribunal within 3 months of this date. The Tribunal concludes, on the evidence adduced that Mrs Stones made a conscious decision not to pursue a claim to Tribunal at this stage.

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88. On **Tuesday 23 Feb 2016** (updated version 0.5) CI H Deans updated the recommendations /action matrix following Mrs Stones **January 2015 Grievance** identifying CNC's progress at that stage, in relation to recommendations contained within the January 2015 Grievance.

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89. On **Wednesday 9 March 2016** Insp S John emailed to CI Brotherston setting out *"the following information is in response to whether from my perspective as the non deployables manager, we can accommodate a career break of one year for..."* Mrs Stones *"At this moment ... we have 30 AFO' who are non deployable and some 20 other officers who have triggered or are about to trigger the working time directive. These levels of non deployable officers have an adverse effect over those that remain in qualification as they have to cover the extra shift. There are further demands being placed on our AFO's over the next near... Using this rationale I would be reluctant to add this burden. However, the circumstances surrounding" her "absence are unique and are as follows ..."* Insp John set out a summary of the position. *"When filing out the PARQ medical questionnaire we became aware of three medical conditions which precluded her from completing training. Initial investigations are ongoing via the NHS for an auto immune condition which causes swelling of the joints and skin. This will rule out"* Mrs Stones *"from being medically fit to train until the condition is investigated and any treatments are given. This condition may rule her out from remaining an AFO..."* *"she "has also suffered a reoccurrences of the blackouts that she suffered previously. The cause was identified as an untreatable condition. We organised a specialist neurologist report to confirm that" she "was able to return to firearms duties after the last blackout.... As such I would support a career break on this occasion... I would suggest that the 20 x 8 hour keep*

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in touch days are used to progress all the various medical reports that will be required" (2/871 – 872 also at 2/1549 to 1550). It is the Tribunal's assessment on the evidence that the term "*non deployables manager*" was not unfavourable treatment because of something arising in consequence of Mrs Stones disability. It was a broad term used to described those officers who for any reason would not be deployable as a firearms officer. Further the use of the word "*burden*" was not unfavourable treatment because of something arising in consequence of Mrs Stones status. It was a term referencing the 30 AFO's who could not be deployed as armed fire officers in the context of 20 other officers who were, or were about to trigger possible working time limitations. Insp Johns analysis, recommendation and support for Mrs Stones application for a career break was not unfavourable treatment because of something arising from Mrs Stones disability. To the extent that it was because of something arising in consequence of Mrs Stone's disability, it was, in any event proportionate as an appropriate means of achieving a legitimate aim, that is the allocation of duties of armed firearm officer amongst the CFC workforce and reasonably necessary to do so.

90. On **Thursday 17 March 2016** CNC had a Management Discussion regarding the issues relating to Mrs Stones application for a career break and identified a plan of action, including identifying the reasons for Mrs Stones request for a career break, and discussing with Mrs Stones how her training could be managed within the career break she had requested to aid a quick return to fully deployable AFO duties, prepare summary for the Divisional Commander's return on 22 March and further present case to the Divisional Commander.

91. On **Tuesday 22 March 2016** CNC had the Management Discussion regarding Mrs Stones. Insp John prepared an e-mail for the attendees following the Management Discussion which set out in brief a summary of the discussion noting that she "*joined CNC on 31.03.2008. She has been away from the unit for some time on Maternity Leave and Career breaks*", the Tribunal notes that Insp S John accepts the reference to a previous career break in the summary email was an error. The Tribunal however notes

that, as had been confirmed by Caroline Ashfield at the meeting, Mrs Stones had just requested a career break. The Tribunal concludes that while there was contextual error in the brief summary it is wrong to conclude that Insp John or any other attendee concluded at the meeting that Mrs Stones had previously been on a career break. The reference in the brief summary was, more accurately to the request by Mrs Stones for a career break. The summary further states that Mrs Stones “*has not been deployable since October 2009*” it did not give full break down at this stage of reasons, but it described as an executive summary. The Tribunal is satisfied that no conclusion was arrived on the summary, the next steps were set out as.

“Management Discussion to discuss

- *Next step procedurally (Management discussion RAP)*
- *Request any necessary specialist medical reports (Neurology, Auto Immune)*

It is the Tribunal’s assessment on the evidence, and in so far as the issue is before it, that the term “*non deployables*”, was not unfavourable treatment because of Mrs Stones absence or disability and was not something arising in consequence Mrs Stones disability. It was a broad term used to described those officers who for any reason would not be deployable as a firearms officer. The description that Mrs Stones had not been deployable since October 2009 was not unfavourable treatment because of something arising in consequence of Mrs Stones disability. It was part of a short summary. No determination was made beyond discussing the possibility of a RAP and that any necessary specialist medical reports be requested.

92. On **Monday 28 March 2016** C/I Brotherston e-mailed Insp Brown “*the fact that Clare has had most of the last 6 years off work would not automatically preclude her from a career Break*”.

The Tribunal notes that it is Mrs Stones’ position that CI Brotherston’ comment was sarcastic in tone. The Tribunal accepts CI Brotherston’s evidence that it was simply factual and that it was not made with sarcastic intent. It is the Tribunal’s assessment on the evidence, in so far as the matter is before the Tribunal, that the comment was not unfavourable treatment

because of Mrs Stones absences and was not something arising in consequence of Mrs Stones disability. It was a factual comment made as part of his overall support for Mrs Stones request for a career break.

5 93. On **Tuesday 29 March 2016** a CNC case report (the **March 2016 CNC Occupational Health Case Report**) was issued by Karen Towers CNC's Senior Occupational Health Adviser reflecting her telephone consultation with Mrs Stones on **Thursday 16 February 2016** and which set out that she considered that Mrs Stones was "*unlikely to be fit*" for work. She set out that
10 2 earlier episodes of loss of consciousness were investigated and diagnosed as benign and related to gastroenteritis "*I understand that ... has had a further 2 to 3 episodes and has now been referred to another Specialist for further assessment and investigations ... At present I would not consider that*" she "*... is fit to return to work until there is a clear diagnosis and prognosis regarding her medical conditions and its impact on her ability to undertake AFO duties. Until further medical information is available is available, I am unable to predict when this is likely to ... I understand that*"
15 she "*is currently seeking a career break although I am not aware of the reasons for this. I can advise if CNC are likely to grant the request than it would be prudent for her to remain under the GP and be referred and assessed via the NHS. Should the CNC be unable to accommodate the request then I would recommend that we seek private referrals to investigate ... ongoing angioedema and episodes of loss of consciousness in order to determine her fitness to return to work and AFO duties*".
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25 94. The Tribunal accepts Karen Towers analysis at the Tribunal of the implications of a career break, for funding of further medical assessment reflected CNC position at the material time and at present, that while they will, subject to recommendations and advice, offer to fund some medical
30 assessments for its officers, that would not be available to individuals who are on a career break. In so far as the issue is before the Tribunal, the medical assessment and recommendation by Karen Towers was unfavourable treatment arising from the lack of prognosis and ongoing

absences arising in consequence of Mrs Stones' disability, and further arising from the health declarations recorded by Insp Brown, the recommendation that she was likely to be unfit pending further investigation was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to the health and of CNC's officers including Mrs Stones and was reasonably necessary to do so.

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95. From **April 2016** Mrs Stones was continuously absent on sick leave until the date of termination of her employment.

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96. Until **Saturday 2 April 2016**, and as set out by Mrs Stones in her **January 2016 Career Break Application**, she believed she was taking "*TOIL until 2 April and should still have a small amount to carry over*".

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97. On **Tuesday 12 April 2016** Insp Brown e-mailed Chief Supt Duncan Worsell, setting out that "*As discussed last week on your visit to the Unit*" Mrs Stones "*has requested to take a career break from CNC for a period of 12 months, her reasons for this request are based around medical issues... Based on the information available I am of opinion that this request should be granted, it will allow time during*" her "*KIT days*" Keeping in Touch Days "*to be managed from a medical standpoint and to attend treatment, appointments etc. CNC OHD are of the opinion that*" she "*is not fit to be in the workplace in any capacity due to her medical issues, this includes catch up training on KIT days until her medical issues are addressed*". The Tribunal notes that it was Mrs Stones' position that this communication was supportive of her and did not seek to argue that it was unfavourable treatment because of something arising in consequence of her disability. In so as it may have been something arising in consequence her disability it the Tribunal assessment that it was proportionate in seeking to establish that those employed by CNC are capable of meeting CNC's statutory obligations.

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5 98. On **Tuesday 12 April 2016** Chief Supt Duncan Worsell. Divisional Commander emailed Insp Brown in response "*I would support a career Break, if that is Clare's request and so long as she is not making that request because she feels it is the only option available to her.*" The Tribunal notes that it was Mrs Stones' position that this communication was supportive of her and did not seek to argue that it was unfavourable treatment because of something arising from her disability. In so as it may have been something arising in consequence of her disability it was proportionate.

10 99. On **Wednesday 13 April 2016** CNC DHC considers Mrs Stones' position and notes that Kirsty Strachan CNC's HR Case adviser described concerns that CNC "*were agreeing to a career break on medical reasons and they are not traditionally utilised for medical purposes. We need to explore every opportunity, perhaps bring her back and flexible work her in the workplace not the career break being the only option. CA has asked Paul Brown to explore every option with PS Stones before a decision is made on the Career Break*". The Tribunal concludes that Kirsty Strachan's description of the implications of a career break for funding of further medical assessment, reflected CNC's position that, while CNC may elect at its discretion, subject to recommendations and advice, to offer to fund some medical assessments for its officers, that would not be available to individuals who are on a career break from their role as an officer. In so far as the issue is before the Tribunal, the Karen Towers concern amounted to unfavourable treatment arising in consequence of Mrs Stones' disability, specifically arising from the health declarations recorded by Insp Brown, the concern was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to the health of CNC's officers including Mrs Stones, the possible funding impact of a career break, and was reasonably necessary to do so.

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100. On **Wednesday 13 April 2016** CI Brotherston e-mailed Chief Supt Worsell and stated "*with the greatest respect (protection for you) I have placed a pause against this (career break) as I am nervous around the*

circumstances and creating a precedent I would counsel that this needs further discussion and that following information at the DHC we need to be sure we are comfortable”.

5 101. The Tribunal concludes that, as this stage further consideration of Mrs
Stones’ request for a Career break was put on hold, reflecting CNC position
that while they would, subject to recommendations and advice, offer to fund
some medical assessments for its officers, that would not be available to
individuals who are on a career break. In so far as the issue is before the
10 Tribunal, CI Brotherston’s concern was unfavourable treatment because of
something arising in consequence of Mrs Stones’ disability, specifically
arising from the health declarations recorded by Insp Brown, the concern
was proportionate. In particular, it was a proportionate means of achieving
a legitimate aim, including having regard to the health and of CNC’s officers
15 including Mrs Stones and the possible funding impact of a career break and
was reasonably necessary to do so.

102. On **Thursday 14 April 2016** CNC’s Caroline Ashfield e-mail to Paul
Brown *“We would not require someone who is not medically fit for work to
20 take a career break, they would be entitled to take sick leave and receive the
appropriate sick pay. I am unsure if this has been discussed with” her...
Whilst on career breaks certain benefits don’t apply eg accrual of annual
leave. I am unsure if the officer is aware of this, whereas annual leave does
accrue whilst on sick leave. The request is reassurance that these
25 discussions have taken place with PS Stones and she is fully aware that
there is no requirement to request a career break due to currently not fit for
work”.*

103. The Tribunal concludes that there was no adverse ulterior motive. In
30 any event, and in so far as the issue is before the Tribunal, that the concern
reflected CNC position that while they will, subject to recommendations and
advice, offer to fund some medical assessments for its officers, that would
not be available to individuals who are on a career break. In so far as the
issue is before the Tribunal, in so far as this concern amounted to

unfavourable treatment arising in consequence of Mrs Stones' disability, specifically arising from the health declarations recorded by Insp Brown, the concern was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to the health and of CNC's officers including Mrs Stones and the possible funding impact of a career break and was reasonably necessary to do so.

104. On **Tuesday 19 April 2016**, while part of the document was before the Tribunal, the Tribunal notes that an immunologist issued a medical note to Mrs Stones' GP which set out "*Thank you for referring Ms Stones a 38 years old police sergeant for immunology assessment. She reported a history of multiple symptoms for many years and has had to take a career break at present. She has recurrent itchy skin rashes and swelling attacks her photographs of the swellings ate are possibly angioedema of her limbs and face although they are not very clear. She has swelling episodes affecting other parts of her body including lip, tongue and throat (no photos). The majority of the of her swelling attacks last a few days*".

105. On **Friday 22 April 2016** Mrs Stones GP Dr B Clancy wrote to Karen Towers CNC's Senior Occupational Health Adviser stating that her "*condition is complicated and the cause of her symptoms uncertain*".

106. On **Tuesday 26 April 2016** Insp Brown e-mailed Mrs Stones setting out that "*I spoke with*" Insp Johns "*and he has asked can you please get a sick line for your doctor. I would suggest to include up to your next appointment with your immunologist on 20th June if you can. If you get one either post it to me and I will copy and send back or if possible e-mail me a scanned copy through*".

107. In so far as the issue is before the Tribunal, the Tribunal does not consider that any relevant claim which Tribunal has jurisdiction to consider arises. The Tribunal in any event is satisfied that an employer is not under a duty justiciable before Tribunal to provide advice, to an employee, as to the

possible implications for an employee being identified as absent for work due
ill-health. The Tribunal does not accept that Insp Brown gave any
undertaking to Mrs Smith that, in the event that her GP provided a Fit Note
certifying that she was medically not fit to attend work, CNC would take no
5 action in consequence. Insp John was not in a position to provide such an
undertaking, there was no reason for him to do so, the reason for his contact
was arising out of concern that Mrs Stones' career break may have limited
CNC's ability to procedurally offer funding for medical assessments. Such a
limitation was reasonably in the contemplation of CNC as not being readily
10 apparent to Mrs Stones.

108. The Tribunal is satisfied that the implications of health related absent
from work, including the risk the longer-term absence may lead to termination
were within Mrs Stones' knowledge and understanding at the time. The
15 Tribunal notes that no evidence was adduced of any response from Mrs
Stones, to the effect, that she was operating on the basis any such
undertaking having been given by Ins Brown. In any event, and in so far as
the issue is before the Tribunal, Insp Brown's approach reflected CNC
position that while they will, subject to recommendations and advice, offer to
20 fund some medical assessments for its officers, that would not be available
to individuals who are on a career break. In so far as the issue is before the
Tribunal, this concern amounted to unfavourable treatment because of
something arising in consequence of Mrs Stones' disability, specifically
arising from the health declarations recorded by Insp Brown, the concern
25 was proportionate. In particular, it was a proportionate means of achieving
a legitimate aim, including having regard to the health and of CNC's officers
including Mrs Stones and the possible funding impact of a career break and
was reasonably necessary to do so.

30 109. The Tribunal does not accept, in all the circumstances that Mr Stones
was unaware, at any material time, that one possible consequence of being
medically absent from work was that ultimately a capability dismissal could
arise. The Tribunal notes that Mrs Stones accepted at the Final Hearing that

CNC had no reason to doubt the opinion of her GP as contained within her GP Fit Notes.

5 110. On **Wednesday 27 April 2016** Mrs Stones was signed off as unfit for 2 months by her GP. The Fit Note stated reason was because of "*Chronic urticaria/angioedema*", the Fit Note recorded "*You are not fit for work*" Mrs Stones' GP scores through all 4 adjustment options ~~phased return to work, amended duties, altered hours, workplace adaptations~~ .

10 111. On **Tuesday 3 May 2016** at CNC Management Discussion which was arranged progress Mrs Stones' case, Karen Towers reported that "*As advised in my last report I do not consider that*" Mrs Stones "*is fit to return to in any capacity until there is a clear diagnosis and prognosis regarding her medical condition and its impact on her ability to undertake AFO duties*".
15 Further and also on **Tuesday 3 May 2016** K Strachan noted in an e-mail that Ins Brown "*had discussed the points with the officer and she did not want to be on sick leave and would prefer the career break*".

20 112. On **Monday 9 May 2016** Mrs Stones e-mailed Insp Brown, following Insp Brown's telephone call her on that day and set out "*I must apologise for cutting you off when you phoned. I just had a funny turn and was waiting the doctor to call*" her husband had "*thought you were the doctor. I now have a epi-pen. When you phoned I had already got a sick note until the end of June as requested and sent this to you. Please could I be placed sick until the*
25 *expiration of the sick note with a view to filling in a new career break when it is clear what my immunologist thinks... The other problem is occupational health have advised I submit a sick note, and as it stands, I would not be*
allowed to fulfil the four weeks work for a career break as I am deemed unfit"

30 113. The Tribunal notes Mrs Stones' direct request that her career break, be converted to sickness initially until the end of June 2016. On the evidence adduced, the Tribunal are satisfied that the four weeks to which Mrs Stones refers, are the Keeping in Touch paid days allocated to CNC officers who are

on career break designed to facilitate an officer returning to work at the conclusion of the career break. The Tribunal further notes that she advised that it would be her intention to apply again for a career break when her health condition was clearer. The Tribunal considers that Mrs Stone herself considered that there was no clarity as to prognosis at this point.

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114. On **Tuesday 28 June 2016** Consultant Neurologist J Greene, following Mrs Stones' attendance for examination on that day dictated his report to Mrs Stones' GP (**the June 2016 Consultant Neurologist Report**) which set out that "*She was troubled with a few episodes of loss of consciousness which started in February 2016... .. She can have pins and needles and numbness which can be felt all over her body She can have difficulty with concentration and a degree of forgetfulness. She can have upper limb sensory symptoms which can be worse when driving. She can feel weak, especially in her arms. She has had three episodes when she has restricted neck movement... her mother has lupus. I think her symptoms may be a combination of cervical spondylosis accounting for upper limb symptoms, but in addition to that she may well have ME or Chronic fatigue syndrome. ... I have requested MRI brain and spine and also nerve conduction studies to check there is no peripheral neurological contribution to her symptoms. I have no specific recommendations meantime, but I plan to review her as soon as the result of the investigations are to hand*".

