EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 3331762/2018

Final Hearing in Glasgow on 7, 8 and 9 October and 17, 18 and 20 December 2019; Members meeting Monday 16 March 2020

Employment Judge R McPherson
Members EA Farrell
P Kelman

Ms M McGuiness	**Claimant** **Represented by:** **M Allison – Solicitor**
British Gas Services	**Respondent** **Represented by:** **V Kerr/J Cran – Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. the Tribunal does not have jurisdiction to consider the claims for Unfair Dismissal asserting breach of s 94 of Employment Rights Act 1996 (ERA 1996), her claims were presented after the expiry of the statutory time limit and it was reasonably practicable for her to have presented her claim before the time limit. Those claims are dismissed; and

2. the claimant's claims of Disability Discrimination in terms of the s 15 of the Equality Act 2010 (EA 2010) discrimination arising from disability do not succeed.

3. the claimant's claims of Disability Discrimination in terms of the ss 20 and 21 of the Equality Act 2010 (EA 2010) failure to make reasonable adjustments do not succeed.

REASONS

Introduction

Preliminary Procedure

1. This claimant brought a complaint for Unfair Dismissal and Disability Discrimination under sections 15 and 20 of the Equality Act 2010 (EA 2010). The protected characteristic is disability, the condition relied upon is cancer, the claimant in her ET1 had additionally relied upon osteoarthritis as basis for impairment and qualifying condition, however the Tribunal was advised at the outset of the Final Hearing that osteoarthritis is no longer relied upon as a qualifying impairment. The respondent (BGas) assert that the reason for dismissal was capability, that there was a fair dismissal and they had not breached the EA 2010.

2. At Preliminary Hearing on 1 April 2019, for Ms. McGuinness it was identified that she would wish to provide Further Particulars as to what was relied upon before the dismissal, whether there was a continuing series of acts and any argument on just and equitable extension. A period of 14 days was permitted for such Further Particulars with BGas being afforded 14 days to respond, if so advised. No Further Particulars were provided before or at the Final Hearing.

3. At a Preliminary Hearing on 12 April 2019 and as identified in Tribunal Note date 25 April 2019 (the April 2019 Note) it had been directed that Ms. McGuiness would give evidence in chief by way of written statement "*which shall be intimated to the Respondents at least 7 days prior to the Final Hearing",* at the Final Hearing it was intimated that no written statement had been provided and that parties were agreed that Ms. McGuiness would give oral evidence.

4. For BGas there was an identified existing issue of time bar (raised at para 31 and 32 of the ET3) which was referred to in the Preliminary Hearing on 12 April 2019 as identified the April 2019 Note. In particular, it was identified in the April Note that this related to whether "*there was a continuing series of*

acts, and any argument on a just and equitable extension" and at para 6 "*that issues of time bar were appropriately dealt with after the evidence was raised*". That is to say, it was in the context of the sequence of events which Ms. McGuiness was relying upon and which occurred over a period. It was not identified as being in relation to the date of termination.

5. It was agreed between the parties that BGas should lead.

6. No agreed chronology of events was provided to the Tribunal.

7. The April 2019 Note records at para 3 that Ms. McGuiness had not at that stage provided her medical records and at para 4 it was indicated that parties "*agreed that a joint medical report may have been appropriate in the event that matters were not all agreed"* but that no order was considered required.

8. At the outset of the Final Hearing, on behalf of Ms. McGuiness it was confirmed that, subsequent to the April 2019 Note and report from Ms. McGuiness's GP to her representative dated 22 May 2017 (provided in the Joint Bundle to the Tribunal for the Final Hearing), a (non joint) medical report had been commissioned and obtained, but that it would not be provided to the Tribunal or the respondent.

9. What, toward the end of the Final Hearing, became a core issue, of the actual date of termination and its impact, was not at an earlier stage identified by either party as being in issue.

10. B Gas, in the course of the hearing, reflecting evidence given in the course of cross examination of Ms. McGuiness, sought to argue that both the Unfair Dismissal claim and Disability Discrimination claim had been lodged out of time.

11. The issues for the Tribunal are as follows:

    (i) Non-disclosure of a medical report;

    (ii) What was the date of termination?; and

    (iii) Unfair Dismissal -Time Limit and Jurisdiction

12. Arising out of an issue which came to light during Ms. McGuiness' evidence, in the Final Hearing, regarding the actual date of termination and the impact of same, subject to whether it was open to BGas and/or Tribunal to take note of the date of termination; Was Ms. McGuiness's complaint of Unfair Dismissal presented within the time limits set out in Sections 111(2)(a) & (b) of the Employment Rights Act 1996 (ERA 1996); 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) of ERA 1996; and whether it was not reasonably practicable for a complaint to be presented within the primary time limit; and

13. In relation to Unfair Dismissal (subject to time limitation):

    a. If this asserted claim was within time, what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of ERA 1996?

    b. Was the dismissal fair or unfair in accordance with Section 98(4) ERA 1996?

    c. Was the decision to dismiss a sanction within *the "band of reasonable responses"* for a reasonable employer?

14. In relation to Disability Discrimination:

    a. What is pled by the respective parties?

    b. What, if any, amendments are permissible?

    c. Were Ms. McGuiness' complaints presented 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) of ERA 1996; and whether time should be extended on a "*just and equitable*" basis; and

d. What was Ms. McGuiness's status in terms of the **Equality Act 2010** (EA 2010)?

15. The heads of claim raised in terms of the EA 2010 are s15 and s20, 21.

16. In relation to EA 2010, section 15: discrimination arising from disability:

a. Did BGas treat Ms. McGuiness unfavourably because of an identified something; and

b. Did that something arise in consequence of Ms McGuiness's disability status

c. If so, has BGas shown that the unfavourable treatment of dismissing Ms. McGuiness was a proportionate means of achieving a legitimate aim? BGas relies on managing the workforce, and in particular managing absence, as its legitimate aim(s).

17. In relation to EA 2010, sections 20 & 21: reasonable adjustments for disability:

a. A "PCP" is a "*provision, criterion or practice".* Did BGas apply a PCP in the form of an Absence Management Procedure to Ms. McGuiness.

b. Did the application of the PCP of the Absence Management Procedure put Ms. McGuiness at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.

c. If so, were there steps that were not taken that could have been taken by the BGas to avoid the disadvantage?

d. If so, would it have been reasonable for BGas to have to take those steps at any relevant time?

Remedy

18. 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?

Evidence

19. The Tribunal heard evidence from the claimant Ms. McGuinness, Ms. Vikki Carson and Ms. Clare Begley for BGas**.** The Tribunal did not hear from the appeal manager.

20. The Tribunal was also referred to one set of Joint Bundle and a Joint Supplementary Bundle. The Joint Supplementary Bundle included McGuiness' P45, her letter of Appeal, minutes of Appeal, Appeal outcome letter together with an e-mail.

21. At the commencement of the hearing for Mrs McGuiness it was confirmed that she no longer sought to argue, as had been set out in the ET1, that BGas had been incongruent in its treatment and or acted in bad faith in relation to Ms McGuiness' dismissal.