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115. The Tribunal notes that the **June 2016 Consultant Neurologist Report** does **not** refer to the earlier loss of consciousness events as being reported to him by Mrs Stones. The Tribunal notes and accepts that the Consultant Neurologist, did not within the **June 2016 Consultant Neurologist Report** offer a firm diagnosis and or prognosis.

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116. On **Thursday 30 June 2016** CNC had a management discussion in respect of Mrs Stones case at which various investigations relating to Mrs Stones health were discussed, it was confirmed that Karen Towers awaited

the neurologist report which although the referral was via her GP was funded by CNC.

5 117. On **Tuesday 9 August 2016 CNC** DHC considered Mrs Stones position again, Karen Towers reported that Mrs Stones *“had attended a neurology appointment (funded by CNC) which made recommendation that she had an MRI scan and nerve conduction studies... we are currently awaiting the results. If there is no neurological reason for the symptoms she is experiencing she will be referred to a rheumatologist. The officer thought*
10 *she had been referred to a gastroenterologist , however upon speaking with her GPO, Dr Clancy, he never formally referred her. He wrote to them asking if the in their opinion was there any gastro condition which could result in her fainting episodes and he is a awaiting a response back. With regards to immunology she will not be reviewed until June next year... When she saw*
15 *the immunologist earlier this year they made changes to her medication and she was referred to a neurologist”.*

20 118. The Tribunal accepts, as did Mrs Stones at the Final Hearing that, as at Tuesday 9 August 2016 while 3 specialist clinical areas were under consideration, there was no clear medical picture available to CNC in respect of Mrs Stones condition.

25 119. On **Friday 12 August 2016** CNC had a Management Discussion in relation to Mrs Stones case at which there is a further update on the *“the three specialist streams”* of investigations into her medical conditions, it was noted that;
a. the neurologist had arranged MRI and nerve conduction studies and the outcome was awaited; and
b. in relation to immunology, some changes to medication had been following
30 attendance earlier in the year and the next review would be June 2017; and
c. while Mrs Stones had understood she had been referred to gastroenterology no referral had been made, her GP had asked a question and was awaiting the response.

120. On **Friday 26 August 2016** Mrs Stones was signed off as unfit for 2 months by her GP. The Fit Note identified that it was due to "*Chronic urticaria/angioedema*" "*You are not fit for work*" GP scores through all 4
5 adjustment options ~~phased return to work, amended duties, altered hours, workplace adaptations~~. The Tribunal notes that Mrs Stones accepted at the Final Hearing that CNC had no reason to doubt the opinion of her GP as set out in the GP Fit Notes.

10 121. On **Tuesday 13 September 2016** Karen Towers Senior Occupational Health Adviser confirmed that Mrs Stones was "*not fit to attend work in any capacity until there is a clear diagnosis and prognosis regarding her medical condition and its impact on her ability to undertake AFO duties*". Karen Towers noted that Mrs Stones had "*undergone MRI Scan and nerve
15 conduction studies which have proved to be normal. The neurologist has recommended a referral to Rheumatology as he considers that she may have "multi system disorder"*".

20 122. The Tribunal notes that Mrs Stones accepted that at this date she been on sick leave for 5 to 6 months. The Tribunal notes that the sick leave reflected the Fit Notes issued by Mrs Stones' GP to CNC. The Tribunal notes that Mrs Stones accepted at the Final Hearing that the decision to recommend that Mrs Stones not attend work in any capacity, "*until there is a clear diagnosis and prognosis regarding her medical condition and its impact
25 on her ability to undertake AFO duties*" was a responsible decision by CNC. The Tribunal notes that Mrs Stones accepted at the Final Hearing that this point in time the MRI scan was "*fine*" and the Neurologist was offering a hypothetical view that the medical issue could be multi system. In so far as the matter is before the Tribunal, and while the recommendation
30 unfavourable treatment was because of something arising in consequence Mrs Stones' disability, specifically the lack of prognosis and ongoing absences, it was proportionate means of achieving a legitimate aim,

including having regard to the health and capability of CNC's officers including Mrs Stones and reasonably necessary to do so.

5 123. On **Tuesday 20 September 2016** CNC held a monthly management meeting to discuss Mrs Stones, it was decided that that Karen Towers should provide an up to date Occupational Health report and get up to date info about medical investigations. JB confirmed that the CNC required to consider the case under the Equality Act 2010 as they would require to determine how this would link into their redeployment procedure. It was noted that "*it may not be that we can redeploy her in other roles but that is an evolving picture at the moment as we work through the capability process.*" It was noted that if someone was off sick for 6 months with no clear return to work then in the next 3 months the capability procedure would be commenced. It was explained that the meeting that using the capability procedure result in a formal procedure to return back to full duties but if that was not possible, they would have the individual in a procedure to follow. It was decided to recommend the commencement of the capability procedure.

20 124. In so far as the issue is before the Tribunal, the proposal to get up to date Occupational Health report was not unfavourable treatment. The discussion to recommend the commencement of the capability, while was unfavourable treatment because of ongoing absences and lack of prognosis arising was something arising in consequence of Mrs Stones' disability, the recommendation was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to capability of CNC officers and reasonably necessary to do so.

30 125. On **Friday 28 October 2016** CNC held a meeting to consider Mrs Stones' case, for "*Agreement to progress with the Capability Procedure*". At the meeting there was discussion around on whether CNC had exhausted the diagnostic reasons for loss of consciousness, Karen Tower explained that CNC did not know when it was likely that Mrs Stones would return to work and full duties. After discussion it was is decided to refer her to a Risk

Assessment Panel (RAP) to consider a permanent restriction on firearms duty, prior to commencing the capability procedure.

5 126. In so far as the issue is before the Tribunal, the decision to refer Mrs Stones to a Risk Assessment Panel on Friday 29 October 2019 was unfavourable treatment because of the ongoing lack of prognosis arising in consequence of Mrs Stones' disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to the role of AFO's in light of the statutory role of the
10 CNC and was reasonably necessary to do so.

127. On **Tuesday 1 November 2016** Mrs Stones was assessed by Dr Hazem Youssef, Consultant Rheumatologist. His report following examination (the **November 2016 Rheumatologist report**) was addressed
15 to Mrs Stones' GP, was inconclusive. He reported that he did not "*think we are dealing with Lupus or multisystem disease and have explained this to Mrs Stones. I am unable to explain her symptoms but suspect they are functional*".

20 128. On **Thursday 8 December 2016** Dr Policarp CNC's Occupational Health Doctor "*considering the specialist reports, GP report, ...conversations with*" Mrs Stones" *the summary of medical problems identified by the specialists*" concluded that "*recovery to operational levels is likely to take a significantly prolonged time*".

25 129. On **Saturday 10 December 2016** Mrs Stones attended for examination by Locum Consultant Gastroenterologist, J Todd via a referral from her GP. He reports to Mrs Stones' GP on **Tuesday 10 January 2017** (the **January 2016 Gastroenterologist Report**) that her "*symptoms are in
30 keeping with irritable bowel syndrome*" and offers a diagnosis of IBS as the cause of Mrs Stones' fainting episodes and suggests that the GP refers Mrs Stones to a dietician. In his report he records that Mrs Stones had "*fainted*"

once in 2012 and twice this year” and indicates that he had explained to Mrs Stones about the potential effects including of drowsiness, blurred vision.

5 130. On **Thursday 15 December 2016** Insp S Johns had welfare contact with Mrs Stones during which was noted that Mrs Stones continued to suffer from a complicated medical history, She has been reviewed by various specialists Insp John who at this time had not seen the **January 2017 Gastroenterologist Report**) notes that it is believed that she is suffering from IBS and that she has been referred to a dietician for advice, he notes 10 that Mrs Stones believes that IBS may be the cause of her fainting , she described she is currently medicated for antihistamines and has been checked for lupus, which came back negative but that she was strongly believes that she was suffering from *“this condition”* she additionally describes that she has outstanding appointments for gastroenterology and immunology follow ups the following year. Insp John notes that she was 15 *“quite upset”* when he explained that the case was to progress to RAP, he discussed the various medical supports that had been provided and *“she expressed her disappointment that she still does not know what is causing her condition”*.

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131. On the evidence adduced the Tribunal concludes that Mrs Stones’ comment regarding being checked for Lupus was a reference to the examination by the Consultant Rheumatologist on 1 November 2016 which resulted in the issue of **November 2016 Rheumatologist report**, the 25 Tribunal forms no view as to whether Mrs Stones had been advised by her GP of the content of that report. On the evidence adduced, the **November 2016 Rheumatologist report** was not provided to Insp Johns as at this date.

132. On **Thursday 22 December 2016** CNC’s RAP met and reflective of 30 the available information concluded that Mrs Stones should be permanently restricted from AFO duties. The available information included the PARQ form. Attendees include DR M Fernandez, Insp S Johns, C Ashfield and K Strachan and was chaired by Duncan Worsell (DW), who set out *“none of*

5 *the pregnancy related illness/time away from work has an impact on whether*” to restrict. On the chair DW seeking clarity on the current medical condition Dr Fernandez sets out his clinical assessment that Mrs Stones had seen multiple specialists *“we are going round in circles. Noone can give diagnosis and therefore we cannot give prognosis of when”* Mrs Stones could return to AFO duties. The chair notes that the restriction would be permanent *“unless someone can come back with evidence that she will or has recovered”*. It is noted that there was *“a potential”* ill health retirement or capability route.

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133. The Tribunal accepts that CNC considered the restriction to be permanent subject, as set out, to further evidence that Mrs Stones has or would recover. While the potential for exit was noted the Tribunal concludes that no decision was made that CNC would proceed to any form of termination of Mrs Stones employment. In so far as the issue is before the Tribunal, the decision to permanently restrict Mrs Stones from operating as an armed officer on Thursday 22 December 2016 was unfavourable treatment because of the lack of clear prognosis was something arising in consequence of Mrs Stones’ disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including having regard to the role of AFO’s in light of the statutory role of the CNC and was reasonably necessary to do so. The Tribunal accepts the evidence of Dr Fernandez throughout the Final Hearing, as both compelling and straightforward.

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134. On **Thursday 22 December 2016** CNC wrote to Mrs Stones setting out that she was permanently restricted from AFO duties. The letter set out that it recognised that the decision would be unwelcome and would *“naturally be of concern”* and urged that Mrs Stones discuss the available options direct with her line manager. The letter set out that the Minutes would be provided. The Tribunal accepts that that the Minutes were not provided subsequently. The Tribunal concludes that CNC omission to provide the minutes was not a deliberate act. The Tribunal concludes, on the available evidence, that Mrs

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Stones did not request the Minutes. In so far as the issue is before the Tribunal, CNC's omission to provide the Minutes of the RAP on **Thursday 22 December 2016** was not unfavourable treatment because of something arising in consequence of Mrs Stones' disability. The Tribunal is satisfied,
5 on the evidence adduced, that Mrs Stone elected not to subsequently act on CNC's recommendation within the letter issued Thursday 22 December 2016.

135. From **Friday 23 December 2016** Mrs Stones was declared as unfit to
10 work by her GP in Fit Note issued Wednesday 11 January 2017.

136. On **Wednesday 11 January 2017** Mrs Stones was signed off as unfit
for 2 months by her GP from Friday 23 December 2016 to 23 February 2017.
The Fit Note identified that it was due to "*Chronic urticaria/angioedema*" "*You
15 are not fit for work*" GP scores through all 4 adjustment options ~~phased return
to work, amended duties, altered hours, workplace adaptations~~. The Tribunal
notes that Mrs Stones accepted at the Final Hearing that CNC had no reason
to doubt the opinion of her GP as set out in the Fit Notes. The Tribunal is
satisfied that Mrs Stones remained signed off as unfit thereafter.

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137. On **Sunday 22 January 2017** Mrs Stones applied for ill health
retirement, completing "request for early payment of pension benefits on ill
health grounds". The application confirmed that Mrs Stones understood
that she "*may be required to attend for medical examinations if these are
25 necessary to establish whether or not the criteria for ill health retirement are
met in my case*". While the Tribunal does not have jurisdiction to determine
issues around eligibility for ill-health pension entitlement, the Tribunal notes
that Mrs Stones adduce evidence that she had applied at this stage. In so
far as the issue is before the Tribunal, a requirement for medical evidence
30 in relation to eligibility of ill health retirement was because of something
arising in consequence of Mrs Stones' disability, it was however was
proportionate. In particular, it was a proportionate means of achieving a

legitimate aim, including seeking to ensure that those eligible to early payment under the scheme are afforded access.

5 138. On **Tuesday 7 February 2017** Dr Manuel Fernandes wrote to Mrs
Stones' GP explaining why CNC is unable to support her application for ill
health retirement setting out in terms of the criteria, Mrs Stones, had "*21
years until retirement. She has a number of unexplained medical symptoms
and she had two underlying medical conditions which should not prevent
her from working in some capacity before the usual retirement date....*
10 *Please let me know if you disagree with the conclusion as soon as possible
so I can forward her application to the pensions authority.*" The Tribunal is
satisfied on the evidence adduced that there was no response from Mrs
Stones' GP disagreeing with Dr Fernandez's assessment.

15 139. On **Monday 6 March 2017** Mrs Stones attended the NHS
Community Dietician. **The Community Dietician** wrote to Mrs Stones' GP
(the **March 2017 Community Dietician Report**) setting out that over the
course of the past 4 week she had followed all first line advice provided for
IBS management but in this period "*she has not noticed a considerable
20 improvement in her symptoms*". She proposed as the symptoms were
having a considerable impact on Mrs Stones' physical and mental
wellbeing to refer her to a specialist gastroenterology dietician.

25 140. On **Monday 6 March 2017** CNC's Armed Police Model
Redeployment Panel (the Redeployment Panel) met. It was noted that Mrs
Stones had a diagnosis of unexplained symptoms and a prognosis could
not be given for a return to work "*in any capacity at this time*". It was noted
that Mrs Stones had applied for ill health retirement "*and this application
was in progress with the GP, but was not supported by the Chief Medical
30 Officer due to the lack of diagnosis and prognosis*". Redeployment Panel
agreed that it was not possible to "*at this time to determine whether the
officer was suitable for redeployment, and the outcome of the ill health
retirement was requirement before this could be considered further*" the

Redeployment Panel had discussed regarded potential redeployment opportunities for Mrs Stones and the “*PS vacancies at Sellafield, which would result in*” a Public Interest Transfer (whereby some relocation costs could be met). The Redeployment Panel deferred any decision pending the outcome of Mrs Stones' ill health retirement application.

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141. In so far as the issue is before the Tribunal and in so far as the decision to defer was unfavourable treatment because of Mrs Stones application for ill health retirement which arose in consequence of Mrs Stone's disability, her ill health retirement application, deferring consideration of redeployment was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including not redeploying officers who would be subject to ill health retirement and was reasonably necessary to do so.

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142. On **Monday 17 April 2017** Mrs Stones was signed off sick for a further two months GP Fit Note stated that because of the following condition (s) “*Chronic urticaria “You are not fit for work”*”, the GP scores through all 4 adjustment options ~~phased return to work, amended duties, altered hours, workplace adaptations~~”. The Tribunal notes that Mrs Stones accepted at the Final Hearing that CNC had no reason to doubt the opinion of her GP as set out in the Fit Notes.

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143. By letter dated **Thursday 25 April 2017** issued to Mrs Stones CNC, confirmed that UKEAE Pension Authority had declined the request to release early pension benefits on ill health grounds, the decision was based “*on the medical information presented at this time by the Chief Medical Officer and his confirmation that without diagnosis treatment option cannot be determined.... If the position changes the Pension Authority has advised that it can further review your application. If you have additional information that could be submitted to appeal this decision please write to*” the relevant person.

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144. On **Friday 5 May 2017** Mrs Stones was notified by Insp Simon Johns that her application for ill health retirement had been rejected by the relevant pension authority. Mrs Stones advised that she was not surprised by this outcome and although the right of appeal was confirmed Mrs Stones confirmed that there was no further information to provide for reconsideration. Mrs Stones advised that she had a rescheduled Immunologist appointment on 15 May 2017 in Glasgow via the NHS and she committed to provide Insp John with an update following same. Mrs Stones had not sought to utilise CNC's self-declaration process notifying of application under EA 2010. Insp Johns explained that her case was on the agenda for the Redeployment Panel to identify any alternative roles. Insp Johns enquired about Mrs Stones ability to attend Dounreay for a meeting under CNC Capability process and was advised that she would be able to attend. In so far as the issue is before the Tribunal, the Tribunal does not consider that the request to Mrs Stones that she confirm that she was able to attend was unfavourable treatment, however and to the extent that the request was because of something arising in consequence of Mrs Stones disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that officers are able to take part in CNC's Capability process.

145. On Friday **12 May 2017** Mrs Stones, in accordance with CNC's standard practice, was asked to sign an updated (and which would be regarded as in date) consent form authorising release of her medical records (previous form of consent having been signed **Tuesday 15 September 2015**).

146. On **Saturday 20 May 2017** Mrs Stones signed CNC's updated medical consent form, consenting to

- a. CNC occupational Health seeking a medical report from her specialist and/or GP as to the history and nature of the condition or its treatment,

- b. CNC occupational Health approaching her GP and/or specialist for a report;
- c. Her case being discussed as part of a Management Discussion; and
- d. Her case being discussed as part of a RAP (Risk Assessment Panel); and
- e. Her case being discussed as part of Redeployment Panel.

147. On **Thursday 1 June 2017** Temp C/ I Pat Green CNC wrote to Mrs Stones inviting her to attend **Stage 1 Capability Meeting** “ *Further to numerous specialist medical investigations which have been unable to confirm a medical diagnosis and following your recent unsuccessful request for IH, I am now writing to invite you to a formal first capability meeting to discuss your continued employment within” CNC and /or any possible return to work on either full or reasonable restricted duties and appropriate timescale*”. The main areas of concern were identified to be the continued medical restrictions which had identified that she was unable to be deployed in her contracted role as an AFO, noting that she was permanently restricted via the RAP on 22 December 2016 and set out “*if a return to work on full or reasonable restricted duties is not likely in the foreseeable future, termination of employment under the Capability Management Procedure is a possible outcome*” . In so far as the issue is before the Tribunal the possible application of CNC Capability Process was unfavourable treatment because of a lack of prognosis arising in consequence of Mrs Stones’ disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that CNC through its officers re able to fulfil its statutory role and was reasonably necessary.

148. On **Monday 5 June 2017** CNC’s Redeployment Panel meets and discusses Stones' position. The RAP panel concluded that the officer was not suitable for redeployment as there was currently no prognosis. The Tribunal accepts CNC’s conclusion that there was no prognosis. The Tribunal considers that prognosis and diagnosis are not interchangeable

terms. In particular, an individual may be diagnosed with a specific condition but the prognosis, that is to say future progress, and any recovery may remain unclear. As at 5 June 2017 the Tribunal is satisfied that there was no prognosis available to CNC. In so far as the issue is before the Tribunal the application of CNC Capability Process was unfavourable treatment because of the lack of prognosis which arose in consequence of Mrs Stones' disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that CNC through its officers re able to fulfil its statutory role and reasonably necessary.

149. On **Monday 19 June 2017** Mrs Stones was signed off sick for a further two months GP Fit Note states because of the following condition "*Chronic urticaria (no refer to /angioedema*" "*You are not fit for work*" GP scores through all 4 adjustment options ~~phased return to work, amended duties, altered hours, workplace adaptations~~". The Tribunal notes that Mrs Stones accepted at the Final Hearing that CNC had no reason to doubt the opinion of her GP as continued within the Fit Notes.

150. On **Thursday 22 June 2017** Mrs Stones attended the Stage 1 Capability Meeting (the **June 2017 Stage 1 Capability Meeting**), at Dounreay which was chaired by Temp C/ I Pat Green. Mrs Stones was accompanied by **PC Andrew Ebert** (who the Tribunal notes was later identified as a trade union [Police Fed] representative). The Executive Summary prepared for the meeting, and which had been sent to Mrs Stones in advance, set out in relation to "*Prognosis and Key information*", that

- a. Mrs Stones had been a non deployable AFO most significantly commencing 8 December 2015 with the PARQ.
- b. Mrs Stones was permanent restricted through AFO through RAP on 22 December 2016.
- c. Mrs Stones had unsuccessful applied for ill-health retirement -as she doesn't suffer from a clearly defined medical condition and without a

definite medical diagnosis the pension administrators had been unable to authorise payment; and

- 5 d. Three individual specialists from rheumatology, immunology and gastroenterology had reviewed her condition but were unable to diagnosis. Dr Policarp CNC Occupational Health doctor had declared Mrs Stones was not fit to be in the workplace; and
- e. Mrs Stones' case had been through the redeployment panel for consideration of other roles but given Dr Policarp's finding no other roles were available.
- 10 f. Various medical reports were included. However, it did not include the following reports to Mrs Stones' GP;
- 15 i) the **December 2015 Rheumatology Report** to Mrs Stones' GP which offered headline diagnosis; "*Urticaria and possible angioedema Unexplained medical symptoms of headache, fatigue and weakness*";
 - ii) the **January 2016 Gastroenterologist Report** to Mrs Stones' GP which indicated a diagnosis of IBS;
 - 20 iii) the **March 2017 Community Dietician Report** to Mrs Stones' GP which had set out that over the course of the past 4 week she had followed all first line advice provided for IBS management but in this period "*she has not noticed a considerable improvement in her symptoms*".

25 At the foot of the Executive Summary it was set out that "*Considerations for the RAP: Can this officer be permanently restricted? Can the officer return to the work place? Can this officer handle firearms whilst on***medication?*"

Towards the start of the **June 2017 Stage 1 Capability Meeting** Mrs Stones challenged the Executive Report setting out that she had a diagnosis of IBS and Eustachian tube dysfunction and Urticaria "*which highlights that there is an immune issue somewhere but nobody can identify what that is*" she described that she was currently under referral of an immunologist 3 times a week having blood drawn and tested to identify any patterns in her blood results. CNC's HRH Jordan confirmed "*advised there are definitely no PS position available*". After an adjournment, Temp

CI P Green “*Advised that there were currently no options to bring*” Mrs Stones “*back into the workplace given her medical status and could not foresee a return for her at present in an AFO role and taking in to consideration there are no vacancies via the APM. However,*” Mrs Stones
5 “*could consider Police Staff roles*” (that is civilian non officer roles within CNC)” which KS (CNC HR Kirsty Strachan) can give details of the roles available. However, they would be subject to medical review and interview process along with relevant salary and terms of that role. At this time he recommends we move this meeting to Stage 2” Capability Hearing.

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151. The Tribunal notes that Mrs Stones agreed at the Final Hearing that she that she could not carry on as an AFO at this time. The Tribunal notes Mrs Stones focus at the Final Hearing on the non-inclusion of the first two of the 3 medical reports to her GP, it being contended by Mrs Stones that
15 CNC were proceeding on a flawed basis that there were 2 diagnosed conditions being urticaria and IBS. The Tribunal however accepts Dr Fernandez’s analysis that the principal focus (as set out in the Executive summary) was “*prognosis*”. The Tribunal accepts that prognosis and diagnosis are not interchangeable terms. In particular an individual may be
20 diagnosed with a specific condition but the prognosis, that is to say future progress and any recovery may remain unclear. As at 5 June 2017 the Tribunal is satisfied that there was no prognosis available to CNC. In any event the Tribunal notes that the **December 2015 Rheumatology Report** describes beyond offering a diagnosis of Urticaria and possible
25 angioedema “*Unexplained medical symptoms of headache, fatigue and weakness*”; and further the **January 2016 Gastroenterologist Report** to Mrs Stones’ GP offering a diagnosis of IBS would, if included, have required to been seen in the context of the **March 2017 Community Dietician Report** to Mrs Stones’ GP which had set out that over the course
30 of the past 4 week she had followed all first line advice provided for IBS management but in this period “*she has not noticed a considerable improvement in her symptoms*”. Further the Tribunal notes and accepts the conclusion of the **June 2017 Stage 1 Capability Meeting** which was

reached after Mrs Stones had the opportunity of setting out her position as to the position within the medical reports sent to her GP.

5 152. The Tribunal accepts that CNC considered Mrs Stones being allocated to civilian non officer roles within CNC, while CNC set out, that there were at this stage no such role and allocation to such role it would be subject to medical review, interview and salary and terms. In all the circumstances and while this amounted to unfavourable treatment because of lack of prognosis and which arose in consequence of Mrs Stones
10 disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that CNC was able to fulfil its statutory role and reasonably necessary in all the circumstances.

15 153. The Tribunal is satisfied that CNC knew or otherwise CNC could reasonably have been expected to know that Mrs Stones was a person with a disability. Further and while not clearly articulated in her claims above, the Tribunal is satisfied that CNC applied a "*provision, criterion or practice*" (a PCP) of requiring that its officers were capability of fulfilling
20 CNC's statutory role.

154. That PCP put Mrs Stones at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that Mrs Stones owing to her disability was not able to
25 operate as an AFO.

155. The Tribunal further concludes that CNC knew or could have been reasonably have been expected to know that Mrs Stones was likely to be placed at any such disadvantage. The Tribunal however considers that
30 there were no steps that were not taken that could have been taken CNC to avoid the disadvantage.

156. While a burden of proof does not lie on Mrs Stones, it is considered helpful to know what steps Mrs Stones allege should have been taken. Mrs

Stones, who was accompanied by a trade union officer did not articulate any steps, at the **June 2017 Stage 1 Capability Meeting** which she considered CNC could have taken. In any event the Tribunal is satisfied that there were no steps which it would have been reasonable for CNC to take at this relevant time. In so far as the issue is before the Tribunal the application of CNC Capability Process was unfavourable treatment because of her absences and lack of prognosis, which arose in consequence of Mrs Stones' disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that CNC through its officers and employees are able to fulfil its statutory role and reasonably necessary in all the circumstances.

157. On **Monday 26 June 2017** CNC's Temp C/ I Pat Green as Chair of the **June 2017 Stage 1 Capability Meeting** wrote to Mrs Stones confirming the outcome, which was that Mrs Stones should be invited to a Stage 2 Capability Meeting.

158. On **Sunday 9 July 2017** Mrs Stones appealed against the outcome of her Stage 1 Capability Meeting. Mrs Stones set out that there was a lack of welfare contact which although had improved following her grievance had in her view been lacking for some time since "*last year*". She set out that she knows she had chronic urticaria and chronic angioedema, Eustachian tube dysfunction and IBS "*No investigation so far can reveal the cause*". She raised a query why in her view CNC budget for medical investigations had not been further used, and while she had anticipated that the Stage 1 Capability Meeting would have been open, her hopes were dashed when she was told "*there was no role for me*". She set out that via her trade union ("Federation friend") she had had to raise issues around the accuracy of the minutes. She set out that "*I do not believe that the grievance has been fully concluded*" and set out what she identified were a number of events between January 2016 and April 2016 to date including the obtaining of a GP Fit Note which she had obtained at CNC prompting "*I was hoping this may highlight my case and result in a fast track diagnosis*

enabling me to get back on to firearms and return to the workplace at the earliest opportunity". The Tribunal concludes that, had Mrs Stones wished to challenge CNC's decision, it would have been reasonably practicable for Mrs Stones to have presented a complaint to the Employment Tribunal within 3 months of this date.

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159. By letter dated **Monday 28 August 2017** Mrs Stones was notified by CNC that she has received an overpayment of sickness benefits and that payment would cease from 1 September 2017 (**the August 2017 notified Overpayment**).

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160. In so far as the issue is before the Tribunal CNC's notification of overpayment of sickness benefits on Monday 28 August 2017 by CNC, it did not amount to Harassment under section **26** EA 2010, it is the Tribunal's assessment that, in all the circumstances, it was not reasonable for that conduct to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. That request is not found to have done so. The notification did not reflect a failure to make reasonable adjustments under section **20** and **21** EA 2010. It is the Tribunal's decision that in CNC operated a practice (a PCP) or requiring that its employees repaid monies overpaid. There is however no causative link between that PCP and the substantial disadvantage, which was the requirement to repay. There was no evidence adduced that CNC would have taken steps other than to request repayment when Mrs Stones was unable, due to period of paid leave having expired. The substantial disadvantage did not "*arise out of*" the PCP. In any event there were no steps, beyond that which CNC took, to seek to effect extension of the period of pay, and which it would have been reasonable for CNC to take; the seeking of the extension was not unfavourable treatment arising in consequence of Mrs Stone's disability, in so far as the request to repay itself the Tribunal does not accept that this was because of something arising out of Mrs Stone's disability, however and in so far as it is argued to be unfavourable treatment arising in consequence of Mrs Stones' disability,

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it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that CNC paid its officers sickness benefit to which they were entitled. In so far as the issue is before the Tribunal CNC's notification of cessation of sickness benefits by CNC was unfavourable treatment because of Mrs Stones absences and arose in consequence of Mrs Stones' disability, it was however was proportionate. In particular, it was a proportionate means of achieving a legitimate aim, including ensuring that CNC paid its officers sickness benefit to which they were entitled.

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161. On **5 Tuesday September 2017** A Ebert the Trade union representation (CNC Police Federation) e-mailed Temp C/I Pat Green *"Unfortunately Clare received correspondence on 22/08/217 Consultant Immunologist who states "would be worth considering her for the management trail of fibromyalgia/chronic fatigue [... commonly known as ME] consequently Clare will be looking into the Equality Act 2010 in order to support her return to the workplace."*

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162. The Tribunal concludes that had Mrs Stones wished to challenge CNC's approach it would have been reasonably practicable for Mrs Stones to have presented a complaint to the Employment Tribunal within 3 months of this date. The Tribunal notes that Mrs Stones did not direct the Tribunal to the Consultant Immunologist correspondence which this e-mail indicates was received by her 22 August 2017.

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163. On **5 Tuesday September 2017** Temp C/I Pat Green e-mailed to Brotherston *"I have copied in Insp Bain regards the welfare contact as it was my understanding he was going to speak to Clare and find out who she wanted this to be. Insp Bain will also manage any work around the Equality Act if Clare makes application on this"*. The Tribunal accepts on the evidence adduced that this is a reference to a system within CNC whereby its officers may elect to self-declare an asserted disability and identify to CNC what adjustments that officer considers are reasonable adjustments.

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164. On **6 Wednesday 6 September 2017** Mrs Stones' trade union representative (CNC Police Federation) A Ebert emailed CNC referencing pay issues and a "*Stage 1 Appeal hearing has been booked for 14/0917 @ 14.00hrs in Inverness however we currently don't have name of the venue? Helen Jordan has assured us that all the issues raised in the appeal will be discussed and not just those relevant to process.*".

165. On **Wednesday 13 September 2017** Mrs Stones' GP set out a "*to whom it may be considered*" letter (the **September 2017 GP letter**) for CNC "*I understand that Clare has been advised that she is unfit to perform her duties as a firearms officer. Clare is concerned she may lose her job altogether. You will be aware that Clare has had disabling symptoms for some time including rashes, headaches and fatigue. However, she has been making some progress. I would consider that she should be fit for some form of light duties and I would hope that it might be possible to consider her for alternative employment other than firearms officer- though the nature of her exact level of fitness for any alternative employment would be best assessed by an Occupational Health specialist with more detailed knowledge of any proposed job role*".

166. The Tribunal notes that Mrs Stones confirmed at the Final Hearing that her GP wrote the letter at her request. The Tribunal notes and accepts that Mrs Stones GP accepted that the nature of Mrs Stones exact level of fitness for any alternative role would be best assessed by an Occupational Health specialist with more detailed knowledge of any proposed job role. The Tribunal concludes that Mrs Stones was aware of the possible outcome of the appeal hearing and considers that had Mrs Stones wished to challenge CNC's approach it would have been reasonably practicable for Mrs Stones to have presented a complaint to the Employment Tribunal within 3 months of this date.

167. On **Thursday 14 September 2017** Mrs Stones attended two meetings arising from her appeal against the outcome of her **Stage 1**

Capability Meeting chaired by Supt Tony Cole. Mrs Stones was accompanied at each of the meetings by a work colleague PC Andrew Ebert (who the Tribunal notes is also a trade union/ CNC Police Federation representative).

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168. The First Meeting on **Thursday 14 September 2017** began at 2pm and ended at 3.10pm. During this First Meeting first meeting, the Tribunal notes that Mrs Stone work colleague PC Ebert set out that *“at the moment he is in limbo until such time as CS has a confirmed diagnosis then he is unable to give clear advice”* He further asked *“ if disability would be considered in this case”* Helen Jordan for CNC responded that *“at a RAP reasonable adjustment are considered under equality act”*. It was also agreed that a CNC welfare officer would make a referral for CNC’s Occupational Health to ascertain what reasonable adjustments should be made in relation to a possible new diagnosis. It was decided that *“the appeal would not be upheld and”* Mrs Stones *“would remain within the procedure”*.

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169. This was followed by a Second Meeting also **Thursday 14 September 2017** starting at 3.10pm to *“discuss the issues addressed in the appeal that was out with the capability procedure.”* and it was at this meeting that, *“contact given for the new parent work group,”*

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170. Whilst the Tribunal was not provided with a letter confirming the outcome, on the evidence adduced, **the** Tribunal accepts, and so far, as relevant, the appeal was not upheld and that Mrs Stones remained within the procedure. It was not was not suggested by Mrs Stones that the outcome was different to that set out in the notes to which the Tribunal, a attention was drawn. At the Second Meeting CNC indicated that it would look into what was said to be a Health and Safety Investigation, CNC offered to complete actions in relation to overpayment issues, and contact was given for what was described as the *“the new parent group”*.

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171. The Tribunal concludes that Mrs Stones was aware that her appeal had not been upheld and considers that had Mrs Stones wished to challenge CNC's approach it would have been reasonably practicable for Mrs Stones to have presented a complaint to the Employment Tribunal within 3 months of this date.

172. On **Thursday 28 September 2017** Mrs Stones was examined by Dr Alex Yellowlees, Consultant Psychiatrist in Glasgow (**the September 2017 Psychologist report**) on a referral from Mrs Stones' GP, who notes that no clear cause has been found to explain her range of symptoms, which he describes as both physical and psychological including poor memory and she anxious, irritable and fatigued. He reports that she described that occasion she has experienced pins and needles in her hands and feet which he feels is mostly likely anxiety related. He offers a diagnosis what he says is **chronic stress disorder**. His report, which is addressed to Mrs Stones' GP, indicates that he feels that Mrs Stones would benefit from antidepressant medication and would benefit greatly from ongoing counselling/individual psychological therapy.

173. On **Monday 2 October 2017** K Strachan CNC HR Case Adviser e-mailed Mrs Stones setting out that her September 2017 salary was reinstated given the time scales involved for receiving her pay rates from pensions, and indicated that once they had detail available overpayment they would be in touch.

174. On the evidence adduced the Tribunal concludes that this was a reference to a process within CNC whereby officers who have ceased to be otherwise eligible for pay, may be paid a sum calculated by reference to the pension would they would receive. While theoretically funded from their pension, this would not operate deplete the pension which the officer would ultimately be entitled to. CNC had by October 2017 identified that this mechanism could potentially be deployed to assist Mrs Stones meeting her

overpayment obligations. There was however no obligation on CNC to implement same.

5 175. On **Thursday 5 October 2017** CNC issued confirmation to K Strachan HR Case Adviser that action had been taken to drop Mrs Stones from nil pay and *“She will therefore stay on full pay till further notice”*

10 176. On **Friday 6 October 2017** CNC sent Mrs Stones CNC Vacancies list to her home e-mail roles include Divisional Business Support officer roles Divisional Support Team Leader.

177. On **Wednesday 18 October 2017** Insp Simon Johns became Mrs Stones' line manager,

15 178. On **Thursday 19 October 2017** Insp L Bain referred Mrs Stones to CNC Occupational Health in light of recent medical updates.

20 179. On **Thursday 19 October 2017** Insp S Johns completed forms for Mrs Stones seeking consideration of both funding for medical treatment and extension of sick pay *“it is requested that an extension of 6 months on full pay followed by a further 6 months on full pay is considered. This would take us up the present whereby the outstanding overpayment could be resolved”*.

25 180. On **Thursday 2 Nov 2017** DS M O’Kane provided comment that *“... I do not believe that the 6 months plus 6 months to cover her overpayment is necessary as this is not a justification to have the overpayment written off. However, this is an application to extend”* her *“sick pay due to the fact that we have caused a delay in identifying her overpayment due to breakdown in regular contact... while she has been out of the workplace. On this basis*
30 *I am content to support the application”*.