22. The Joint Bundle contained a medical report from Ms. McGuiness's GP to Ms. McGuiness' representative dated 26 April 2019 **(the April 2019 GP Report)**. That document was the sole medical report obtained for the Final Hearing provided to the Tribunal.

23. At the outset the Tribunal was notified that a medical report commissioned on behalf of Ms. McGuiness and obtained in advance of the Final Hearing would not be lodged or otherwise led in evidence.

24. Ms. McGuiness' full GP records encompassing the period from the commencement of Ms McGuiness' period with BGas period from employment were contained in the Joint Bundle. Those entries to which the Tribunal was directed are narrated below in the Findings of Fact.

25. Ms. McGuiness' Occupational Personnel records were contained in the Joint Bundle. Ms McGuiness Occupational Health documentation from Thursday

31 October 2013 were also included the Joint Bundle. Those entries to which the Tribunal was directed are narrated below in the Findings of Fact.

26. Both Ms McGuiness and BGas's representatives provided written submissions, having been given an opportunity to exchange and revise same, prior to the issue of those written submissions to the Tribunal.

Findings in fact

27. The claimant Ms. McGuiness commenced employment as a Customer Care Assistant with BGas on **20 Feb 2006** at their call centre facility in Uddingston.

28. BGas operate a Group Attendance Management Policy and Procedure (the Attendance Management Policy), which, as at 15 August 2016 sets out;

    a. **Its purpose,** "*We want to do what we can to support you if you're off work and need help you to return to work when you're fit to do so. This policy is also designed to encourage regular attendance and minimise sickness absence fairly and consistently… While short terms absence is to be expected from time to time, too much absence can have a negative impact on our business… This policy and procedure covers both short term intermittent absence and long term absences"*

    b. **How absence affects business,** describing that low levels of absence are to be expected from time to time "*However, high levels of absence can have a negative impact on our business… it can: Put a heavier workload on those who attend work regularly, Increase costs when the work of absent employees need to be covered by employees working overtime or temporary staff, Affect quality customer service and efficiency in the business, Reduce flexibility … Make it more difficult to meet customer deadlines."*

    c. **The role of Occupational Health**: *they can provide guidance to both employees and managers on health problems that may impact attendance at work Can provided managers with all the relevant information they need, including whether there is an underlying reason for*

absence, so they can meet their obligations…. Will advise on any reasonable adjustments to your work environment

d. **Absence Trigger** points for starting an attendance management procedure are either: where an employee has 6 days absence in a rolling 12-month period (either continuous 6 days or separate period) or the employee is off sick on 3 occasions in the last 6 months.

e. **Describes** the operation of BGas's **Return to Work Interview**, which is not part of the part of the Attendance Management Procedure, however, if an employee reaches one of the Absence Trigger points the Attendance Management Policy should be followed.

29. The Attendance Management Policy set out the role of Occupational Health (known as MyHealth in the UK). They can "*provide impartial guidance to both employees and managers on health problems that may impact attendance at work.*

Can provide managers with all the relevant information they need, including whether there is an underlying medical reason for the absence, so they can meet their obligations under this policy.

Can provide written reports to managers and where appropriate (with the individual's written consent) seek additional information from Doctors or Specialist A doctor or medical specialist is best placed to advise on issues such as diagnosis and treatment (not fitness)

Will advise on any reasonable adjustment to ... working environment or arrangements which may be necessary to help improve … attendance and help… return to work…" they *"might be able to change, or given flexibility in… working hours Change your duties or work location, make physical adjustments to your work premises or work station Allow… time off for treatment Consider other available roles for you, if we cant make adjustments to your existing role.*

Will understand the prognosis for your medical condition and (if current absent) the likelihood of your returning to work. They can also give their

opinion on whether you have a disability for the purposes of the applicable country legislation."

30. The procedure in relation to absence management, as set out in the **Attendance Management Policy** (ARM) is substantially the same, as has been in place from 2010 onwards. The Policy involves 4 Stages. An employee may be entered into the ARM if they have more than 6 days of absence within a rolling 12-month period. An employee enters the ARM procedure at Stage 1. If following a Stage 1 ARM, the employees' attendance does not improve to an acceptable level, the employee would be invited to attend a Stage 2 ARM. The Stage may be extended. If an employee achieves an acceptable level of attendance reflecting a Trigger Absence Level set for that employee within the 12-month rolling period set at Stage 1, 2 or 3, the employee may remain at the Stage level although exiting from progression to the higher Stage, and will be warned that if further unacceptable absence level occurs, they will progress within that existing level. There are no companywide absence thresholds for moving an employee up to the next level as these are individually set for each employee in light of the particular circumstances, including but not limited to the previous absence history. Trigger Absence Level targets which enable an employee not to advance to the next stage are not strictly mandated and are individually varied reflecting available information. The ARM allows some absences to be excluded from calculation. The process continues until Stage 4, at which the employees continued employment is considered by an independent manager. A Stage 4 ARM would provide for *"a thorough review of your attendance record, and make a decision about your future employment with the company",* which decision may result in termination of employment, that is not however the only outcome. BGas operate a panel for Stage 4 and a Review Pack is prepared and issued to the employee in advance containing information which will be considered.

31. It is considered appropriate to set out the terms of the medical report provided by Dr Jani, a GP within Ms. McGuiness's GP Practice, to her representative

dated **Friday 26 April 2019** (the **April 2019 GP Report**) provided within the Joint Bundle:

Re Ms Margaret McGuiness …

Thank you for your letter dated 11th April for the above-named patient requesting a factual report to the following:

1. *I can confirm that the above-named patient has been diagnosed with cancer.*

2. *Date of diagnosis as recorded on notes; 01/02/2010*

3. *Treatment given... surgery) followed by chemotherapy and radiotherapy in the immediate post-operative period*

4. *Summary of condition;*

   Left Breast Cancer… treated with surgery plus chemotherapy and radiotherapy in 2010. This was followed by hormone therapy (Tamoxifen) from 2010 to 2016. Patient is no longer receiving any treatment for breast cancer. The physical impact of her condition on her current performance levels and capacity is likely to be minimal. However, many cancer patients may experience long term psychological stress following diagnosis of cancer

5. *I can confirm that the above named patient has a diagnosis of Osteoarthritis (OA) of right ankle.*

6. *Date of diagnosis; 25/04/2018*

7. *Summary of condition: OA Right Ankle. First presented on 24 April 2018 with symptoms of ankle pain. She underwent x-ray examination on the next day and the result suggested a diagnosis of ankle OA. She was subsequently referred to hospital (Orthopaedic specialist) for the opinion on*

management. She did not attend the hospital appointment and hence discharged from their services.

8. OA is a condition which is often associated with pain and negative functional capacity. The patient has not presented to our practice with any symptoms related to OA in the last 6 months. As a result. It is not possible to comment on the effects of OA on her current functional capacity.

I hope this is useful."