181. The Tribunal notes that CNC, as of 2 November 2017, considered that there had been a breakdown in regular contact with Mrs Stone which

impacted in a delay in identifying her overpayment. In so far as the issue is before the Tribunal, CNC assessment at **Thursday 2 November 2017** did not amount to harassment under section **26** EA 2010, it is the Tribunal's assessment that, in all the circumstances, it was not reasonable for that conduct (CNC's request in respect of the August 2017 notified overpayment, notified to her by CNC on Monday 28 August 2017 that there had been an overpayment) to Mrs Stones to repay overpaid sick pay while on sick leave and with no earnings) to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. That request is not found to have done so. Further there was no failure to make reasonable adjustments under section **20** and **21** EA 2010. It is the Tribunal's decision that in CNC operated a practice (a PCP) or requiring that its employees repaid monies overpaid. There is however no causative link between that PCP and the substantial disadvantage, which was the requirement to repay. There was no evidence adduced that CNC would have taken steps other than to request repayment when Mrs Stones was unable, due to period of paid leave having expired. The substantial disadvantage did not "*arise out of*" the PCP. In any event there were no steps, beyond that which CNC took to seek to effect extension of the period of pay, and which it would have been reasonable for CNC to take; and

182. The Tribunal considers Mrs Stone was aware of such payments as were made to her bank account. The Tribunal notes that Mrs Stone does not seek to argue that an overpayment where made did not fall to be repaid. CNC granted her application for retrospective sick pay for a period of 3 months which was approved on **14 February 2018** and a further pay appeal was submitted by Insp John which returned Mrs Stones to full pay for the period of overpayment from Monday 13 November 2017 until Tuesday 1 May 2018 following recommendation from Brian Rowles CNC Health and Safety Manager.

183. The Tribunal further notes that Mrs Stones was assisted by her representative in respect of the August 2017 notified overpayment. Mrs

Stones was made aware from Monday 28 August 2017 that there had been an overpayment. Mrs Stones was assisted by her representative in respect of that overpayment. The August 2017 overpayment was not a continuing act. The Tribunal does not consider it just and equitable to apply a time limit beyond the 3 months less one day time limit provided in terms of s129 of EA 2010 in respect of that notified overpayment.

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184. The Tribunal accepts, and it was not placed in dispute, that as set out in Insp Jones' statement Mrs Stone was paid from Tuesday 1 May 2018 until the termination of her employment. The Tribunal concludes that the CNC knew or otherwise could reasonably have been expected to know that Mrs Stone was a person with a disability. In respect that the requirement to repay overpayments could amount to a "*provision, criterion or practice*". CNC applied that PCP to Mrs Stones. The Tribunal does not accept that the application of such a PCP put Mrs Stones at a substantial disadvantage in relation to a relevant matter in comparison with officers who were not disabled at any relevant time. The Tribunal does not accept that CNC knew or could be reasonably expected to know that Mrs Stones was likely to be placed at any such disadvantage. The Tribunal does not consider that there were steps that were not taken, and that could have been taken by the CNC to avoid the disadvantage. In any event the Tribunal concludes that CNC took such steps as it was reasonable in all the circumstances for CNC to have taken to have taken by returning Mrs Stones to full pay for the period of overpayment from Monday 13 November 2017 until Tuesday 1 May 2018. There was however no obligation on CNC to do so.

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185. On **Monday 13 November 2017** CNC's HR officer H Jordan, wrote to Mrs Stones setting out CNC's explanation and break of the salary overpayment to Mr Stones and setting out her repayment options. The letter apologised for the delay providing figures to Mrs Stones and set out that she would do her best to be available to discuss the information on the payslips. The letter set out that in order to avoid any further overpayment the salary will cease to be paid with effect from Tuesday 31 October 2017

and no further payment would be made until “*you return to the workplace. There is an option for you to receive payment at the Pension Rate and I would be more than happy to take you through this option... I look forward to hearing from you and once again apologise for the delay in getting you the information we agreed to provide.*”

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186. On **Monday 27 November 2017** Insp Simon Johns had a telephone discussion with Mrs Stones noting that treatment routes maybe available for consideration and in relation to the issue of repayments noted that “*she is receiving support from Andy Ebert and Ian Muir of the CNC federation*”.

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187. On **Tuesday 12 December 2017** Lorraine Holloway, CNC’s Occupational Health Specialist, set out her opinion (the **December 2017 Occupational Health Case Report**) that Mrs Stones was “*unfit for work until further information has been acquired through her GP*” ... *To date no definite diagnosis has been made apart from a reference from the consultant Immunologist to possible fibromyalgia /Chronic fatigue*”. her report set out that Mrs Stones “*self-funded an appointment with a psychologist in Glasgow who apparently has written a detailed report which was supplied to her GP. I have requested a copy of this report with PS Stones consent and currently awaiting a response*”. Further and in relation to Current Work Position it set out “*In my opinion, until this report has been received PS Stones is not fit for work. Once the report has been received, it will be reviewed and if required discussed with Dr Policarp, OHP, for further opinion*”. The report set out in relation to “*Personal Safety Training (where appropriate to role I consider her currently to be Unfit to take Personal safety Training.*” The report set out relation to “*Fitness Assessment (where appropriate to role) I consider her currently to be Unfit to undertake Fitness Assessment (where required)*”. In relation to Review Arrangements it set out that “*A further review was conducted on 4th December and again today but she failed to respond to my call*”.

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188. The Tribunal notes that the December 2017 Occupational Health Report does not refer reports issued to Mrs Stones GP

a. the **December 2015 Rheumatology Report describes beyond offering a diagnosis of** Urticaria and possible angioedema

5 *“Unexplained medical symptoms of headache, fatigue and weakness”*; and

b. the **January 2016 Gastroenterologist Report** to Mrs Stones’ GP offering a diagnosis of IBS

c. the **March 2017 Community Dietician Report** to Mrs Stones’ GP which had set out that over the course of the then past 4 week she had followed all first line advice provided for IBS management but in this period *“she has not noticed a considerable improvement in her symptoms”*.

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189. The Tribunal, however, accepts that the **December 2017 Occupational Health Case Report** and in particular its assessment that Mrs Stones was *“unfit for work until further information has been acquired through her GP”* reflected the considered assessment of the CNC’s Occupational Health Specialist Lorraine Holloway on the basis of the information available to her at the time, including consideration of **the**

20 **September 2017 Psychologist report**, provided via Mrs Stones’ GP. The Tribunal further notes that the **December 2017 Occupational Health Case Report** was consistent with the Fit Note issued by Stones’ GP on Friday of that week (**Friday 15 December 2017**) and for the preceding period from

25 Friday 18 August 2017.

190. On **Friday 15 December 2017** GP issue Fit Note covering Friday 18 August 2017 to Thursday 15 February 2018 which stated that because of the following conditions *“Chronic urticaria”* *“You are not fit for work”* GP scores through all 4 adjustment options ~~phased return to work, amended duties, altered hours, workplace adaptations~~. The Tribunal notes that Mrs Stones accepted at the Final Hearing that CNC had no reason to doubt the opinion of her GP as set out in the Fit Notes.

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191. On **Monday 18 December 2017** Insp Simon Johns has telephone welfare meeting with Mrs Stones, he explained that he required to plan “*the Capability Stage 1 meeting following her recent appeal hearing. It was agreed this would be held in Inverness, although Clare is willing to attend Dounreay if necessary*” list of dates were provided when her partner was on a rest day...”. The dates in January 2018 which were given were 18, 19 24 24, 30 and 31.

192. On **Friday 29 December 2017** Temp C/I Pat Green emailed Mrs Stones suggesting they meet in January 2018 (either 18 or 19 January) “*as these are the dates you have advised Inspector Johns you would be available to “discuss issues relating to pay, and if “you wish to have federation representation for this meeting please advise who this will be and I will make arrangements for them to be present... The scope of this meeting will be limited to issues in relation to pay so that the necessary focus can be applied to it. Once this meeting has been held than I will identify a date to reconvene the capability process which was adjourned pending your appeal.”*

193. The Tribunal does not consider that CNC’s proposal to use a date which had been identified as suitable for Mrs Stones for to review pay issues rather than capability created unreasonable pressure on Mrs Stones. It was a pragmatic and proportionate proposal by CNC. In so far as the matter is before the Tribunal it did not amount to a discriminatory action.

194. On **Wednesday 3 Jan 2018** Temp C/I Green emailed Helen Jordan to TCI Green “*In relation to... capability is it appropriate to hold stage 1 or should this be moved to stage 2 as per the previous stage 1 ruling, which was appealed and not upheld*”

195. On **Monday 22 January 2018** Insp Johns had a telephone meeting with Mrs Stones and explained to Mrs Stones that he required to plan the Capability Stage 1 meeting and thanked Mrs Stones for providing dates

5 196. On **Wednesday 24 January 2018** Temp C/ I Pat Green identified that Mrs Stones should proceed to Stage 2 of CNC's capability procedure
"Secondly in relation to how best to proceed with capability process. I am of the opinion that there has been no change in relation to fitness to work since I held a capability meeting at stage 1 and referred ... to stage 2. This
10 decision was appealed but not upheld. Therefore pending opinion and direction in relation to fitness in the workplace by OHD I would advocate that this case should indeed" move to Stage 2.

197. Lorraine Holloway who was unable to attend ET, in her extended
15 witness statement, it was put to her by Mrs Stone that in early 2017 Ms Holloway had discussed CNC sending Mrs Stone to see psychiatrist Dr Vicenti (why did CNC not refer Dr Vicenti) set out that "*It was in fact in February 2018 you were referred to OH in November 2017, when I discussed the referral with you. Prior to appointment of Dr Phil Moss, clinical psychologist, our process was to refer externally to an independent
20 psychologist or psychiatrist. As our external provided had limited availability until April 2018 it was decided that referral to Dr Moss who had been recently appointed, would be appropriated which was supported by the Chief Medical Officer*" witness statement. The Tribunal does not accept, in
25 all the circumstances, that any relevant claim arises from CNC's decision on this allocation of its medical resources.

198. On **Friday 2 February 2018** Insp Johns e-mail to Nicola Loughlin say that Mrs Stones "*is being provided all Vacancies Notices via our local HR
30 rep Kirsty Strachan... has been sent the vacancy for the National Recruitment team and has enquired whether she can apply. I understand that it closed a few days ago. Would you be able to accommodate another*

application? If you send me the forms I will ensure they are received by”
Mrs Stones.

5 199. The Tribunal notes that by February 2018 CNC were notifying Mrs Stones direct of CNC vacancies. There was no evidence adduced before the Tribunal that CNC had not done so before, and on the evidence adduced the Tribunal is satisfied that CNC had been issuing such vacancy notices since at least 2017.

10 200. On **Monday 5 February 2018** CNC confirmed that to Insp Johns they welcome an expression an interest in the vacancy in the National Recruitment Team. The Tribunal notes that CNC indicated that they were willing to consider an expression of interest for such role, after the date for submission of same, from the evidence adduced, had closed.

15 201. On **Monday 5 February 2018** Mrs Stones expressed interest in a vacancy in the National Recruitment Team.

20 202. On **Tuesday 6 February 2018** Mrs Stones advised Police Federation Ian Muir rep *“I am not expecting any positive result, especially given the current OHD delays in signing me fit for work”*.

25 203. While the Tribunal notes that, at the Final Hearing, that Mrs Stone asserted that she did not receive a response the Tribunal, in all the circumstances, makes no adverse findings in respect of same. There was no evidence of any mechanism whereby any officer who had expressed an interest would be advised. Further the Tribunal notes Mrs Stone’s position to the CNC Police Federation representative that she was not expecting a positive response, it is the Tribunals conclusion that on the evidence
30 adduced Mrs Stones did not consider that she would have been capable of taking up the role had it been offered. It is further, the Tribunal’s view that Mrs Stones could have asked for confirmation of response.

204. On **Tuesday 13 Feb 2018** CNC's HR Manager H Jordan completed a CNC Consideration for Extension of Sick Pay application form for Mrs Stones (the **February 2018 Extension of Sick Pay Application**). On page one it identifies that one of three possible criteria requires to be met. The
5 criteria met for Mrs Stones was "*An individual's case is being considered in accordance with CNC policy and procedure and matters beyond the control of the individual have delayed the decision and or resolution of their case.*" It set out that it was recommended that 3 months extension to sick pay was approved on basis that "*the CNC had delayed the resolution of this case*".

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205. In so far as the issue is before the Tribunal CNC's February 2018 Extension of Sick pay Application did not amount to harassment under section **26** EA 2010, it is the Tribunal's assessment that, in all the circumstances, it was not reasonable for that conduct (CNC's request in
15 respect of the August 2017 notified overpayment, notified to her by CNC on Monday 28 August 2017 that there had been an overpayment) to Mrs Stones to repay overpaid sick pay while on sick leave and with no earnings) to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. That request is not found to have
20 done so. The February 2018 Extension to Sick pay Application represented a reasonable adjustment under section **20** and **21** EA 2010. It is the Tribunals decision that in CNC operated a practice (a PCP) or requiring that its employees repaid monies overpaid. There is however no causative link between that PCP and the substantial disadvantage, which was the
25 requirement to repay. There was no evidence adduced that CNC would have taken steps other than to request repayment when Mrs Stones was unable, due to period of paid leave having expired. The substantial disadvantage did not "*arise out of*" the PCP. In any event there were no steps, beyond that which CNC took to seek to effect extension of the period
30 of pay, and which it would have been reasonable for CNC to take.

206. On **Wednesday 14 February 2018** CNC's HR officer H Jordan confirmed to Mrs Stones that her application to extend sick pay was approved "*the extension is a retrospective one and is for a period of three*

months". The Tribunal notes that Mrs Stone accepted at the Final Hearing that CNC were not "*hassling her*" at this stage.

5 207. On **Monday 19 February 2018** Insp Johns had a telephone welfare meeting with Mrs Stones, it was noted that Mrs Stones was pleased to have received an extension to 3-month sick pay and CNC's HR would be reviewing the outstanding payment and had reviewed annual leave and would be confirming both.

10 208. On **Monday 26 February 2018** CNC had a Management Discussion of Mrs Stones' case which included DS and acting OUC M O'Kane. An overview set out that CNC's Occupational Health had at this time received the **September 2017 Psychologist report**, Mrs Stones having provided her consent and the Occupational Health referral was ongoing, further that
15 Dr Fernandez planned to discuss a consultation with Dr Moss who was CNC's panel psychologist, based in Newcastle upon Tyne, and if required expedite the consultation process in line with the Stage 2 process. The Tribunal notes and accepts, Dr Fernandez's comments in his evidence at the Final Hearing that he was concerned that the **September 2017**
20 **Psychologist report** offered an unrecognised (by diagnostic manuals) diagnosis.

25 209. On **Tuesday 13 March 2018** Mrs Stones attended for appointment with Dr Phil Moss, CNC's panel Consultant Psychologist in Newcastle upon Tyne for psychological assessment and report.

30 210. On **Wednesday 28 March 2018** Dr Phil Moss set out his psychological report. (the **March 2108 Psychological Report**). He found no evidence of any mental health issue that could warrant a diagnosis under a recognisable mental health classification scheme. In relation to the prognosis, he set out that in the absence of a clearly identifiable mental health or psychological condition this was not relevant. While it was noted that Mrs Stones was having weekly sessions of supportive counselling

which she reported as beneficial he set out that *“it is unlikely that any treatment can be identified which would have a direct impact on return to work within a definite timescale”*. The Tribunal accepts the conclusions of the **March 2018 Psychological Report**. The Tribunal was not presented with any subsequent contrary medical opinion.

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211. On **Wednesday 4 April 2018**, Mrs Stone attended Stage 2 Capability Meeting (the **April 2018 Stage 2 Capability Meeting**) chaired by Supt Martin O'Kane. Mrs Stones was accompanied by PC Ian Muir in his capacity as a friend. It was set out by Dr Moss that he had ruled out any mental health conditions, but the physical condition remained. It was set out to Mrs Stone that in relation to redeployment the issue was that there was no prognosis and *“without prognosis she couldn't be redeployed in a role that may make her any worse”*. It was confirmed that the **December 2017 Occupational Health Case Report** had been reviewed by Dr Fernandez *“One area of concern that has been removed” was Mrs stones' mental health but the condition still remained.... Its not just an AFO role but there has been no diagnosis in relation to coming back to the workplace.”* It was set out that they had the **September 2017 GP letter** and the **December 2017 Occupational Health Case Report**, it was described *“that despite the letter from the GP saying she could return to work on restricted duties. OHD have confirmed she would be unable to do so. She explained that we have to take what OHD state and cannot go against their advice”*. Following an adjournment, Supt O' Kane informed Mrs Stones that his recommendation was that Mrs Stones' employment should be terminated because of the lack of a diagnosis and prognosis as to when she will be able to return to work.

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212. The Tribunal notes that Mrs Stones agreed at the Final Hearing that Dr Moss had ruled out any return. Given the available medical evidence and review by Dr Fernandez of the **December 2017 Occupational Health Case Report** the Tribunal is satisfied that there was no requirement for CNC to obtain further medical evidence for or from the **April 2018 Stage 2**

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Capability Meeting. The Tribunal notes that at the Final Hearing there was no subsequent medical report provided by Mrs Stones. The Tribunal concludes that while the decision to recommend dismissal on 4 April 2018 was unfavourable treatment because of both the lack of prognosis and absences was something arising in consequence of Mrs Stones' disability; however, it was however proportionate. In particular, the Tribunal concludes that a dismissal in these circumstances is a proportionate means of achieving a legitimate aim of having have a capable workforce which can ensure that CNC meets its statutory obligations.

213. From **Tuesday 1 May 2018** was the commencement of period in respect of which Mrs Stones submitted retrospective fit notes confirming that her absence was due to pregnancy. Full pay was reinstated from this date.

214. **Monday 7 May 2018**, was the date, the Tribunal notes from Dr Fernandez' statement, upon which that Mrs Stones applied again for Ill Health Retirement.