32. As set out in the April 2019 GP Report, in February 2010 Ms. McGuiness having been diagnosed with breast cancer, commenced treatment including Tamoxifen. While no expert evidence was led on the use of Tamoxifen it is accepted, and was not challenged, that Tamoxifen is a prescription only drug commonly prescribed to lower the risk of reoccurrence of breast cancer. While Tamoxifen Package Information for Patient leaflets were provided together with extracts from Cancer Research UK description of the use of Tamoxifen, in the absence of medical analysis and or medical report being provided to the Tribunal, the Tribunal was unable to draw any conclusions as to the implications or side effects of the use of Tamoxifen generally or otherwise in relation to Ms. McGuiness.

33. As set out in the April 2019 GP Report, following the diagnosis in February 2010 Ms. McGuinness underwent surgery, followed "*by chemotherapy and radiotherapy in the immediate post-operative period"*

34. From 2010, as set out in the April 2019 GP report, following treatment by surgery, chemotherapy and radiotherapy Ms. McGuiness received hormone therapy (Tamoxifen) to 2016.

35. On **Friday 13 January 2012,** following a series of absences**,** Ms. McGuiness attended a Stage 1 Absence Review Meeting (the **January 2012 Stage 1 ARM**) at which a 12-month review period was set and was notified that BGas were seeking significant and sustained improvement in Ms McGuiness's attendance. The Tribunal on the evidence adduced, does not conclude that

any preceding absence which led to the January 2012 Stage 1 ARM, occurred because of something arising in consequence of Ms. McGuiness cancer including its diagnosis and/or treatment**.**

36. The Tribunal does not conclude, on the evidence adduced, that the **January 2012 Stage 1 ARM** was something arising in consequence of Ms. McGuiness cancer including its diagnosis and/or treatment. Further the Tribunal on the evidence adduced, finds that in the setting of the review period, the notification that BGas were seeking significant and sustained improvement in Ms McGuiness's attendance was not something arising in consequence of Ms. McGuiness cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

37. On **Tuesday 3 July 2012**, Ms. McGuiness attended a Return to Work meeting with her then manager, at which she reported that she "*recently had an operation to remove a benign lump …"* as a consequence of surgery she was prescribed antibiotics for an infection and reported that she was advised by her GP that the recovery time after her surgery should be 6 to 8 weeks. However, she stated *"she felt well enough to return and did not think this contributed to the infection. She is feeling better and the infection is clearing up."*

38. On **Monday 19 November 2012** Ms. McGuiness was invited to a Second Attendance Review Meeting (**the November 2012 – Stage 2 ARM**) to take place on 22 November 2012 arising out absences 14 to 16 April 2012, 7 to 20 June 2012, 28 June to 3 July 2012, 9 to 13 August 2012 (page 78). Ms. McGuiness was advised that she had the right to ask a trade union representative or colleague to attend with her. The Tribunal, on the evidence adduced, finds that any preceding absence which led to the November 2012 Stage 2 ARM, did not occur because of something arising in consequence of Ms. McGuiness cancer including its diagnosis and/or treatment.

39. The Tribunal finds, on the evidence adduced, that the November 2012 – Stage 2 ARM was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

40. On **Thursday 22 November 2012** Ms. McGuiness attended the **November 2012 Stage 2 ARM**. Ms. McGuiness had decided that she did not wish a trade union representative or colleague to attend. Ms. McGuiness reported to BGas that the absences were due to; April 2012 – stomach cramps; June – exploratory operation and subsequent infection; August 2012 – pains in legs possibly rheumatoid arthritis; October to Nov 2012 – chest and lung infection. Ms. McGuiness agreed that it was not necessary for a referral to Occupational Health to be made but that this would be reviewed again in the future. Ms. McGuiness was advised that she was now at Stage 2 of BGas' Attendance Management Procedure for a period of **12 months** and was advised that she should not be absent for more than **3** days in the next **12 months**. Ms. McGuiness was advised that she required to make a significant and sustained improvement to her attendance so that it was an acceptable level. She was advised that a further meeting would be arranged in 3 months' time, or sooner if BGas were concerned about her absences. She was advised by BGas letter, issued 22 November 2012 (the 22 November 2012 letter) that if she "*failed to reach and maintain a satisfactory level of attendance, ultimately we may need to end your employment on the grounds of capability or unacceptable levels of attendance".* She was further advised that she could contact her, then, Team Manager and the letter concluded *"Don't forget, you can also contact your HR managers or Occupational Health if you need any extra support at any time".*

41. The Tribunal finds, on the evidence adduced, that the decisions, including the appointment of a 3 day trigger absence level, reached at the November 2012 – Stage 2 ARM, was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

42. In relation to absences in 2013, on the evidence adduced, the Tribunal makes the following Findings of Fact in respect of the reported causes:

    a. from **Wednesday 13 Feb 2013-** 2 days cold and flu;

    b. from **Monday 19 March 2013** - 2 days kidney infection;

    c. from **Thursday 21 May 2013** -2 days cold and flu;

    d. from **Saturday 14 Sept 2013** -3 days neck pain;

    e. from **17 October 2013** - 1 day – no cause;

    f. from **20 October 2013** – 1 day – stomach cramps

43. The Tribunal on the evidence adduced concludes that any absences in 2013 did not occur because of something arising in consequence of Ms. McGuiness cancer including its diagnosis and/or treatment.

44. In particular Tribunal, on the evidence adduced, finds that any absences in 2013 did not arise because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

45. On **Wednesday 24 October 2013** BGas invited Ms. McGuiness to a Stage 3 ARM to be held on Wednesday 30 October 2013. BGas noted that since the **Nov 2012 Stage 2 ARM**, Ms. McGuiness had been absent from work on a number of occasions and had reported the causes; from 17 December 2012 4 days due to stomach pain as a side effect from cancer medication, from 13 February 2013 2 days due to cold and flu, from 18 March 4 days due to kidney infection; from 21 May 2013 2 days due to cold and flu; and from 14 September 3 days due to soft muscle damage to neck. (page 95 and 96 of bundle). Ms. McGuiness was advised that she had the right to ask a trade union representative or colleague to attend with her. She was further advised that she could contact her, then, Team Manager and the letter concluded *"Don't forget, you can also contact your HR managers or Occupational Health if you need any extra support at any time".*

46. On **Thursday 31 October 2013** BGas's Occupational Health advised that in light of the absences, reported causes and further in respect that they were advised that Ms. McGuiness was taking Tamoxifen, her manager "*may wish to consider setting allowance at 6 days for a stage 3 for 12 months, due to ongoing treatment".*

47. The Tribunal finds that BGas do not now have Occupational Health notes earlier than this date.

48. On **Thursday 31 October 2013** Ms. McGuiness attended the **October 2013 Stage 3 ARM.** Ms. McGuiness was offered trade union representation but advised that she was happy to go ahead without same.

    a. Ms. McGuiness reported at the October 2013 – Third ARM that she was "*still suffering from high blood pressure"* which was being monitored by her GP and they were adjusting medication which she was receiving to help with this and there was a 4-weekly review with her GP.

    b. Ms. McGuiness reported that she continued to get an annual check up for her breast cancer which she reported as having *"almost five years ago and is still taking medication for this",* Ms. McGuiness reported that she has been *"experiencing cramps in her legs ongoing with this medication"* (the Tamoxifen) and that she would ask about this at her next review with her GP the following week.

    c. She also described a frozen shoulder and advised that she would speak to her GP about that.

    d. She was asked if she required anything at her workstation that might help and she advised that there was not.

    e. Ms. McGuiness was reminded that to speak to her manager if she required any support, she was reminded that BGas's Employee Assistance Programme an Occupational Health were available should she require

f. It was also confirmed to Ms. McGuiness that if she was feeling unwell in the morning, she could contact BGas, seek advice, take medication, and change shift from day to a backshift if she felt that would assist. BGas advised that they were unable to provide "*shift slides"* into other days as this would be masking sickness.

g. BGas set an absence trigger level for the following 12 months on 31 October 2013, of 3 absences in 6 months or beyond 6 days in 12 months.