215. On **Monday 7 May 2018** Insp Johns has telephone meeting with Mrs Stones it was noted that Mrs Stone would receive the formal letter by recorded delivery and that she would have 7 days to appeal. Mrs Stones advised Insp John that she wished to reapply for Ill health retirement as Occupational Health had indicated that she was not in any fit capacity to return to the workplace. It was confirmed that Mrs Stones had received a full breakdown of the overpayments after taking into account the sick pay appeal and entitlements, and she expressed her gratitude to CNC's HR (C Lewis) who had been helpful in explaining the breakdown of the figures. It was identified that there was a remaining overpayment which could can be addressed via any capability payment or future income from CNC.

216. On **Monday 21 May 2018** CNC submitted a pro forma funding application to BEIS "*template for BEIS approval for Capability exit from*

5 *the...CNC". (the May 2018 BEIS Funding Application)* in relation to Mrs Stones. **May 2018 BEIS funding application** sets out in relation Value for Money that *"Each month the officer continues to be employed, this costs an additional £5,200 in back-fill overtime and management/occupational health time. This is in addition to any sick pay the officer receives."* The **May 2018 BEIS funding application**, erroneously suggests that Mrs Stone had not applied for any roles, Mrs Stone had expressed interest in a role.

10 217. The Tribunal concludes that, while the **May 2018 BEIS funding application**, erroneously suggests that Mrs Stone had not applied for any role, the Tribunal accepts this error would have been addressed by setting out that Mrs Stone had expressed interest in a role did not amount to an attempt to mislead BEIS. The Tribunal accepts, on the evidence adduced that, in addition to any payments which were made to Mrs Stones, CNC
15 incurred backfill overtime costs providing AFO cover for which Mrs Stone while she was absent from work due to ill health. The Tribunal accepts, on the evidence adduced, that **the May 2018 BEIS Funding Application** reflects a provisional draw down facility of funding from BEIS who fund CNC. Further the Tribunal accepts that such an advance application is
20 required in order to permit an actual draw down from BEIS, in the event that payment requires to be made, and is made in advance of such an eventuality, in order to prevent any delay should the draw down facility to prevent a delay in making an exit payment should that arise. The Tribunal concludes that it does not reflect a prejudgment of the outcome of any
25 capability or other process. Further the Tribunal concludes that it does not reflect any attempt by CNC to mislead BEIS.

30 218. On **Tuesday 5 June 2018** Insp Johns had a telephone welfare meeting with Mrs Stones. He noted that Mrs Stones' appeal against the **April 2018 Stage 2 Capability Meeting** decision had been submitted to CNC's HR although Mrs Stone had not yet received confirmation of the *"the success of his appeal"*. Mrs Stone informed him that she was now pregnant with her fourth child with a due date of **Monday 1 Oct 2018**. He *"congratulated her this wonderful news"* he noted that Mrs Stone was

possession of her Mat 1B and would send it electronically to him. He noted that he would take guidance from HR regarding Maternity process for employees not currently in the workplace.

5 219. On **Tuesday 19 June 2018** Insp Johns reported by e-mail to CNC's HR Helen Jordan, in relation to Mrs Stones' appeal against the **April 2018 Stage 2 Capability Meeting** decision that he "*Had a positive meeting with PS Clare Stones. She can attend a Stage 2 Appeal on Monday 25th June in the afternoon*" at a site in North Ayrshire and confirmed that Insp Jim
10 Ferguson would attend a Police Friend. Insp Johns requested that overnight accommodation was arranged for Mrs Stones and describes that he will undertake an Expectant Mother Risk Assessment to cover the proposed journey. On the evidence adduced the Tribunal is satisfied that Mrs Stones was subsequently advised that her appeal against the **April**
15 **2018 Stage 2 Capability Meeting** decision was moved to take place at a later date, Tuesday 2 August in Birmingham.

220. On **Tuesday 17 July 2018** CNC's HR Clare Lewis e-mailed Insp S Johns regarding CNC policy around maternity process for employees not
20 currently in the workplace setting out that "*Any pregnancy related sickness during pregnancy will be regarded a special paid leave and will not count towards sickness absence levels. As such the employee must notify their Line Manager that she is absent from work because of pregnancy and of the date, on which her absence from that reasons began, as soon as*
25 *reasonably practicable. The Line Manager will inform HR about the absence. If it is not clear whether an absence is pregnancy related or not, advice will need to be obtained from the occupation Health Department. Therefore, I think we will have to place her back onto full pay from 1 May 2018, should the answer to question 2*" (which relate to what was set out in
30 a Fit Note)" *...be clarified satisfactory through OHD. This also means, should she still be here when her maternity leave is due to begin, she will probably qualify for full maternity pay*". The Tribunal does not consider that

any adverse inference arises from this statement, setting out CNC's process.

5 221. The Tribunal notes that a complaint about something that happened before date **Wednesday 20 July 2018** was potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it. Section.207B(3) of the Employment Rights Act 1996 provides that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted; s.207B(4) If a time
10 limit set by a relevant provision would (if not extended by this subsection expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. So earliest date a claim could be in time **20 July 2018** (presentation less 3 months + 1 day less time between Dated A&B).

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222. On **Friday 20 July 2018** Insp S Johns e-mail CNC Nigel Couzens and others *"I have reviewed the submission below to BEIS and I am not aware of any outstanding medical request awaiting action. All were completed during the capability process. OH may be aware of an
20 outstanding report but this has never come up any meetings from either the organisation or indeed"* Mrs Stones. The Tribunal accepts that Mrs Stone did not provide any further medical report to CNC and further notes that at the Final Hearing, Mrs Stone did not provide any additional medical reports from 2018 onwards.

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223. On **Friday 20 July 2018** Clare Lewis HR issued a response e-mail to S Johns *"I think I knew this, was asking OH to respond ... ;O)"*. The Tribunal accepts the evidence of Clare Lewis that no adverse intent was meant or otherwise arises from the use of what Mrs Stones argued at the
30 Final Hearing was a *"winking emoji"*. While the Tribunal accepts that the use of the characters forms what is often called an emoji, the Tribunal accepts the evidence of Clare Lewis that there was no adverse inference

intentional or otherwise from those characters in the e-mail of Friday 20 July 2018.

5 224. On **Monday 23 July 2018** Lorraine Holloway, Occupational Health Manager, wrote to Mrs Stones' GP seeking further information and update on Mrs Stones' medical conditions setting out 8 questions including; whether she had been referred to any new Specialists regarding her multipole symptoms and have any further investigations been conducted and for a copy of her medical records.

10 225. On **Tuesday 24 July 2018** for a CNC management Stage 2 appeal preparation meeting reference is made to "*Stage 2 decision at the time was based on the officer not being fit to return to work due to a number of a number of unresolved medical condition and supporting medical information*".

15 226. On **Tuesday 24 July 2018** in response to an email from CNC HR C Lewis C who from her review of information believed that there was an outstanding MRI Scan which CNC had funded, and wondered why CNC were not waiting for results of such tests, Occupational Health Clinical Manager Lorraine Holloway responded "*As far as Manuel and I are concerned we are not aware of outstanding results of test or MRI scan CNC has funded. We have certainly not requested any. I have asked "S Johns "and he has no knowledge or notes to this effect. I am reluctant to ask" Mrs Stones "directly I have written to the GP requesting a copy of her entire medical records which I have advised is urgently required."* The Tribunal accepts, on the evidence adduced, that there were no such outstanding tests and or results. The Tribunal notes no further medical reports were provided by Mrs Stone for the Final Hearing which were not otherwise available to CNC.

25 30 227. On **Thursday 26 July 2018** Dr Brendan Clancy, Mrs Stones' GP, replies to Ms Holloway (the **July 2018 GP Report**), indicating that Mrs Stones has, not ben referred to any new specialists, her symptoms are

complex and probably represent immune system dysfunction combine with the effects of stress/anxiety.” *It would not be possible to give a simple prognostic outlook on the length of time to recover*”. There was no firm diagnosis and prognosis.

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228. On **Friday 27 July 2018** Brian Rowles, CNC's Health and Safety Manager sets out in an email that he had concluding a Health and Safety investigation previously recommended by D/I Deans. He recommended that Mrs Stones' sickness absence from 13 November 2017 until 1 May 2018 should be classified as work-related stress *“It isn't always necessary for a stress trigger to be a single event or indeed be intentional... I do consider the grievance investigation meetings the stands required to meet Health and Safety investigation requirements ... This investigation process has identified that this is a complex matter but identifies issues some going back a period of time whilst not intentionally acted as stress triggers to this individual”*. He concludes that *“on balance this absence should be treated as work related stress for CNC attendance management processes”*. The Tribunal notes that Mrs Stones drew its attention to this communication but as it does not have jurisdiction to consider claims for personal injury, and was not further relevantly addressed, the Tribunal does not consider that it is able to draw any conclusion from the terms of this e-mail while noting that Mr Rowles concludes that *“on balance this absence should be treated as work related stress for CNC attendance management processes”*

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229. On **Friday 27 July 2018** the Tribunal notes, on the evidence adduced, that CNC applied for extension to sick pay due to work related absence, in light of B Rowles e-mail of Friday 27 July 2018 which that *“on balance this absence should be treated as work related stress for CNC attendance management processes”*. The Tribunal, while noting that it was suggested that an absence should be administratively treated as work related stress, having regard to the matters before it, does not give rise to any relevant matter for consideration nor in the assessment of the Tribunal

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in all the circumstances, does it give rise to any adverse inference in respect of matters which the Tribunal has jurisdiction for.

5 230. On **Wednesday 1 August 2018** Dr Manuel Fernandes emailed CNC's HR Business Partner C Lewis, noting that only one aspect of Mrs Stones' symptoms has settled down due to her pregnancy and there is no timeframe for the rest of her symptoms to settle down.

10 231. On **Tuesday 2 August 2018** Mrs Stone attended the appeal against **April 2018 Stage 2 Capability Meeting** decision. The appeal which was heard in Birmingham, was heard by Deputy Chief Constable Chesterman Mrs Stones was supported by Inspector Ferguson. No further medical evidence was presented by Mrs Stones in relation to prognosis of her various conditions. She set out that in her view *"things and people had*
15 *brushed under the blanket and alternatives haven't been discussed and the writing was on the for a very long time... she thought CNC was her future and this has now been stripped from her"*. Following an adjournment DCC Chesterman *advised "he had to base his decision on medical evidence provided and hadn't hear anything that changes the stage 2 Capability*
20 *outcome"* he described that she would be going back onto full pay for the remaining period, she would be entitled to a payment in lieu of notice but confirmed that he was upholding recommendation to terminate her employment.

25 232. The Tribunal concludes that, in so far as the decision to uphold the decision to dismiss on 2 August 2018 was unfavourable treatment because the ongoing lack of prognosis, arising in consequence of Mrs Stones' disability; it was however proportionate. In particular a dismissal in these circumstances is a proportionate means of achieving a legitimate aim
30 of having have capable workforce which can ensure that CNC met its statutory obligations and was reasonably necessary.

233. On **Wednesday 3 August 2018** CNC's Head of Occupational Health issued an e-mail to CNC's HR C Ashfield and DR Fernandez which set out

5 *"I have been asked to look at a pay extension ... the process is different to a stand extension sick pay case...It was always the process that capability would commence until IHR was concluded and I know we amended this so the two could run concurrently but the final decision on capability would be paused until the IHR was conclusion was reached... we will need to consider whether we support payment on IHR grounds should the pension scheme manager support this?"* .

10 234. On **Wednesday 3 August 2018** Insp Johns emailed to Mrs Stones *"I received a call yesterday afternoon from Jim to update me of the outcome of your appeal. You will still be an employee of the CNC as I understand it for 3 months' notice. I have been working in the background on a review of maternity/sick entitlements. I will discuss further with you... on Tuesday when we have our catch up call"*.

15 235. On **Thursday 9 August 2018** Dr Manuel Fernandes wrote to Mrs Stones' GP explaining why he again could support her application for Ill Health Retirement, referencing the pension scheme requirement. *"She has several unexplained medical symptoms and two underlying medical conditions which should not prevent her from working in some capacity before her usual retirement age ... In my opinion the applicant's health has not deteriorated sufficiently seriously so as to prevent the applicant following alternative /adjusted duties of employment"*.

25 236. In so far as the matter is before the Tribunal, Dr Fernandez clinical decision not to support Mrs Stone application was unfavourable treatment because of the lack of prognosis which arose in consequence of Mrs Stones' disability; it was however proportionate. In particular expressing his clinical judgment was a proportionate means of achieving a legitimate aim being the proper operation of the pension scheme and was reasonably necessary.

30 237. On **Friday 17 August 2018** Nigel Couzens, HR Business Partner, wrote to Mrs Stones setting out that she would receive three months' pay in lieu of notice and setting out her exit payment and that her employment

terminated on Friday 17 August 2018 on the grounds of capability. It set out that she should sign a mandate for the sum accepting the payment in accordance with her terms and contract of Employment, which sum at that stage included a payment in respect of Pay in Lieu of Notice.

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238. On the evidence adduced, the decision to invite Mrs Stones to sign a mandate was not unfavourable treatment because of Mrs Stones lack of prognosis and or absences or otherwise was something arising in consequence of Mrs Stones' disability, in particular it arose from the CNC's procedures unrelated to Mrs Stones disability. It was in any event proportionate. In particular where an employer provides a payment in these circumstances is a proportionate means of achieving a legitimate aim of certainty arising from an employee having acknowledged receipt of payment.

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239. **Saturday 18 August 2018** the day before which Mrs Stones' claims are prima facie out of time say Respondent.

240. On **Saturday 18 August 2018** Mrs Stones wrote to CNC, querying the calculation the notified exit payments.

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241. On **Monday 20 August 2018** CNC provided was it considered to be clarification of exit payments calculation.

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242. On **Friday 24 August 2018** CNC sent an updated letter to Mrs Stones setting out a recalculated exit payment and e-mail to explain. It again set out that she should sign a mandate for the sum accepting the payment in accordance with her terms and contract of Employment, which sum at that stage included a payment, in respect of Pay in Lieu of Notice.

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243. On the evidence adduced, the Tribunal concludes that CNC's updated letter inviting Mrs Stones to sign a mandate was not because of something arising in consequence of Mrs Stones' disability, it arose from the CNC's procedures. It was in any event proportionate and reasonably necessary. In particular The Tribunal considers that where an employer provides a payment in these circumstances it is a proportionate means of achieving a

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legitimate aim of certainty arising from an employee having acknowledged receipt of payment and was reasonably necessary.

5 244. On **Monday 3 Sept 2018** Mrs Stones contacted ACAS Early Conciliation

10 245. On **Monday 3 Sept 2018** Mrs Stones emailed Nigel Couzens, HR Business Partner stating she is "*not happy*" with the figures provided and explained that until she gets a satisfactory response, she would not be signing the mandate to acknowledge payment.

The Tribunal notes that it was Mrs Stones evidence at the Final Hearing that she accepted that this "*all v civilised*". The Tribunal concludes that none of this communication amounted to harassment within the meaning of s26 of the EA 2010. While CNC issued requests that Mrs Stone sign mandates and insofar as Mrs Stones did not wish to sign (at this stage) and the the conduct was unwanted, and related to a protected characteristic of disability it did not;

15 a. have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mrs Stones;

20 b. have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal concludes on the evidence that when taking into account Mrs Stones perception, the other circumstances of the case, it would not reasonable for the conduct (being requests to sign mandates) to have that effect. Further the conduct did not have that effect.

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246. **Mid sept** 2018 P45 is issued by CNC.

247. On **Monday 1 Oct 2018**;

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- ACAS EC Certificate was issued to Mrs Stones
 - CNC wrote to Mrs Stones setting out final revised calculations of exit payments with a mandate to accept capability payment only. CNC in addition set out factual explanation which was taken from a CNC

Payroll Project Manager who had provided an earlier analysis explaining CNC's understanding of HMRC rules around tax codes for someone who is leaving together with a spreadsheet. The Tribunal notes that Mrs Stone's evidence at the Final Hearing was to the effect that "he put it an format illegible but knows stress. He doesn't put in format understandable. I have again been asked to sign" The Tribunal notes that Mrs Stones accepted that at the Final Hearing that the communication was not rude or offensive.

The Tribunal notes that Mrs Stones' contemporaneous e-mail response does not set out that she considered that the communication was rude or offensive but rather sets out a factual disagreement on the calculation. Mrs Stone did not offer to the Tribunal what she considered to be the correct calculation at the Final Hearing. As set out above the Tribunal concludes that none of this communication amounted to harassment within the meaning of s26 of the EA 2010. While CNC issued communications to Mrs Stones, including with a spreadsheet with requests that Mrs Stone sign mandates, and while Mrs Stones did not wish to sign (at this stage) the conduct was unwanted, it did not;

- a. have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mrs Stones;
- b. have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal concludes on the evidence that when taking into account Mrs Stones perception, the other circumstances of the case, it was not reasonable to consider that the conduct (being the communication around the calculation including the spreadsheet and request that mandate) had that effect. It did not have that effect.

248. On Tuesday **2 October 2018** CNC emailed Mrs Stones agreeing that she will be given three months' notice of termination instead of payment in

lieu of notice. The Tribunal notes that CNC agreed to give Mrs Stones 3 months' notice of termination her employment. The Tribunal does not, however consider that CNC actions, had the intention to to seek to restrict Mrs Stones eligibility to pay including maternity pay. The Tribunal does not
5 accept that the decision to dismiss was rushed. The Tribunal notes that HMRC records identify that Mrs Stones did not earn enough during the qualifying weeks to be eligible for any maternity pay or maternity allowance. That does not however create an actionable right before the Tribunal. It is the Tribunal's assessment that in term of s18 of the EA 2010 (pregnancy & maternity discrimination) that while CNC treated Mrs Stones unfavourably by
10 terminating her employment and not paying her during certain period of non maternity leave, and while the unfavourable treatment took place in a protected period and/or was it in implementation of a decision taken in the protected period, such unfavourable treatment was not because of pregnancy or of illness suffered as a result of it; in particular it was not
15 because Mrs Stones was on compulsory maternity leave; and was not because Mrs Stone was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.

20 249. On Wednesday **3 October 2018** Mrs Stones was notified that her second application for ill health retirement is rejected.