49. The absence trigger level set on Thursday 30 October 2013 at the **October 2013 Stage 3 ARM**, **represented an adjustment within BGas's Attendance Management Programme.** On the evidence adduced, the Tribunal is unable to make Finding in Fact that the absence trigger level was something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment and /or symptoms of cramp, in her legs which were reported by Ms. McGuiness as arising from the Tamoxifen.

50. The Tribunal finds, on the evidence adduced, that the decisions which were made at the **October 2013 Stage 3 ARM** beyond extending the were not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

51. In relation to absences from **Thursday 31 October 2013** to **28 November 2014**, the Tribunal makes the following Findings in Fact:

a. On **Friday 7 Feb 2014** Ms. McGuiness was absent for **3 days**, she reported to BGas that this was due to high blood pressure, she had visited her GP and had been given medication to control this; and

b. On **Tuesday 18 Feb 2014** Ms. McGuiness was absent for **1 day,** she reported to BGas that this was due to lower limb cramps pain; and

c. On **Wednesday 5 March 2014** Ms. McGuiness was absent for **3 days** which she reported as being a recovery period following a medical procedure; and

d. **On Thursday 13 March 2014** Ms. McGuiness was absent for **3 days** which she reported as being due to with sickness bugs**.**

52. The Tribunal makes no Findings of Fact as to any absences or any cause of same absences. In relation to the January 2015 Absence, on the evidence adduced, these did not arise because of something in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment**.** In particular Tribunal finds, on the evidence adduced, absences in 2014 did not arise because of something arising in consequence of Ms. McGuiness cancer including its diagnosis and/or treatment**.**

53. On **Friday 31 October 2014 (p108)** Ms. McGuiness attended a Third Absence Review Meeting (**the October 2014 Stage 3 ARM**). BGas confirmed that as Ms. McGuiness had demonstrated a significant and sustained improvement in her level of attendance during the review period and was therefore no longer in BGas' Attendance Management Procedure. Ms. McGuiness had not exceeded the **7-day** trigger absence level set as of 31 Sept 2013 level in the preceding 12 months. In particular she was able to do so, as BGas had removed 3 days (adjusting the trigger absence level) reflecting what was reported as recovery from a medical procedure. A 12-month review period was set. BGas wrote to Ms. McGuiness on **Friday 28 November 2014** confirming the position. It was explained that if she failed to maintain this level of attendance, she may be reinstated into Attendance Management Procedure and that "*given your past progress through the attendance management procedure, if you fail to maintain this improved level of attendance, you may go straight into Stage 3 of the*" Attendance Management Procedure.

54. From **Tuesday 6 January 2015** (the January 2015 Absence) Ms. McGuiness was absent for **4 days,** which she reported to BGas, at the Return to Work Interview on **Monday 12 January 2015** as being due to *"sickness bug"* and being *"sick*". In response the question "*Is this absence related to previous absences*" Ms. McGuiness advised "No". In relation to the January 2015 Absence, on the evidence adduced, this did not arise because of something

in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment**.**

55. The Tribunal finds, on the evidence adduced, that **the January 2015 Absence** did not arise because of something in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

56. On **Tuesday 13 January 2015** BGas wrote to Ms. McGuiness inviting her to a "Third Attendance Review" to take place on **Thursday 22 Jan 2015.** Ms. McGuiness was advised that she had the right to ask a trade union representative or colleague to attend with her.

57. On **Thursday 22 Jan 2015** Ms. McGuiness attended the Third Attendance Review **(**the **January 2015 Stage 3 ARM**). At the January 2015 - Third ARM BGas asked if there was anything at work which could be contributing to her ill health. Ms. McGuiness responded that "*everything is fine at work".* Ms. McGuiness further described that she sometimes became stressed with the systems but had been advised that at any time she could take an additional break. Ms. McGuiness further advised that she was "*on Tamoxifen for the next 5 years which is a post cancer treatment drug. This can result in side effects which are similar to flu, hot flushes and*" that she suffered from cramps in her hands and legs at times. Ms. McGuiness reported that that she was going for further tests and had a bone scan booked in for 29 January 2015 which would involve radioactive injections. BGas agreed that, due to *"these ongoing issues"*, breaks from her desk would be agreed if needed and further discussed changing shifts and also reducing hours. Ms. McGuiness advised that she had no desire to look at this but it was confirmed that this can be reviewed at any time. BGas also discussed extra support with e Occupational Health and Employee Assistance programme. Ms. McGuiness agreed that it was not necessary to refer her to Occupational Health. Ms. McGuiness advised "*there is nothing else we can do to help you are aware of these options"*.

58. The Tribunal finds, on the evidence adduced, that the **January 2015 Stage 3 ARM** which was appointed due to the **January 2015 Absence** did not arise

because of something in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

59. On **Thursday 22 January 2015,** following the **January 2015 Stage 3 ARM** BGas sought advice from Occupational Health, listing some of the preceding absences and reported causes; sickness bug 6 Jan 2015 (4 days), chest infection 11 August (2 days), 5 March 2014 recovery from operation (3 days), 7 Feb 2014 blood pressure (3 days), 19 November 2013 sick/unwell(no further detail) (2 days). In addition, BGas described that Ms. McGuiness had exited Stage 3 Process on **28 November 2014** "*however due to recent absence has now gone back to a stage 3. During this discussion Margaret did point out that she does suffer from side effects from the medication she takes for her blood pressure tamoxifen – flu symptoms, cramps in hands/legs, hot flushes. Please can you give target absence days for the above*". Occupational Health responded that BGas *"may wish to consider setting allowance days at 6 days for stage 3 for 12 months. Tamoxifen is post cancer treatment for 5 years normally".* BGas responded the following day *"I fed this back to Margaret and she has advised that her consultant is putting her on this medication for another 5 years. Margaret is advising she was advised of this in December 2014. Would this make any difference to your decision on the days".* Occupational Health replied *"the days would still be the same."*