25 250. Mrs Stones presented, at the Final Hearing, an undated communication (other than 8 Feb 2019 at the top right of the otherwise undated sheet) from HMRC which set out that CNC had made some changes to information which they had provided to HMRC; and

- On **Friday 7 Sept 2018** HMRC were told that Mrs Stones she paid £2,304 more income tax; and
 - On **Friday 7 September 2018** HMRC were told her taxable income was £8,8896.56 more; and
 - On **Friday 7 September 2018** HMRC were told that she paid £110.23 more National Insurance.
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On the evidence adduced the Tribunal is satisfied that Mrs Stones received no pay month ended **30 Sept 2017** and thereafter month ended **30 November 2017** to month ended **31 March 2018**. No evidence was adduced in respect of any unnotified deductions in respect of those periods when Stones did not receive pay. While it was Mrs Stones' position that she never received a payslip, she did not articulate the period the during which she considered that CNC did not provide any payslip.

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251. The Tribunal declines to make any finding that CNC did not provide any payslips. The Tribunal was not presented with an argument that it had jurisdiction to consider such matters. The Tribunal notes that an employee has the right to be given by her employer, at or before the time at which any payment of wages or salary is made to them, a written itemised pay statement in terms of s8 of the ERA 1996. However no compensable remedy arises unless an Tribunal finds both that an itemised pay statement had not been given to the employee and unnotified deductions have been from the pay of the employee during the period of 12 weeks immediately of the application for the reference, in which case the Tribunal may order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions so made in terms of s12(4) of ERA 1996. There was no evidence of unnotified deductions. In so far as the matter is before the Tribunal, it declines to order CNC to pay any sum in terms of s12(4) of ERA1996.

252. Mrs Stones' employment with CNC terminated on Friday **16 November 2018** under CNC's capability procedure.

253. Mrs. Stones presented her ET1 on **16 Friday November 2018**.

254. **The Tribunal notes that** In term of s.207B(3) of the Employment Rights Act 1996 provide that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted; s.207B(4) . If a time limit set by a relevant

provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. The Tribunal concludes that the earliest date a claim could be in time **20 July 2018** (presentation less 3 months + 1 day less time between Dated A&B).

255. CNC presented its ET3 on Tuesday **18 December 2018**

Submissions

256. Both Mrs Stone and CNC representatives provided written submissions and were given an opportunity to issue supplementary commentary in light of their opponent's submissions.

257. Submission for Mrs Stones

258. Mrs Stones set out her position in her written submissions. Mrs Stones set out her claims should be accepted reflecting the factual history of the case.

259. Mrs Stones listed a number of cases, and while formal citations were not provided these are included in this summary: **Gallop v Newport City Council** [2018] ICR 1492 (**Gallop**), **McCubbin v Perth and Kinross Council** (McCubbin) and **O'Brien v Bolton St Catherine's Academy** [2017] IRLR 547 (**O'Brien**). While no specific commentary was provided the Tribunal has considered each of those decisions and addresses the issues below. It is observed that each case is available on the EAT website at <https://www.gov.uk/employment-appeal-tribunal-decisions> (which also provides the link to older decisions).

260. In addition, Mrs Stone made reference to, but did not provide a copy of, a first instance tribunal decision **Horler v South Wales Police Service**. All tribunal judgments since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>, however that decision, which predates February 2017 is not available online. It is observed that the

tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online and judgments from February 2017 are available online.

5 261. The Tribunal, however, understand that the case reference is 1600591/2012 and that the decision was issued 5 August 2013. The decision was issued following a remedy hearing arising out of a judgment in favour of the claimant which was issued on 5 August 2012. The 2013 decision arose out of an issue between the parties in relation to two offers of reinstatement and whether or not their rejection amounted to a failure to mitigate. The background to claim is understood to have included section 20 and s 15 of the Equality Act 2010. Such a decision is, in any event, not binding on this Tribunal. CNC provided what was indicated to be a summary of Horler which is repeated below. The Tribunal notes the reference and the analysis provided by CNC but does not consider that it is of assistance to the Tribunal.

Submissions for CNC

262. For CNC it was submitted that as a result of period of maternity leave and several period of long term sickness, Mrs Stones was unable to undertake AFO duties after 31 May 2010 and that it proved impossible to get to the bottom of her various health conditions and she was permanently restricted from undertaking AFO duties at a RAP on 22 December 2016.

263. It was submitted that as a result of a range of underlying health problems Mrs Stones was dismissed under the CNC's Capability procedure on 16 November 2018.

264. CNC accepted that Mrs Stones was disabled within the meaning of s6 of the EA 2010 at all material times, However and as the precise nature of the disability was never identified despite investigations, it is submitted that CNC never knew nor could be reasonably expected to know that Mrs Stone was disabled.

265. CNC referred to **IPC Media v Millar** [2013] IRLR 707(**Millar**), **Carphone Warehouse v Martin** [2013] EqLR 481 (**Martin**), **Donelien v Liberata** [2018] IRLR 535 and **Igen v Wong** [2015] ICR 931 (**Igen**).

5 266. CNC responded, in supplementary commentary, to the cases referred to by Mrs Stones. In relation to **Horler v South Wales Police Service**, CNC indicated this was a first instance decision and one which turned on its own facts. The claimant had arthritis in one of his knees, and so was disabled, but was otherwise fit to work.

10 267. The Tribunal, in that case had found that there were a number of suitable alternative jobs which the claimant could have done and, that the employer in that case had failed to make reasonable adjustments. In the present case, by contrast, it was argued that Mrs Stones was unfit to carry
15 out any work at the CNC, and no suitable alternative jobs were identified. It was set out for CNC it does not have the wide range of jobs which a regular policy force with as the South Wales Police would have.

20 268. In relation to **Gallop** it was intimated that, the factual background in that case the employer had relied upon an unreasoned opinion from occupational health that an employee was not disabled. CNC intimated that that Gallop was considered in **Donelien v Liberata UK Ltd** [2018] Ltd IRLR 535 (**Donelien**) noting that Underhill LJ at the end of para 32 set out that the Gallop decision was “*very far from saying that an employer may not attach great weight to the informed and reasoned opinion of an*
25 *occupational health consultant.*”

30 269. For CNC it was intimated that CNC sought repeated and specific advice from Dr Policarp, Dr Moss and Dr Fernandez, who looked carefully at all the available medical evidence. It was suggested for CNC that in the circumstances, it cannot be said to have had constructive knowledge that Mrs Stones was disabled, when no disability was ever clearly identified. In relation to **McCubbin**, for CNC it was intimated that the key question before the Scottish EAT was when the employer knew about an

employee's disability, a question which again turned on its own facts. The EAT had allowed the appeal on the basis that the ET had failed to turn its mind properly to the question of constructive knowledge: see Lady Stacey at [47]-[48]. In the present case, it is argued that CNC did not have
5 constructive knowledge of Mrs Stones disability, because there was never clear and consistent medical evidence to establish the nature of any disability.

270. Finally, and in relation to **O'Brien** the Court of Appeal held that the
10 decision to dismiss a disabled employee was disproportionate and accordingly in breach of section 15 of EA 2010, the key point in that case was that, by the time of the appeal hearing, there was evidence that the employee was fit to return to work: see Underhill LJ at [56]. In the present case, the position remained, on the medical evidence, that Mrs Stones was
15 unfit for work. Moreover, it was submitted that in all circumstances CNC could not reasonably have been aware of her disability and thus the section 15 EA 2010 duty did not apply.

Issues in this Tribunal claim

20 Further and Better Particulars/Scott Schedule.

The Law

33. The Tribunal notes that in **Uwhubetine v NHS Commissioning Board England** UKEAT/0264/18 (23 April 2019, unreported) (**Uwhubetine**) Judge Auerbach commented at para 51 "*whilst the phrase "Scott Schedule" and
25 the use of what are called Scott Schedules has become extremely common in ETs for some years now, and particularly in cases where there are multiple allegations of discrimination and/or whistle blowing detriment, while that is no doubt a very useful tool in the Tribunal's case management kit, there is no one size fits all of so-called Scott Schedules. It is a matter for
30 the Judge giving directions to decide what Particulars should be directed, and covering what topics or types of issue or types of information, which claims or responses (in multi-party cases), and so forth.*"

34. The term “*Scott Schedule*” is one which has been adopted from civil court procedure in English CPR Rules, and is understood to be embedded in certain types of court process including the Technology and Construction Court Guide for England. It is understood that it developed to assist judicial decision-making by summarising the issues in dispute in a given claim. It typically consists of a schedule in which disputed issues are particularised and quantified so that the treatment of disputes can be carried out in a methodical and efficient manner. The term Scott Schedule as Judge Auerbach identifies above does not appear as a defined term within the 2013 Rules.

35. The Tribunal has reminded itself that the EAT observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of pleadings “...is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it”, and further in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and “... a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it”.

271. The EAT in **Reuters Ltd v Cole** UKEAT/0258/17 (**Reuters**), described the operation of labelling of existing claims.

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Issues in this Tribunal claim

Further and Better Particulars/Scott Schedule.

Discussion and Decision

36. There was no objection to the formulation of the complaints. The Tribunal is content that it was in accordance with the overriding objective to proceed on the basis of the complaints as set out in the Scott Schedule and where relevant the Scott Schedule is referred to. The Scott Schedule is, in effect, an acceptable labelling of Mrs Stones complaints.

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Issues in this Tribunal claim

Disability Discrimination, Qualification under s6 EA 2010.

5 Discussion and Decision

272. CNC concede that Mrs Stones was disabled at all material time. As such matters which would otherwise be before the Tribunal in terms of **s6** of the **EA 2010** and **Schedule 1** Determination of Disability, do not arise:

- a. whether the claimant had a physical or mental impairment at the relevant time; and
- 10 b. did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities; and
- c. if so, is that effect long term? In particular, when did it start and (has the impairment lasted for at least 12 months /is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less
- 15 than 12 months? do not arise; and
- d. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal
- 20 day-to-day activities?

273. The Tribunal considers that the concession made by CNC is, in light of the evidence appropriate and proceeds on the basis that Mrs Stones was disabled at all times relevant to the claims before the Tribunal.

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Issues in this Tribunal claim

Time limits

The Law

274. s.123(1) of the EA 2010, provides:

30 123 Time limits

(1) ... Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting **with the date of the act** to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

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...

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

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(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it”

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275. s.123(1) of the EA 2010 is subject to s.207B(3) of the Employment Rights Act 1996 which provides that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted; s.207B(4). If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

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Issues in this Tribunal claim

Time limits /Just and Equitable

Relevant Law

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276. Tribunals have a broader discretion under discrimination law than they do in unfair dismissal cases as the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal claim can only be extended if the claimant shows that it was “not reasonably practicable” to present the claim in time.

277. In determining whether to exercise discretion and late claims the EAT's reasoning in **British Coal Corporation v Keeble** [1997] IRLR 336 (**Keeble**) is helpful. In that case the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980 which in turn consolidated earlier Limitation Acts. Section 33(3) deals with the exercise of discretion in civil courts and personal injury cases in England & Wales and requires the court to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

- (a) the length of and reasons for the delay; and
- (b) the extent to which evidence which may adduced for either side is likely to be less cogent than if the action had been brought within the time allowed; and
- (c) the conduct of the party defending the action after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the party bringing the action for information or inspection for the purpose of ascertaining facts which were or might be relevant to the party bring the action's cause of action; and
- (d) the duration of any disability of the party arising after the date of the accrual of the cause of action; and
- (e) the promptness with which the party bringing the action acted once s/he knew of the facts giving rise to the cause of action; and
- (f) the steps, if any, taken by the party bringing the action to obtain appropriate professional advice once s/he knew of the possibility of taking action.

278. The Limitation Act 1980 does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973 (the 1973 Act)**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, s19A simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision.”

5 279. While it can be argued that just and equitable “*escape clause*” is wider than that relating to unfair dismissal claims, the Court of Appeal in **Robertson v Bexley Community Centre** [2003] IRLR 434 (**Robertson**) stated that when Employment Tribunals are considering exercising this discretion: “*There is no presumption that they should do so unless they can*
10 *justify a failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule”.*

15 **Issues in this Tribunal claim**
Time limits/ Just and Equitable
Discussion and Decision

280. The complaints, so far as relevantly, before the Tribunal are formulated by reference to the Equality Act 2010 (variously ss 13, 15, 18,
20 20, 21 and 26). It is asserted by CNC that some of the claims have been presented out with the statutory limit. That is to say some claims were lodged out with 3 months less one day time limit (allowing for the operation of ACAS early conciliation).

25 281. The Tribunal has considered the heads of claim which are defined by date within the Scott Schedule, taking them in date order for ease, rather than following the numbering within the Scott Schedule;

a. Pre-Dismissal Claim (**SctSch Claim 8**): May 2012: the claimant’s claims of cancelled parental leave (unfavourable treatment because of
30 maternity under section 18 EA 2010, direct sex discrimination under section 13 EA 2010); and

b. Pre-Dismissal Claim (**SctSch Claim 9**): May 2012: the claimant’s claims of Requirement to agree a payment plan in respect of overpaid

maternity benefits (unfavourable treatment because of maternity under section 18 EA 2010, harassment under section 26 EA); and

- 5 c. Pre-Dismissal Claim (**SctSch Claim 10**): December 2014: the claimant's claims of Failure to offer training and shifts on return from maternity leave (unfavourable treatment because of maternity under section 18 EA 2010); and
- d. Pre-Dismissal Claim (**SctSch Claim 11**): 2014: the claimant's claims of Failure to consider request for flexible working properly on return from maternity leave (harassment under section 26 EA 2010); and
- 10 e. Pre-Dismissal Claim (**SctSch Claim 12**): 2015: the claimant's assertion that there was a failure to conduct a health and safety investigation after Mrs Stones' first grievance (the legal basis of which claim remains unclear); and
- f. Pre-Dismissal Claim (**SctSch Claim 13**): December 2015: the claimant's claims of Removal from self-defence training preventing Mrs Stones from returning to work (discrimination arising from disability under section 15 EA 2010, failure to make reasonable adjustments under sections 20 and 21 EA 2010); and
- 15 g. Pre-Dismissal Claim (**SctSch Claim 19**): April 2016 onwards: the claimant's claims of Failure to provide a copy of the sick pay policy and failure to follow the sick pay policy (the legal basis of which claim remains unclear) do not succeed; and
- 20 h. Pre-Dismissal Claim (**SctSch Claim 14**): April 2016: the claimant's claims of being refused a career break, forcing Mrs Stones to take sick leave which triggered the capability procedure (discrimination arising from disability under section 15 EA 2010);
- 25

282. The Tribunal considering what may be referred to as the **Keeble** factors, notes that

- 30 a. Mrs Stones has not adduced evidence, which satisfies the Tribunal on the reasons for delay in presenting claims respect of any of those listed in the immediately preceding paragraph **a**.to **h** above; and
- b. Further the Tribunal considers given the period of time of which has elapsed that evidence which may adduced for either side was, in

fact, less cogent than if the action had been brought within the time allowed, including the Tribunal notes the RAP from Monday 1 December 2014, which was not available in this claim; and

- 5
- c. The Tribunal ascribes no criticism to CNC in respect of their conduct in the manner in which they have defended the action after the cause of action arose; and
- d. The Tribunal does not consider that there has been any material failure on the part of CNC, to respond to requests reasonably made by Mrs Stones, for information or inspection for the purpose of
10 ascertaining facts which were or might be relevant to the party bring the action's cause of action; and
- e. The Tribunal does not consider that that there has been material evidence in relation to the duration of the Mrs Stones disability after the date of accrual of those cause of action which had any impact
15 upon Mrs Stones ability to pursue claims; and
- f. The Tribunal is, however, critical of the promptness with which Mrs Stones brought the actions once she knew of the facts giving rise to the cause of action of the matters listed in the immediately preceding paragraph.
- 20

283. The Tribunal concludes, in all the circumstances, that Mrs Stones made a conscious decision to not to raise proceedings within the limit provided within s123(1)(a) of EA 2010 following her withdrawal of the **January 2015 Grievance on 4 May 2015** ; the **February 2016 Medical Declaration on Tuesday 16 February 2016**; and her appeal on **Sunday 9 July 2017** against the outcome of the **Stage 1 Capability Meeting**.

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284. The Tribunal is satisfied that it is not just and equitable to extend the time limit in respect of those claims. This Tribunal does not have jurisdiction
30 to consider those claims and they do not succeed.

Issues for Tribunal

Time Limits/ Continuing Acts s123(1) and (3) of the EA 2010.

Relevant Law

285. The Tribunal notes the EAT in **Hale v Brighton & Sussex University Hospitals NHS Trust** UKEAT/0342/16 (**Hale**) held that the various stages of a disciplinary procedure, which culminated in Mr Hale's dismissal, were considered to constitute an act extending over a period rather than, in the words of Mummery LJ, '*a succession of unconnected or isolated specific acts*', each with its own time limit.

286. The facts of **Hale** were that Mr Hale, a hospital consultant, who was white British, was subjected to the hospital's disciplinary procedure following complaints of race discrimination and harassment being made against him by junior doctors for whom he had responsibility, and who were of Asian origin. The NHS Trust (the respondents) instigated a formal investigation, which concluded that Mr Hale had a case to answer; this in turn led to a disciplinary hearing, which resulted in the complaints being upheld; and the outcome was that Mr Hale was summarily dismissed, and his subsequent appeal turned down. Mr Hale brought proceedings for race discrimination, unfair dismissal and wrongful dismissal. The discrimination claim in that case was expressly directed at the whole disciplinary process from the setting up of the formal investigation through to the dismissal. Tribunal had not considered whether Mr Hale, as asserted in his claim, had been discriminated against in relation to the overall procedure, but rather the Tribunal had only considered each stage separately. Significantly it found that the First Stage, being the decision to open a formal investigation, was discriminatory but held that it was a one-off act, which was out of time and there were no just and equitable reasons for extending time. It rejected the allegations of discrimination in relation to the other stages.

287. The EAT in **Hale**, allowed the appeal. Choudhury J held that, while it was open to the tribunal, to subdivide issue of the overall procedure into three separate questions, it '*should not have lost sight of the issue as formulated*', which indicated that that complaint as formulated against the overall procedure was "*about a continuing act commencing with a decision to instigate the process and ending with a dismissal*" (para 38). He stated (at

para 42): *"By taking the decision to instigate disciplinary procedures, it seems to me that the respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the respondent would subject the claimant to further steps under it from time to time."*

Issues for Tribunal

Continuing Act (s123(1) and (3) of the EA 2010.