60. On **Thursday 29 Jan 2015** BGas wrote to Ms. McGuiness setting out that "*that your level of absences remains at an unacceptable level. Your now at stage 3 of our attendance management procedure, because your absence in the last 12 months have caused you to trigger. This will run from today* (29 Jan 2016) *for the next 12 months. You are required to make a significant and sustained improvement to your attendance so that it's at an acceptable level to the company. I have sought advice from Occupational Health and I have decided to set you an improvement target of no more than 6 day within this period…. If you fail to reach an maintain a satisfactory level of attendance, ultimately we may need to end your employment on grounds of capability or unacceptable levels of absence."*

61. In relation to **January 2015 Stage 3 ARM and** subsequent trigger absence target, on the evidence adduced, the Tribunal finds that those did not arise because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

62. The Tribunal finds that the **January 2015 Stage 3 ARM** did not arise because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment The Tribunal is satisfied that the, trigger absence target set at the **January 2015 Stage 3 ARM** did not arise because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

63. Ms. McGuiness thereafter exited BGas's Attendance Management Procedure in or around **Friday 29 January 2016*.*** BGas' letter confirming exit of Attendance Management Procedure, also explained that Ms. McGuiness could re-enter the process if attendance was impacted*.*

64. Ms. McGuiness was again absent in April 2016 (the April 2016 absences);

    a. From **Saturday 12 March 2016** to **Monday 4 April 2016** Ms. McGuinness was absent from work for a period of **16 days**. Ms. McGuiness reported that she was diagnosed with swine flu in Return to Work Interview on **Monday 4 April 2016**; and

    b. Ms. McGuiness absence continued from **Monday 4 April 2016** to **Monday 11 April 2016** for bereavement leave following her brother passing away having contracted swine flu which escalated**.**

65. On **Tuesday 25 April 2016** BGas invited Ms. McGuiness to a Third Absence Review (the **April 2016 Stage 3 ARM**) to take place on 28 April 2016, due to the April 2016 absences. Ms. McGuiness was advised she was entitled to have a trade representative or colleague in attendance and was advised that she should contact her HR manager, occupational Health or the Employee Assistance Programme if she needed any extra support. The invite to the **April 2016 Stage 3 ARM**, did not arise because of something arising in

consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

66. In particular the **April 2016 Stage 3 ARM** did not arise because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

67. Ms Begley became Ms. McGuiness Manager in late April 2016.

68. On **Wednesday 4 May 2016,** for neutral administrative reasons, including Ms Clare Begley taking on the role of Ms. McGuiness manager, the 2016 Stage 3 ARM, which had been originally scheduled for 28 April 2016 took place. Three days' advance notice was given to Ms. McGuiness of the rescheduled 2016 Stage 3 ARM. Ms. McGuiness declined to have a trade representative or colleague in attendance at the 2016 Stage 3 ARM.

69. At the **April 2016 Stage 3 ARM** Ms Begley set out that "*As I only became your manager when you returned to work in April, I am keen to understand your attendance history and make sure that am up to date with your attendance notes and more importantly how your current health and wellbeing is*" the issue for BGas was not the genuine nature of Ms. McGuiness' absences but rather *"it's the level and the frequency that has triggered this review".*

a. Ms. McGuiness was asked to describe any underlying heath issue, Ms. McGuiness reported side effect Tamoxifen causing cramps in legs and feet, described that she had been diagnosed with breast cancer 6 year ago, had 4 operations and radiotherapy and had 6 bone scans in the previous year. She indicated that she didn't know what was causing the factures. She reported that she currently had fractured ribs which caused pain. She reported that medication can cause thinning of bones. She reported that she was on high blood pressure medication of 2 tablets per day.

b. Ms. McGuiness was asked to describe how it affects her and reported that her energy levels were low, fatigue, changed shifts to accommodate travel to work

c. Ms. McGuiness was asked to identify any medication and reported that she was on Tamoxifen and a separate medication for blood pressure.

d. Ms. McGuiness was asked to comment on absences

(i) 6 Jan 2015 - 4 days – and reported this was due to pains in stomach, she reported taking medication in morning, that she did not need any support at that time from Occupational Health or EAP, and that she did not need any support from BGas at the time of this 2016 Third ARM in connection with this absence.

(ii) 18 Feb 15- 1 day – and reported this was due to cramp /pain in shins and fingers, she reported that she believed it was a side effect of medication including Tamoxifen and had been advised to drink tonic water. She reported that she did not receive any medication in connection with cause of the reported illness, that she believed it was a side effect of Tamoxifen. She confirmed that she had been assessed on return to work for a chair, and reported that she felt the pain mostly when lying on her bed and can happen when going into her purse, In relation to requirements she described that she had been measured for a specialist chair, although it had not arrive, it was additionally recorded that a new foot rest may be need. Additional breaks were identified.

(iii) 13 March 15- 2 days – and reported she could not recall the cause, in relation to medication she described herbal tablets and that she got an annual flu jab, that she did not need any support at that time from Occupational Health or EAP, and that she did not need any support from BGas at the time of this 2016 Third ARM in connection with this absence.

(iv) 19 June 15 - 1 days – and reported this related to a family member.

(v) 8 July 15-1 day – and reported a cause but did not report that it arose from Tamoxifen treatment. She described that she received some medication which resolved the issue. In relation to any support at that time from Occupational Health or EAP she reported that there was e-mail advice.

(vi) 23 Nov 15- 2 days – and reported it was normal flu and that that she did not need any support at that time from Occupational Health or EAP.

(vii) Ms. McGuiness reported that following a referral to occupational health in connection with concentration and multitasking she was afforded more support on any changes to work processes. In relation to improvement to working environment, Ms. McGuiness reported that it was quieter. Ms. McGuiness further reported that *"surgeon advised treatment can impact memory"*

(viii) 12 Mar 16- 16 days, followed by 5 days bereavement– and reported it was due to swine flu, she had received antibiotics. In relation to the loss of her brother she was advised to use EAP.

70. On **Tuesday 24 May 2016** Ms. Begley on behalf of BGas wrote to Ms. McGuiness confirming that she had not been re-entered into the Attendance Management Process (the 24 May 2016 letter) and setting out that it was **"***not the genuine nature of your absence that's in doubt.*

Wanting to support you Margaret I asked you if I had any idea how we can make the multitasking simpler for you ... you didn't know… I spoke about the fact that we had sent an exit letter on the 25 Jan 2016 which confirmed that you had exited the absence management programme. The exit letter also explained that you could re-enter the process at some stage if your attendance was impacted and you were off on the 12 March 2016 for 16 days for by 5 days bereavement leave

We spoke about your absence which was difficult for you however you managed to explain that you had swine flu and that this was also the illness that cause the death of your brother… you believed that because you visited

your GP who prescribed you with antibiotics that this helped with your recovery. The death of your brother has not hit you and got emotional with this review… I explained that there is support that is available through the EAP programme… you went onto explain that you have good and bad days, I encouraged you to come and see me if you feel you are struggling at any time.

Key Outcomes …

Agreed it wasn't necessary to refer your case to Occupational Health at this stage but that we'd review this again in future.

I have not moved you back into the attendance management process due to the sensitivity and nature of your recent absence. Please note that we will continue to monitor your attendance, and any further absences may lead to progression onto Stage 3 of the absence management policy.

71. On **Thursday 25 May 2016** Clare Begley issued a further letter to Ms. McGuiness letter (the 25 May 2016 letter) using a template style, on behalf of BGas which stated "*I am pleased to confirm you are no longer in our attendance management programme. The next 12 Months … I will continue to monitor your attendance during the next 12 months, and that if you fail to maintain this improved level of attendance, we will need to meet again, and you may be reinstated into the attendance management procedure"* **.**

72. From **Wednesday 6 July 2016** to **Tuesday 26 July 2016** (a period of 13 days) Ms. McGuiness was absent from work

73. On **Tuesday 26 July 2016** Ms. McGuiness returned to work. She reported the cause of her absence in the Return to Work Interview as arising from matters which resulted in her being given an emergency appointment at Monklands Hospital which was scheduled for Monday 29 August 2019. she reported that her GP had prescribed medication, that the absence related to previous absences, that Occupational Health and EAP would be able to provide additional support and awareness. She was still sore however she wanted to get back to work. In relation to what steps could be taken to prevent

future absences it was recorded that this would not be until she had "*been to the hospital to understand exactly what the issue is".*

74. On **Tuesday 2 August 2016** Clare Begley, on behalf of BGas wrote to Ms. McGuiness, inviting her to a Third Attendance Review Meeting (**the August 2016 Stage 3 ARM**) on Friday 5 August 2016 noting that she had been off again for 13 days**.** The 5 August 2016 letter set out **"***please be aware you have the right to ask a trade union representative or colleague to attend with you"*

75. On **Friday 5 August 2016** Ms. McGuiness attended **August 2016 Stage 3 ARM** with Clare Begley.

76. On **Friday 5 August 2016** Ms C Begley wrote to Ms McGuiness following the **August 2016 Stage 3 ARM** "*what we discussed at your third attendance review… A colleague attended this meeting with you… Your absence remains at an unacceptable level… not the genuine nature of your absence that's in doubt. However, there are some concerns on how much time you are taking off as recently you were off for 13 days from 6 July until 26 July 2016**…** you explained that your absences were due to an underlying issue …. Which may be due to the medication you were on for cancer treatment … At the moment you explained that you are no longer taking these tablets as per your GP and will be discussing with your consultant as they are not aware of this**…"*** the appointment with the consultant "*to discuss your health and recent issues ... has been rescheduled to the 1st of September 2016"*

We agreed it wasn't necessary to refer your case to Occupational Health but that we'd review this again in the future.

*As discussed, you're now at stage three of our attendance procedure, because there has been insufficient improvement. We have re-entered you on a **stage 3** for **12 months** and have given you **5 allowance days** for the time being taking into account all of your history we will review this again after your appointment, If needs be and look at the allowance days if there is another health issue associated with it as it may have to be altered accordingly……. If you fail to reach an maintain a satisfactory level of*

attendance, ultimately we may need to end your employment on grounds of capability or unacceptable levels of absence."

77. Insofar as the August 2016 Stage 3 ARM arose because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment, the appointment of the August 2016 Stage 3 ARM was proportionate. In particular, it was an appropriate means of achieving a legitimate aim, that is the limitation of workplace absences and reasonably necessary to do so.

78. The setting of the absence target however at the **August 2016 Stage 3 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. In particular it was set in the context that Ms. McGuiness had ceased Tamoxifen. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

79. From **Monday 19 September 2016** Ms. McGuiness was absent from work for **3 days** until Friday 23 September 2016.

80. On **Friday 23 September 2016** Ms. McGuiness returned to work

81. On **Monday 26 September 2016** Ms. McGuiness attended BGas Return to Work Interview. She reported to BGas the reason for her absence was a lump on her face/lip swollen. She reported that she attended her GP, no medication was prescribed and the absence was not related to previous absences. It was noted that she was ***"****on Stage 3 with 5 Allowance days built in and this would mean that she only has 2 left. However, at the last review it was discussed we may look at these days pending an outcome from a recent hospital visit."* The reason for that planned hospital visit was described to BGas.

82. From **Wednesday 11 Jan 2017** to **Thursday 19 January 2017** Ms. McGuiness was absent from work for a period of **6 days** (the January 2017 absence for flu like symptoms). In the Return to Work Interview Ms. McGuiness reported reason for this absence to BGas as due to *"Flu like symptoms, sore ears & stomach, chest infection".* In response to the question of whether the absence related to previous absences, Ms. McGuiness

reported "*had flu and chest infection previously".* Ms. McGuiness described that steps which she could take to prevent future absences for this reason included *"ensuring workstation is clean".* In relation to additional support BGas could offer "MyHealth", BGas's occupational health provider was identified.

83. On **Friday 17 March 2017** Ms. McGuiness e-mailed her Line Manager Ms Begley stating that "*My consultant at Hospital… was surprised my Doctor had stopped the medication of Tamoxifen … he strongly advised that he wants me to keep taking these for the next 3 years… I will keep you updated"*

84. On **Tuesday 2 May 2017**, in consequence of the 6 day absence in January 2017(for flu like symptoms) exceeding the then current 5 day absence target, Ms. McGuiness was invited to a Stage 4 ARM to be held on **Friday 12 May 2017** (**the May 2017 Stage 4 ARM**) "*When you were due to exit stage 3 of the attendance management process which was July 2017 … You were given 5 days allowance as part of stage 3 and exceeded… by 1 day... which triggered today's review".*

85. On **Friday 12 May 2017** Ms. McGuiness attended the Stage 4 ARM (the **May 2017 Stage 4 ARM**) with her Trade union representative and on its reconvened date of Tuesday 16 May 2017.

86. On **22 May 2017** BGas's employee health provider MyHealth called Ms McGuiness *" we arranged for time off the phone for you to go and speak to them… MyHealth have advised that they have no further recommendations around how we are able to support you at work more than we already are",* GP records request.

87. On **24 May 2017** (the 24 May 2017 letter) Vikki Carson wrote to Ms. McGuiness "*what we discussed at your"* May 2017 Stage 4 meeting Friday 12 May and reconvened 16 May 2017. It set out that

"*We talked at length at the number of days absence set at each of your reviews as you highlighted that you felt it was unfair and not enough"* The conclusion page 148 "You **will therefore remain on your stage 3 until 19 Jan** *which is 12 months from your date of return since your last absence…*

2010 absence 9 occasions- 75 days

2011 absence 4 occasions 42 days

2012 absence 8 occasions 28 days

2013 absence 7 occasions 12 days

2014 absence 3 occasions 7 days

2015 absence 5 occasions 11 days

2016 absence 3 occasions 32 days

2017 absence 1 occasions – 6 days

You were given a 5 days absence as part of stage 3 in July 2016 and exceeded the allowance by 1 day over a 10 day period. Your stage 3 would have ended in July 2017. You exceeded the trigger in January 2017 and have had no absences since then.