Discussion and Decision

288. On the evidence adduced, the Tribunal is satisfied that each of the various complaints up to, and including Mrs Stone's claims of being refused a career break in April 2016, which she asserts forced her to take sick leave which triggered the capability procedure (discrimination arising from disability under section 15 EA 2010) were discrete in the present case and there was no inevitable or indeed sufficiently causatively link to amount to conduct extending over a period in terms of **s123 of EA 2010.**

Issues in this Tribunal

Disability Discrimination EA 2010 overview

Relevant Case Law Overview

289. HHJ Richardson in **Carranza v General Dynamics Information Technology Ltd** [2015] IRLR 43 comments at para 32 to 33:

"The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability.

The first is discrimination arising out of disability: section 15 of the Act.

The second is the duty to make adjustments: sections 20–21 of the Act.

The focus of these provisions is different.

Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim.

Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.

5 *Until the coming into force of the Equality Act 2010 the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I think, two reasons for this. First, although there was provision for disability-related discrimination, the bar for justification was set quite low: see section 5(3) of the Disability Discrimination Act 1995 and *Post Office v Jones* [2001] ICR 805. Secondly,*

10 *the decision of the House of Lords in *Lewisham London Borough Council v Malcolm* (Equality and Human Rights Commission intervening) [2008] 1 AC 1399 greatly reduced the scope of disability-related discrimination. With the coming into force of the Equality Act 2010 these difficulties were swept away. Discrimination arising from disability is broadly defined and requires*

15 *objective justification."*

Issues in Tribunal

S136 (1) to (3) of EA 2010 (the burden of proof provisions)

290. The burden of proof provisions are set out in s.136(1)-(3) EA 2010.

20 *“(1) This section applies to any proceedings relating to a contravention of this Act.*

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

25 *(3) But subsection (2) does not apply if A shows that A did not contravene the provision. “*

291. In ***Igen v Wong*** [2005] ICR 931 (***Igen***), to which CNC refers, the Court of Appeal provided the following guidance which, although it refers to the former Sex Discrimination Act 1975, it is considered to apply equally to the EA 201:

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‘(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts

from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) *Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.*

(10) *It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

(11) *To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.*

(12) *That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

(13) *Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'*

292. More recently in **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that '*could conclude*' [The EA 2010 uses the words '*could decide*', but the meaning is the same] meant: '*[...] that "a reasonable Tribunal could properly conclude" from all the evidence before it.*'

293. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.*'

294. The Court of Appeal in **Anya v University of Oxford** [2001] ICR 847 (at paras 2, 9 and 11) (**Anya**) held that the Tribunal should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged to constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the Tribunal is twofold: first, to establish what the facts were on the various incidents alleged by the Claimant; and, secondly, to decide whether the Tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. In order to give effect to the legislation, the Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Issues in this Tribunal claim

Disability Discrimination

EHRC Code of Practice

The Statutory provisions

295. s15 (4) of Equality Act 2006 provides that, the EHRC 2011 Statutory Code of Practice of, shall be taken into account wherever it appears relevant to the Tribunal to do so.

296. s13 of EA 2010 provides that

“13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

5 (4) *If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

(5) *If the protected characteristic is race, less favourable treatment includes segregating B from others.*

(6) *If the protected characteristic is sex—*

10 (a) *less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*

(b) *in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*

(7) *Subsection (6)(a) does not apply for the purposes of Part 5 (work).*

15 (8) *This section is subject to sections 17(6) and 18(7).*

S13 EA 2010

Relevant case law

20 297. The Tribunal notes that in *Burnett v West Birmingham Health Authority* [1994] IRLR 7 (**Burnett**) the EAT identified that what amounts to less favourable treatment is an objective one. It is the treatment that must be different and less favourable **Balgobin v Tower Hamlets London Borough Council** [1987] IRLR 401(**Balgobin**). Further in **Watts v High Quality Lifestyles** [2006] IRLR 850 (**Watts**) the EAT identified that the Tribunal had failed to consider whether the employee had in fact been treated less
25 favourably than an equivalent hypothetical comparator, who should have some attribute which must carry the same risk. **Watts** was subsequently Cited with approval in the Court of Appeal in **Aitken v Commissioners of the Police of the Metropolis** [2012] ICR 78 (**Aitken**).

Issues in this Tribunal claim

s15 EA 2010 Claims

298. For the remaining claims Tribunal considers that it is useful, having regard to the legal principles, when considering those claims, to group where there is a single asserted statutory basis, by the relevant section of the EA 2010, the claims asserted under s15 EA 2010 are;

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a. Pre-Dismissal Claim (**SctSch Claim 16**): the claimant's claims that Mrs Stones was ignored for long periods while on sick leave and not kept up to date with developments (discrimination arising from disability under section 15 EA 2010); and

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b. Dismissal-Related Claim (**SctSch Claim 2**): the claimant's claims of Dismissal arising from disability (section 15 EA 2010).

Issues for Tribunal**Disability Discrimination, s15 EA 2010**

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The Statutory Provisions

299. s15 of the EA 2010 provides:

"15 Discrimination arising from disability

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

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(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."*

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The Law**Issues in this Tribunal claim****Disability Discrimination EA 2010 s15 (1)(a)****Relevant Case Law**

300. For CNC reference was made to **IPC Media Ltd v Millar** [2013] IRLR 705 (**Millar**) at the comments of Underhill J at para 26 to 27, those comments reflected the submissions on the evidence for IPC. It is noted that in this regard that that it was identified in **Millar** that there had been
5 nothing, in the contemporary documents, evidencing any awareness on the part of the individual, who had carried out the redundancy consultation of Ms Millar's history of absences.

301. The Tribunal considers that **Millar** in essence identifies that no *prima facie* case of discrimination can arise sufficient to pass the burden of proof
10 to the respondent unless it can be shown that the putative discriminator was aware of the thing arising from disability (absences), this analysis is consistent with the EAT decision in **Pnaiser v NHS England** [2016] IRLR 170 (**Pnaiser**) and the Court of Appeal decision in **City of York Council v Grosset** [2018] IRLR 746 (**Grosset**).
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302. In **Pnaiser** the EAT notes from para 69: “
20 “69 It is common ground that while the statute does not require knowledge (whether actual or constructive) of the precise diagnosis of the disability in question, it does require knowledge (actual or constructive) of the facts constituting the disability. In other words, that the individual is suffering from a physical or mental impairment which has substantial and long-term adverse effects on his or her ability to carry out normal day-to-day activities...
72. The question what a respondent knew or should reasonably have been
25 expected to know is one for the factual assessment of a tribunal. Here, the tribunal made findings about the reference given” which referred to 2 surgical procedures which were the cause of 2 absences during a 12-month period in 2010. There was also a reference to a significant absence... “If linked, these facts could lead to the conclusion that the claimant had a physical
30 condition that had substantial, long term adverse effects on her day-to-day activities because it required two surgical interventions and caused her to have significant absences from work (consistent with not being able to perform normal day-to-day activities) over a period longer than 12 months.

5 *The tribunal found that Prof Rashid was a doctor with a high level of awareness of medical conditions. If he had asked Ms Tennant about the absences, and whether there was a link with the earlier surgery (as the tribunal found he should have done), it is implicit on the tribunal's findings that Ms Tennant (who knew that the claimant's significant absence was disability related) would have told him that the claimant was disabled.*”

10 303. In **Grosset** it was confirmed that Section 15(1)(a) EA 2010 did not require that the respondent should be shown to have been aware, when choosing to subject a disabled person to unfavourable treatment, that the relevant “*something*” that provided him with his reason for treating the claimant unfavourably had arisen in consequence of the claimant’s disability.

15 304. Further in **Gallop v Newport City Council** [2014] IRLR 211, CA (**Gallop**) it was intimated that an employer cannot simply *rubber stamp* a health practitioner’s opinion. A bare, unreasoned assertion from an Occupational Health adviser that an employee was not disabled did not mean that there was no constructive knowledge. The knowledge required was of the facts constituting disability, it was considered that the employer (the respondent), need not also realise that those particular facts meet the legal definition of disability.

20 305. By contrast the Court of Appeal intimated that in **Donelien v Liberata UK Ltd** [2018] IRLR 535 (**Donelien**), to which CNC had referred, the employer was entitled to attach great weight to the informed and reasoned opinion of an OH expert.

30 306. **Grosset** it was indicated that Section 15 of EA 2010 requires an investigation of two distinct causative issues:
a. Did A treat B unfavourably because of an identified “*something*”; and
b. Did that something arise in consequence of B’s disability.

I). The first issue involves an examination of the putative discriminator's state of mind – did the unfavourable treatment occur because of CNC's attitude to the relevant "*something*".

5 II). The second issue is an *objective* matter, whether there is a causal link between B's disability and the relevant "*something*"?

There is **no** further requirement that CNC must be shown to have been aware, when choosing to subject B to the unfavourable treatment in question, that the relevant "*something*" arose in consequence of B's disability. Liability can be established under s.15(1) even though the
10 respondent does not know that the "*something*" arose from the claimant's disability.

The test of justification under s.15(1)(b) is objective, the ET must make its own assessment.

15 307. Further the Tribunal notes that the Court of Appeal in **Dunn v Secretary of State for Justice** [2019] IRLR 298, CA(**Dunn**), draws analogy with s.13 direct discrimination, intimating that the Claimant must establish, with aid of s.136 of EA 2010 if required, that the *disability related factor* operated on the mind of the putative discriminator as part of
20 conscious or subconscious '*mental processes*.

308. The Tribunal, notes the EAT decision in **Shiekholeslami v University of Edinburgh** [2018] IRLR 1090, EAT(**Shiekholeslami**) the
25 critical question was whether, on the objective facts, Ms Shiekholeslami's refusal to return arose "*in consequence of*" (rather than being caused by) her disability.

309. At paragraph 64 of **Seldon v Clarkson Wright & Jakes** [2012] ICR 716, SC, Lady Hale suggests that where it is justified to have a general
30 rule, then the existence of that rule will usually justify the treatment which results from it. However, a different approach will normally be taken in absence management cases. The ET is concerned not merely with the scheme itself, but with a series of discretionary decisions taken under it.

That can be contrasted with **Seldon** in which the treatment was mandated by the policy concerned. In such a case justification for the general rule will normally justify its application. The key case confirming this approach is **Buchanan v Commissioner of Police of the Metropolis** [2017] ICR 184 (Buchanan), EAT.

Issues in this Tribunal claim

Disability Discrimination EA 2010 s15 (1)(a)

Discussion and decision

10 310. The Tribunal, concludes that, there is no basis for concluding that CNC relied upon an unreasoned assertion from an Occupational Health. In so far as CNC relied upon opinions CNC were entitled to attach great weight to the informed and reasoned opinions including from Dr Policarp, Dr Moss and Dr Fernandez. The Tribunal is not critical of CNC's
15 Occupational Health advisers includer Karen Towers. However, on the question of whether CNC, as set out in **Paisner** had actual or constructive knowledge of the facts constituting the disability, or other words, that Mrs Stones was suffering from a physical or mental impairment which has substantial and long-term adverse effects on her ability to carry out normal
20 day-to-day activities, the Tribunal is satisfied that CNC had the requisite knowledge by **Thursday 17 December 2015**.

25 311. The Tribunal, thus following the approach in **Grosset** considers that Section 15 of EA 2010 requires an investigation of two distinct causative issues:

- a. Did A treat B unfavourably because of an identified "*something*"; and
 - b. Did that something arise in consequence of B's disability.
- I) The first issue involves an examination of the putative discriminator's state of mind – did the unfavourable treatment occur because of
30 CNC's attitude to the relevant "*something*".
 - II) The second issue is an *objective* matter, whether there is a causal link between B's disability and the relevant "*something*"?

The Tribunal considers that there is **no** further requirement that CNC must be shown to have been aware, when choosing to subject B to the unfavourable treatment in question, that the relevant “*something*” arose in consequence of B’s disability, further liability can be established under s.15(1) even though the respondent does not know that the “*something*” arose from the claimant’s disability, and whether on the objective facts, as set out **Shiekholeslami**, that something arose “*in consequence of*” (rather than being caused by) her disability. The test of justification under s.15(1)(b) is objective, the ET must make its own assessment.

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312. In respect of the claims before the Tribunal and set out in the findings of fact above where the Tribunal has considered each claim where it is suggested that CNC treated Mrs Stones unfavourably because of an identified something and where the Tribunal concludes that Mrs Stone was treated unfavourably because of an identified something arise in consequence of Mrs Stones disability, CNC’s actions were justified in terms of s15(1) (b) of the EA 2010. Thus, taking the specific s15 EA 2010 claims as follows

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- a. Pre-Dismissal Claim (**SctSch Claim 16**): the claimant’s claims that Mrs Stones was ignored for long periods while on sick leave and not kept up to date with developments (discrimination arising from disability under section **15** EA 2010), the Tribunal does not accept that Mrs Stones was ignored for long periods while on sick leave and not kept up to date with developments. The Tribunal does not accept that, taking matters as a whole, that Mrs Stones was ignored for long periods and kept up to date with developments. There was frequent contact made with Mrs Stones both by telephone and email during each year. There was no evidence adduced by Mrs Stones from which the Tribunal can accept that she was ignored, nor that she was not reasonably kept up to date with matters. It is the Tribunal assessment that Mrs Stones was treated not unfavourably, she was not treated

unfavourably because of something arise in consequence of Mrs Stones disability. There was no breach of s15 of the EA 2010.

- 5 b. Dismissal-Related Claim (**SctSch Claim 2**): the claimant's claims of Dismissal arising from disability (section 15 EA 2010), it is the Tribunal assessment that Mrs Stones was treated unfavourably because of an identified something and where the Tribunal concludes that Mrs Stone was treated
- 10 unfavourably because of an identified something arise in consequence of Mrs Stones disability, CNC's actions were justified in terms of s15(1) (b) of the EA 2010.

15 313. It is the Tribunal's decision that **Scott Schedule Claims 16 and 2 do not succeed.**

Issues in this Tribunal claim

s18 EA 2010 Claims

- 20 314. For the remaining claims Tribunal considers that it is useful, having regard to the legal principles, when considering those claims, to group where there is a single asserted statutory basis, by the relevant section of the EA 2010, and thus, taking the claims solely asserted under **s18** EA 2010:
- 25 a. Pre-Dismissal Claim (**SctSch Claim 21**): the claimant's claims of Information being withheld on job opportunities (unfavourable treatment because of maternity under section **18** EA 2010); and
- b. Dismissal-Related Claim (**SctSch Claim 3**): the claimant's claims of Dismissal for capability reasons when only physical problems were pregnancy related (unfavourable treatment because of maternity under section **18** EA 2010); and
- 30 c. Dismissal-Related Claim (**SctSch Claim 4**): the claimant's claims of a flawed and rushed capability procedure aimed at dismissing Mrs Stones prior to the birth of her child (unfavourable treatment because of maternity under section **18** EA 2010); and

- d. Dismissal-Related Claim (**SctSch Claim 5**): the claimant's claims of Maternity-related absences treated as sick leave, leading to dismissal (unfavourable treatment because of maternity under section **18** EA 2010).
- e. Dismissal Related Claim (**SctSch Claim 15**); the claims that she was overpaid whilst on sick pay and then hassled to agree a repayment plan (unfavourable treatment because of maternity under section 18 EA 2010)

315. **Section 18** of **EA 2010** (pregnancy & maternity discrimination) provides

"18 Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

5 (b) it is for a reason mentioned in subsection (3) or (4).”

Section 18 of EA 2010 (pregnancy & maternity discrimination)

Relevant case law

10 316. The provisions of s18 EA 2010 expressly sets out that it prohibits discrimination because of compulsory maternity leave or because the employee exercises or seeks to exercise her right to take ordinary or additional maternity leave. S18 (2) provides protection against unfavourable treatment because of a pregnancy related illness

15 317. In order for a discrimination claim to succeed under s.18 EA 2010, the unfavourable treatment must be ‘because of’ the employee’s pregnancy or maternity leave. The meaning of this expression was considered in this context in **Indigo Design Build and Management Ltd. V Martinez** (UKEAT/0020/14/DM). HHJ Richardson referred to **Onu v Akwivu** [2014] ICR 571 (**Onu**), in which Lord Justice Underhill said:

20 *‘What constitutes the “grounds” for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application,*

25 *plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator’s mind... so as to lead him to act in the way complained of.*

30 *It does not have to be the only such factor: it is enough if it has had “a significant influence”. Nor need it be conscious: a subconscious motivation, if proved, will suffice.’*

318. Where a discrimination claim is based upon multiple allegations, it necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. The Tribunal should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12 (**X**). It must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Section 18 of EA 2010 (pregnancy & maternity discrimination)

Discussion and Decision

319. In relation to the complaints asserted

a. Pre-Dismissal Claim (**SctSch Claim 21**): the claimant's claims of Information being withheld on job opportunities (unfavourable treatment because of maternity under section **18** EA 2010). It is not accepted on the evidence adduced that CNC withheld job opportunities. Nor is it accepted that CNC withheld job opportunities because of the periods of pregnancy or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave. In so far as matters are before the Tribunal it is not accepted that any asserted unfavourable treatment was because of any of the pregnancies or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; nor because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.

b. Dismissal-Related Claim (**SctSch Claim 3**): the claimant's claims of Dismissal for capability reasons when only physical problems were pregnancy related (unfavourable treatment because of maternity under section **18** EA 2010). It is not accepted on the evidence adduced that CNC withheld job opportunities. Nor is it accepted that CNC withheld job opportunities because of the periods of pregnancy or of illness suffered

as a result of it; nor because the claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave. In so far as matters are before the Tribunal it is not
5 accepted that any asserted unfavourable treatment was because of any of the pregnancies or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; nor because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.

10
c. Dismissal-Related Claim (**SctSch Claim 4**): the claimant's claims of a flawed and rushed capability procedure aimed at dismissing Mrs Stones prior to the birth of her child (unfavourable treatment because of maternity under section 18 EA 2010); and It is not accepted on the evidence
15 adduced that CNC engaged in a flawed and rushed capability procedure aimed at dismissing Mrs Stones prior to the birth of her child. Nor is it accepted that CNC operated a flawed and rushed capability procedure aimed at dismissing Mrs Stones prior to the birth of her child because of the periods of pregnancy or of illness suffered as a result of it; nor
20 because the claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave. In so far as matters are before the Tribunal it is not accepted that any asserted unfavourable treatment was because of any of the pregnancies or of
25 illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; nor because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.

30
d. Dismissal-Related Claim (**SctSch Claim 5**): the claimant's claims of Maternity-related absences treated as sick leave, leading to dismissal (unfavourable treatment because of maternity under section 18 EA 2010). It is not accepted on the evidence adduced, that CNC treated Maternity- related absences as sick leave leading to dismissal. Nor is it

accepted that CNC treated Maternity- related absences as sick leave leading to dismissal because of the periods of pregnancy or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave. In so far as matters are before the Tribunal it is not accepted that any asserted unfavourable treatment was because of any of the pregnancies or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; nor because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.

- e. Dismissal-Related Claim (**SctSch Claim 15**): the claimant's claims that she was overpaid while on sick leave and then hassled to agree a repayment plan (unfavourable treatment because of maternity under section 18 EA 2010). While CNC accept that there was an overpayment it is not accepted on the evidence adduced, that there was a breach of s18 of EA 2010. It is not accepted that the overpayment or the request to repay were because of the periods of pregnancy or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave. In so far as matters are before the Tribunal it is not accepted that any asserted unfavourable treatment was because of any of the pregnancies or of illness suffered as a result of it; nor because the claimant was on compulsory maternity leave; nor because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.

320. There was no evidence to suggest that the Claimant was treated less favourably than other employees who had not taken maternity leave in the brief period that she was available to attend courses. The burden of proof does not shift to the Respondent.

321. All these head of claims are not well founded and are therefore dismissed. Mrs Stones asserted claims of maternity discrimination are therefore dismissed. It is the Tribunal's decision that **Scott Schedule Claims 21, 3, 4 and 5 do not succeed.**

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Issues in this Tribunal claim

s20 and 21 EA 2010 EA 2010 Claims (reasonable adjustments (for disability))

322. For the remaining claims Tribunal considers that it is useful, having regard to the legal principles, when considering those claims, to group where there is a single asserted statutory basis, by the relevant section of the EA 2010, and thus taking the claims asserted under **ss20** and **21** EA 2010

10

a. Dismissal-Related Claim (**SctSch Claim 1**): the claimant's claims of Failure to offer suitable alternative employment, failure to offer a phased return to work and/or additional breaks and refusal to consider a return to work in 2018 when Mrs Stones' health had improved (failure to make reasonable adjustments under sections **20** and **21** EA 2010); and

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f. Pre-Dismissal Claim (**SctSch Claim 17**): the claimant's claims of Failure to provide funding for treatment of Mrs Stones' medical conditions (failure to make reasonable adjustments under section **20** and **21** EA 2010); and

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Disability Discrimination s20 (and s21)

The Statutory Provisions

323. s20 of the EA 2010 provides

Adjustments for disabled persons

25

20. Duty to make adjustments

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

30

(2) *The duty comprises the following three requirements.*

5 (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.*

(4) *The second requirement is a requirement, where a physical feature 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.*

10 (5) *The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.*

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

20 (7) *A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

25 (8) *A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

(9) *In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to*

(a) *removing the physical feature in question,*

(b) *altering it, or*

(c) *providing a reasonable means of avoiding it.*

(10) *A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a*
5 *reference to*

(a) *a feature arising from the design or construction of a building,*

(b) *a feature of an approach to, exit from or access to a building,*

(c) *a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

10 (d) *any other physical element or quality.*

(11) *A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*

(12) *A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.*

15 (13) *The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.*

324. **s21** of the **EA 2010** provides:

s. 21 Failure to comply with duty

(1) *A failure to comply with the first, second or third requirement is a failure*
20 *to comply with a duty to make reasonable adjustments.*

(2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

(3) *A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of*
25 *establishing whether A has contravened this Act by virtue of subsection (2);*

a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

S20 and 21 of EA 2010

5 **Relevant case law**

325. The tribunal notes the EAT's decision in **Environment Agency v Rowan** [2008] IRLR 20 (**Rowan**) and **Secretary of State for Work and Pensions v Higgins** [2014] ICR 341 (**Higgins**) which confirms and updates guidance for EA 2010, and which indicates that that the Tribunal should
10 identify and then make clear reasoned findings on:

(1) any relevant PCP

(2) the identity of non-disabled comparators (where appropriate)

(3) the nature and extent of any substantial disadvantage suffered by the claimant

15 (4) any step (or steps) which it would have been reasonable for the employer to take.

326. The Tribunal has had regard to the Court of Appeal decision in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160
20 (**Griffiths**) which identifies the need for care when framing a PCP. The context in Griffiths was absence and the application of absence management policies. The correct PCP was not the particular absence policy itself, but rather the underlying requirement, reflected in the policy, to
25 "*maintain a certain level of attendance at work so as to avoid disciplinary sanctions*".

327. Further the Tribunal notes that the EAT in **General Dynamics Information Technology Ltd v Carranza** [2015] ICR 169, EAT (**Carranza**) identifies that it is unsatisfactory to define a PCP in terms of a procedure
30 which is designed, at least in part, to alleviate the disadvantages of disability (e.g. a sickness management procedure), rather the appropriate approach would be to identify the feature of the procedure which causes

the disadvantage. In **Carranza** the ET had correctly identified the PCP as the requirement for *consistent* attendance.

5 328. The Tribunal has had regard to the EAT's decision in **Nottingham City Transport Ltd v Harvey** [2013] EqLR 4, EAT (**Harvey**) which identifies that here must be a causative link between the PCP and the substantial disadvantage so identified. The substantial disadvantage must "arise out of" the PCP. It is not sufficient, merely to identify that an employee has been disadvantaged in the sense of badly treated, and to
10 conclude that if he had not been disabled, he would not have suffered. That would be to leave out of account the requirement to identify a relevant PCP.

15 329. The Tribunal notes that the content of the former s.18B DDA1995 is now largely replicated by paragraph 6.23 onwards of EHRC Code of Practice:

- Extent to which taking the step would prevent the effect in relation to which the duty is imposed
- Extent to which it is practicable for the employer to take the step
- The financial and other costs which would be incurred by the
20 employer in taking the step and the extent to which it would disrupt any of his activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance with respect to taking the step
- The nature of the employer's activities and the size of his
25 undertaking.

30 330. The Court of Appeal in **Griffiths** set out "*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.*" (Elias LJ at paragraph 29)

331. The Tribunal considers that CNC were not under an obligation to place Mrs Stones into a role which there was no evidence that she could perform, reference is made to **Wade v Sheffield Hallam University** [2013] EqLR 951, EAT (**Wade**). In **Wade** the claimant had been assessed as ‘*not appointable*’ and failed to meet the majority of 8 ‘*essential*’ criteria for the role. The EAT held that appointment would go beyond adjusting an essential requirement of the role. In any event the evidence as to Mrs Stones prognosis was such it would not have been reasonable to appoint Mrs Stones to any role. No medical evidence was provided to the Tribunal that Mrs Stones lack of prognosis up to and including the date of dismissal had been resolved by the time of the Final Hearing.

332. While reference was made to **Carphone Warehouse Ltd v Martin** [2013] EqLR 481 (**Martin**), it is noted that in that case the EAT was considering a failure on the part of an employer to operate within its own time limits and observed that “*incompetence or a woeful lack of application, or a failure to stick to (the employers) won time limits, cannot, in our view, be properly characterised as a “provision, criterion or practice applied” by an employer.*”

333. Further and again with reference to **Griffiths** it is noted that there was no reason in principle why absences relating to disability could not be discounted in the context of determining whether to dismiss or otherwise manage absenteeism. There was nothing unreasonable in the employer being entitled to have regard to the whole of the employee’s absence record (and not just disability related absence) when making that decision.

S20 and 21 of EA 2010

Discussion and decision

334. In relation to the claims solely under ss 20 and s21;
- a. Pre-Dismissal Claim (**SctSch Claim 17**): the claimant’s claims of Failure to provide funding for treatment of Mrs Stones’ medical conditions (failure to make reasonable adjustments under section **20**

and **21** EA 2010) it is not factually accepted that there was a failure to provide funding for treatment of Mrs Stones medical conditions. CNC took steps to identify to Mrs Stones that they may consider funding of medical investigations in respect of employees who were not on a career break. CNC however gave no undertaking that in the event that Mrs Stone elected not to take a career break they would provide funding for treatment. In so far as this head of claim is focussed on an asserted failure on the part of CNC to provide funding for medical investigations, it is not accepted that CNC were under any obligation to fund further medical investigations. The Tribunal does not accept that the CNC were under obligation to provide funding for medical investigations up to a defined budget. In so far as there was a practice, it was that CNC relied upon their appointed medical advisers including Dr Moss, Dr Policarp and Dr Fernandez in considering whether further medical investigations were merited, the Tribunal concludes that CNC were entitled to do so. No material evidence was adduced that there were further medical investigations as at the date dismissal or appeal which would have resolved the issue of the uncertain prognosis in respect of Mrs Stones. The Tribunal notes that no subsequent medical evidence was provided to the Tribunal by Mrs Stones at the Final Hearing. There are no non-disabled comparators. Mrs Stones did not suffer any substantial disadvantage in terms of s20 and s21 of EA. There were no steps which it would have been reasonable for CNC to take having regard to the EHRC Code of Practice; and

- b.** Dismissal-Related Claim (**SctSch Claim 1**): the claimant's claims of failure to offer suitable alternative employment, failure to offer a phased return to work and/or additional breaks and refusal to consider a return to work in 2018 when Mrs Stones' health had improved (failure to make reasonable adjustments under sections **20** and **21** EA 2010). Mrs Stones asserted failures, on the part of CNC to offer suitable alternative employment, failure to offer a phased return to work and/or additional breaks and refusal to consider a

5 return to work in 2018 when it is suggested as part of this asserted
claim Mrs Stones' health had improved, are on the basis of the
evidence adduced not accepted. There was no evidence presented
to the Tribunal, that it could conclude that the prognosis in relation to
Mrs Stones health had improved in or around 2018. In so far as CNC
operated a PCP it was a practice to establish what the relevant
prognosis was in order to avoid the risk of harming its employees and
or otherwise causing further ill health absences. The Tribunal
accepts the evidence of Dr Fernandez, who while advising the
10 relevant pension authority that it could not be said that Mrs Stones
condition could be said to meet the pension authority criteria, offered
his clinical judgment to CNC that there was no clear prognosis and
that in light of the continuing uncertainty, notwithstanding diagnosis
of urticaria and IBS, of the underlying reasons for ill health and future
15 prognosis there was no requirement on the part of CNC to offer
alternative employment, a return to work (whether phased or
otherwise), or indeed additional breaks in 2018. The Tribunal
concludes that on the facts and in the absence of a clear prognosis
there was no suitable alternative employment, nor was a phased
20 return to any work with CNC in 2018 appropriate against the clinical
advice of CNC's medical advisers including Dr Fernandez. There are
no non-disabled comparators. Mrs Stones did not suffer any
substantial disadvantage in terms of s20 and s21 of EA. There were
no steps which it would have been reasonable for CNC to take
25 having regard to the EHRC Code of Practice.

335. It is the Tribunal's decision that **Scott Schedule claims 17 and 1 do not succeed.**

30 **Issues in this Tribunal claim**

S26 Claims (Harassment)

336. For the remaining claims Tribunal considers that it is useful, having regard to the legal principles, when considering those claims, to group where

there is a single asserted statutory basis, by the relevant section of the EA 2010, and thus taking the claims asserted under **s26** EA 2010; and

- a. Dismissal-Related Claim (**SctSch Claim 6**): the claimant's claims of errors in final termination payments (harassment under section **26** EA 2010); and
- b. Dismissal-Related Claim (**SctSch Claim 7**): the claimant's claims of offer of pay in lieu of notice rather than termination of employment on expiry of notice (asserted as amounting to harassment under section **26** EA 2010).

Issues in this Tribunal claim

S26 Claims (Harassment)

Statutory provisions

337. **S 26** of the **EA 2010** provides:

"26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection

(1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection

(1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) the perception of B;

(b) the other circumstances of the case;

5 *(c) whether it is reasonable for the conduct to have that effect.*

(5) *The relevant protected characteristics are—*

- *age;*
- *disability;*
- *gender reassignment;*
- 10 • *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.”*

15 **Issues in this Tribunal claim**

S26 Claims (Harassment)

Relevant case law

338. The Court of Appeal in **Rev Canon Pemberton v Right Rev Inwood** [2018] IRLR 542 at para 88 sets out the relevant approach.

20 *“In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was*

25 *reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to*

30 *have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.”*

Issues in this Tribunal claim**S26 Claims (Harassment)****Discussion and decision**

- 5 339. In relation to the
- a. Dismissal-Related Claim (**SctSch Claim 6**): the claimant's claims of errors in final termination payments (harassment under section **26** EA 2010), the Tribunal notes that there were initial errors in CNC's calculation of final termination payments. It is the Tribunal's
- 10 assessment that, in all the circumstances, it was not reasonable for that conduct (the errors and the communication of same to Mrs Stones) to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. Those errors are not found to have done so; and
- 15 b. Dismissal-Related Claim (**SctSch Claim 7**): the claimant's claims of offer of pay in lieu of notice rather than termination of employment on expiry of notice (asserted as amounting to harassment under section **26** EA 2010). It is the Tribunal's assessment that, in all the circumstances, it was not reasonable for that conduct (the offer to pay
- 20 in lieu of notice) to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. The offer to pay in lieu of notice are not found to have done so.
- 25 340. It is the Tribunal's decision that **Scott Schedule Claims 6 and 7 do not succeed.**

Issues in this Tribunal claim**Claims relying upon multiple provisions under the EA 2010****Discussion and decision**

- 30 341. For the remaining claims before the Tribunal which are asserted in terms of the EA 2010, the Tribunal has already set out the statutory provisions and relevant and case law for

- a. Pre-Dismissal Claim (**SctSch Claim 20**): the claimant's claims of being requested to repay overpaid sick pay whilst on sick leave and with no earnings (harassment under section **26** EA 2010, failure to make reasonable adjustments under section **20** and **21** EA 2010).
5 It is the Tribunal's assessment that, in all the circumstances, it was not reasonable for that conduct (of being requested to repay overpaid sick pay whilst on sick leave and while not in receipt of pay) to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. Those errors are not found to have
10 done so; and the Tribunal is satisfied that in so far as there was practice of requesting repayment of monies which are overpaid, having regard to the EHRC Code of Practice, it would not be practicable not to take the step of requesting repayment against the financial and other costs which would be incurred by the employer in
15 taking the step and the extent to which it would disrupt any of CNC's activities. The Tribunal in any event concludes that CNC carried out such reasonable adjustments as were open to in in securing an extension to their sick pay arrangements of 3 months. In all the circumstances Mrs Stones did not suffer any substantial
20 disadvantage in terms of s20 and s21 of EA. There were no further steps which it would have been reasonable for CNC to take having regard to the EHRC Code of Practice;
- b. Pre-Dismissal Claim (**SctSch Claim 22**): the claimant's claims of Discriminatory language used about Mrs Stones in email
25 communications (unfavourable treatment because of maternity under section **18** EA 2010, direct sex discrimination under section **13** EA 2010). The Tribunal does not accept, on the evidence, that there was discriminatory language used having regard to s13 of EA 2010. The Tribunal does not accept that the term non deployable was an act of
30 direct discrimination, nor was CI Brotherston's email of **28 March 2016** an act of direct discrimination in its tone or use of language. Nor was CI Brotherston's email of **13 April 2016** identifying that he had placed a pause in career break process an act of direct

discrimination, rather it was a responsible approach against the implications for both CNC and Mrs Stones, including the effect of depriving her from possible further medical investigation and income from CNC. Nor again was the use of an Emoji within Clair Lewis's email of **Friday 20 July 2018**. Nor was the email from Lorraine Holloway of **24 July 2018** which made reference to Mrs Stones case, an act of direct discrimination, the Tribunal accepts that it was a casual email with a simple factual statement. Nor having regard to s18 of EA 2010, in all the circumstances, would it be reasonable for any of those actions or conduct, either individually or cumulatively, to be regarded as violating the claimant's dignity or creating an adverse environment for Mrs. Stones. Those actions and conduct are not found to have done so.

15 342. It is the Tribunal's decision that **Scott Schedule Claims 20** and **22** do not succeed.

Issues in this Tribunal claim

Claims where no statutory basis asserted

20 343. In respect of the remaining claim before the Tribunal Pre-Dismissal Claim (**SctSch Claim 18**): the claimant's claims of Failure to keep proper written records, such as welfare reports, the Tribunal notes that the Scott Schedule throughout identified that the legal basis of this claim was unclear. Mrs Stones did not offer an explanation in respect of that claim, in her
25 submissions which the Tribunal is able to accept as founding a relevant claim.

30 344. The Tribunal notes the asserted claim. The Employment Tribunal is a creature of statute. It has jurisdiction to consider those claims which statute has provided it may do so. It is not like the civil courts which may adjudicate on other matters.

345. It is the Tribunal's decision that **Scott Schedule Claim 18** (the claimant's claims of failure to keep proper written records, such as welfare reports), **does not succeed**.

5 **Conclusion**

346. None of the claims within the Scott Schedule succeed.

347. In Particular Claims Scott Schedule Claims **8, 9, 10, 11, 12, 13, 19** and
10 **14** do not succeed as the Tribunal does not have jurisdiction to consider them.

348. The remaining claims do not succeed for the reasons set out above.

15 349. The Tribunal in reaching these conclusions has been minded to avoiding a fragmented approach, being conscious of the diminishing the cumulative effect of primary facts and the inferences which may be drawn and considered the totality of the evidence, deciding the reason why the Claimant received less favourable treatment. In summary the reason why
20 Mrs Stones was dismissed was due to capability, for reasons unrelated to her pregnancy and maternity.

350. In coming to this view the Tribunal have applied the relevant case law.

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351. If there are further submissions which either party considers it is
necessary, in the interests of justice, to address supplemental to their
respective existing submissions, they should set out their position in a
request for reconsideration in accordance with Rule 71 of the 2013 Rules.

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Date of Judgment:
Date of Judgment:
Date Sent to Parties:

Rory McPherson
28 April 2020
13 May 2020

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