*You need to make a significant and sustained improvement in your attendance during this time**. A review will be held in January 2018 to review your health situation**. You will also meet with your Team leader at 3 monthly intervals to discuss your health and well being.*

I would remind you that if you fail to reach and maintain a satisfactory level of attendance during this period, we may have to end your employment

*Following the full review that was carried out by My Health on my request on 19 May 2017 **I have set you a target of no more than 8 days absence until January 2018. If this is exceeded a stage 4 hearing will be called which could lead to your dismissal.***

88. The 24 May 2017 letter confirmed that Ms. McGuiness could appeal the decision within 7 days. Ms. McGuiness did not lodge an appeal, either directly or through her Trade Union, to BGas.

89. The **May 2017 Stage 3 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. The setting

of the absence target at the **May 2017 Stage 3 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

90. On **Tuesday 27 June 2017** a workplace assessment/Display Screen Assessment (DSE) was carried out by BGas HSE co-ordinator who *"advised Margaret the correct positioning of her chair"* and provided a foot platform, recommended that a vertical penguin mouse was provided and advised Ms. McGuiness to take micro breaks one very hour, standing at her desk to alleviate pressure, help with fatigue muscles from sitting for long periods and promote blood flow. Email confirmation of same was issued to Ms. McGuiness on **Thursday 29 June 2017.**

91. From **11 July 2017** to **12 July 2017** Ms. McGuiness was absent for 1 day. At the Return to Work meeting she reported to BGas that she was absent due to *swelling on elbow and pain on shoulder, going to doctor on Tuesday 17 July 2017 for further test for diabetes"*. The return to work interview confirmed that BGas were in discussions with Ms. McGuiness Additional support (OH or EAP) we can offer – "*No – DSE assessment suggest stretching frequently throughout the day***"**

92. BGas's received a Case Management Report Overview of Ability to Work dated **Tuesday 22 August 2017** (the 22 August 2017 Case Management Report) via an external provider Occupation Health Adviser**,** Healthcare RM although not on headed notepaper compiled by a Ms F Smallman and which was headed Summary of Recommendations: Overview of Ability to Work. Its reported that "*Ms McGuiness is currently fit for work with no restrictions. A GP report was requested and confirmed that Ms. McGuiness has a serious health condition which*" BGas "*are aware of, that is currently in remission. She was taking medication for this condition which cause her to experience significant side effects impacting on her attendance**.** Her condition currently is well controlled and as she is not taking this medication now she is not experiencing any of the side effects and has not for some time. However, she is due to start taking the medication is again in August and may therefore start to experience*

the side effects again. It is not possible to predict whether she will experience side effects at the same level, but her previous response is a good indicator … There is no doubt Ms McGuinness's condition is covered by the Equality Act 2010(Disability)" BGas *"will be required to make any necessary reasonable and practicable adjustments in the workplace."* BGas" *need to consider some additional allowance for attendance in relation to her condition, so as not to disadvantage her compared to colleagues without this condition. There is currently no indication for any other additional modifications over and above those already implemented by"* BGas. *"Ultimately it is"* BGas' *"decision what is reasonable for them to accommodate within the needs of the business. From our understanding following an update today … Ms McGuiness will not be taking the medication that has previously given her side effects that impacted on previous absences. No further cases management is needed at present, but if any further guidance is needed in the future please do not hesitate to contact me.*

93. The GP report described within the 22 August 2017 Case Management Report was not adduced in evidence at this Final Hearing. The Tribunal was not advised whether comments made in the 22 August 2017 Case Management Report were in the nature of a medical opinion.

94. On **Wednesday 30 August 2017** Mrs McGuinness took part in a **3 Monthly Catch Up Meeting** with her team manager Ms C Begley. Mrs McGuiness was advised that BGas had concluded that she should be allowed a further period of time to demonstrate an improvement in her attendance. "*You will therefore remain on your Stage 3 until January 2018 which is 12 months from your date of return since your last absence. This is on the basis that the improvement you have demonstrated since 2010. This spiked in 2016 but one of these occasions were when you contracted swine flu and were off for 17 days which is a rare absence and had this not be contracted, your absence days for the year would have been 15."*

95. BGas received a Case Management Report Overview of Ability to Work dated **Friday 6 October 2017** (the **6 October 2017 Case Management Report**) via an external provider Occupation Health Adviser, Healthcare RM, compiled by

a J Edge and which was headed Summary of Recommendations: Overview of Ability to Work. "*I made initial contact … on 06/10/2017 following notification of the referral and would advise that she is fit to remain in work with no restrictions to her role*" … "*diagnosed with* a *serious underlying health condition which Centrica are aware of back in 2007 and receive appropriate support and treatment. This condition has now significantly improved and now only requires an annual review to ensure that it does not need further treatment or intervention… As a result of the treatment she has received, it has had a lasting effect on her general function and has left her with persistent feelings of Fatigue, tiredness and exhaustion as well as general pain and soreness in her joint.*

It is likely that these symptoms will continue to persist moving forward as part of the long-term self-management for the continued recovery from her condition but it is hoped that they will not have a significant impact on her fitness for being in work.

It is to be expected that she will have some good days and some bad days moving forward and she may have days where she will struggle with her symptoms.

Ms McGuiness has a condition which is automatically covered under the Equality Act 2010 (disability) as it is covered at the point of diagnosis and therefore" BGas *"will be expected to consider any necessary, reasonable and practical adjustment in the workplace. Ultimately it is for"* BGas *"to decide whether it is reasonable for them to accommodate within the needs of the business.*

Due to the long terms nature of Ms McGuiness' condition it is reasonable to consider that she may experience additional absences throughout a year in comparison to an employee who has not had her condition" BGas *"may want to consider making reasonable adjustments to her sickness absence triggers as a result of this"*

BGas *"may want to consider allowing Ms McGuiness microbreaks to allow her to get up and move around to help her manage her symptoms. It is also recommended that Ms McGuiness workstation*

I have provided Ms McGuiness with some specific self help and guidance relating to continued management of her symptoms and it is hoped that this will have a positive impact on her condition both in work and at home.

Ms McGuiness can also contact MyCare… if she requires any … support to help how she is feeling.

Case Plan: Recommended Next Steps No further input is needed from Healthcare RM after this, but please do not hessite to contact us if any further advice is needed in the future."

96. On the evidence adduced no finding in fact is made whether comments made in the 6 October 2017 Case Management Report reflected a medical opinion.

97. From **Tuesday 12** to **Friday 13 October 2017** Ms. McGuiness was absent from work and reported on Monday 16 October 2017 to BGas that this was due to *"Back injury after a fall in bath"*

98. On **Monday 16 October 2017** Ms. McGuiness attended Return to Work Interview and reported to BGas, as recorded within the Return to Work Discussion Form, that she *"fell in the bath on* (Friday) *6 October this caused severe pain in left side at the back. Margaret managed to attend work at this stage. Friday /Saturday as well as Mon /Tues however on the Wednesday Margaret was still in a lot of pain and contacted NHS 24 who asked Margaret to attend the hospital. So Margaret left work to go to Monklands were they completed a few routine checks … they stated the injury was muscular and prescribed Margaret with pain killer to manage the pain.*

Support/Adjustments agreed to help maintain attendance were identified as; *Micros breaks - Get mobile and walk about, Later start this week to help medication kick in, Encouraged to use the new mouse.*

99. Ms C Begley created a table within this Return to Work Return to Work Discussion Form to "*keep her right"* which table recorded:

Stage 3	
End of Current state	*19 Jan'18*
0 remaining	*8 Target Days*
23 Nov 2016	
19 Jan 17	*6*
11 /07 /2017	*1*
04/09/2017	*1*
05/09/2017	*1*
06/08/2017	*1*
08/09/2017	*1*
09/09/2017	*1*
12/10/2017	*1*
13/10/2017	*1*
Target Days	
Completed Reviews	
3 moment review No 1 *30.08.2017*	

100. From **Monday 30 Oct 2017** Ms. McGuiness was absent from work returning **Wednesday 1 November 2017.**

101. On **Wednesday 1 November 2017** Ms. McGuiness returned to work. At the Return to Work Interview Ms. McGuiness described that she was struggling with recent deaths that had happened since August and would like to engage with EAP for possible counselling. BGas arranged that Mrs McGuiness could have breaks as felt appropriate, to be able to phone EAP direct. Mrs McGuiness also asked if she could change her shift to match that of a colleague in order that she could car share with her, for reasons unrelated to Mrs McGuiness cancer and or treatment.

102. On **Monday 6 Nov 2017** Ms C Begley had an in-depth discussion with Ms McGuiness around travel to work arising because previous informal car sharing arrangement unrelated to Mrs McGuiness cancer and or treatment was no longer an option. Ms C Begley suggested that Ms McGuiness take an Access to Work form to her GP who would require to complete for support. Ms Begley had experience of successful use of Access to Work for a colleague. Mrs McGuiness having been provided with Access to Work form on 2 previous occasions via BGas reported that she had been advised by GP that he was unable to provide required support enabling Access to Work funding to operate, and requested BGas to revisit options for support to assist her travel arrangements by providing a shift change. Ms C Begley, having discussed matters with her own manager and in the absence of GP support for Access to Work, recommended that Mrs McGuiness complete and submit a written Flexible Working Request in order that BGas could consider modification to her shift in accordance with the appropriate and provided the request form to Mrs McGuiness**.** While the form was provided to Mrs McGuiness, she did not submit a Flexible Work Request to BGas. The form was provided for reasons unrelated to Mrs McGuiness cancer and or treatment.

103. **Monday 4 December 2017** is the date Mrs McGuiness provided to BGas as being the date upon which she sustained facture to her knee occurring and

from which she was subsequently continuously absent from work up to the date of termination of employment.

104. On **Wednesday 6 December 2017** Mrs McGuiness reported to Ms Begley that she had sustained fracture to her knee, described having waited for ambulance, that she would be in a cast (stocky) for 6 weeks. Ms Begley advised that MyHealth BGas's occupational health would contact Mrs McGuiness in connection with the knee facture to provide any support which would be appropriate.

105. In **December 2017** Ms C Begley made subsequent calls to Ms McGuiness including one shortly be before Christmas "*to wish her a Merry Christmas and update her on my working pattern"*

106. On **Wednesday 3 Jan 2018, Monday 8 Jan 2018, Tuesday 16 Jan 2018,** Tuesday **23 Jan 2018**, **Wednesday 31 Jan 2018, Thursday 1 Feb 2018** and **Monday 12 Feb 2018** Ms C Begley a contact update call to Ms. McGuiness in connection with Ms McGuiness knee fracture injury.

107. On **Monday 12 February 2018** in response to query if BGas could do more to support to work, Mrs McGuiness indicated that she would subject to recovery from the knee fracture, look to return on a phased return. Ms C Begley confirmed that this would be an option and that they would work on a Return to Work Plan. Ms Begley documented a Plan of Support, to include a DSE assessment and call refresher. Ms McGuiness advised that this would assist her.

108. On **Tuesday 20 Feb 2018** Ms C Begley made a contact update call to Ms McGuiness in connection with Ms McGuiness knee fracture injury. Ms McGuiness reported that she had undergone physiotherapy the previous week and was content that BGas MyHealth were due to make contact with her in connection with her knee facture injury the following Thursday.

109. On **Friday 9 March 2018** Ms C Begley made a contact update call to Ms McGuiness in connection with Ms McGuiness knee fracture injury and agreed

a Return to Work meeting to take place on **Monday 12 March 2018** to meet at BGas reception at 11 am.

110. On **Monday 12 March 2018** Ms McGuiness phoned Ms C Begley and advised that she did not yet feel able to return to work describing symptoms connected with her knee fracture and this period of absence arising from the knee facture, it was agreed that the return to work would be delayed till late that week.

111. On **Thursday 14 March 2018** Ms McGuiness returned to work on a limited basis.

112. On **Friday 23 March 2018** BGas issued a letter to Ms McGuiness requiring that she attend a Stage 4 attendance meeting on **Thursday 29 March 2018** (the **March 2018 Stage 4 ARM**)**.** It was confirmed that that there were a number of possible outcomes including "*ending your employment on grounds of capability or unacceptable absence levels of absence".* It was confirmed that the Hearing Manager would consist of 2 people including Ms V Carson and that Ms McGuiness. Ms McGuiness was provided with the pack of information which would be used at the March 2018 Stage 4 ARM and it was confirmed that she had the right to ask a Trade union representative or colleague to attend.

113. The appointment of the **March 2018 Stage 4 ARM** was not something which arose in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

114. On **Thursday 29 March 2018** Ms McGuiness attended the March 2018 Stage 4 ARM with her trade union representative.

a. A summary of the absences since 2010 was provided to Ms McGuiness.

b. Ms McGuiness confirmed she had not applied under the Access to Work funding scheme as her GP had declined to support same.

c. It was put to Mrs McGuiness that her previous absences have been related to Tamoxifen and she had stopped taking this August 2016, although it had

been intimated that her consultant was considering reinstating. Mrs McGuiness confirmed that she had not seen her GP in connection with another subsequent matter which had arisen in August 2017, but that she was due to see her surgeon with whom she would discuss her view that her previous treatment for cancer made her bones brittle. Mrs McGuiness described that "*they won't admit that it's the treatment that caused it".* She described that her *"GP was not telling me anything, it would need to be the surgeon"*

d. In response to the suggestion that chemotherapy may cause low immune system, lack of concentration and confusion, Mrs McGuiness described that *"I had a phase of forgetting things but it's a lot better".*

e. Mrs McGuiness further confirmed that adjustments had been made and in response to a question on whether her shifts were okay she responded "*yes".* She confirmed she did not have continuing blood pressure issues. She described that she was using the provided document hold although found the mouse gave her cramps in her fingers and preferred the flat mouse.

f. BGas confirmed that a Posturite chair had not been provided and was to be chased up, but explained that it "*was reassessed by Sam Harkins and she discussed habits and posture needed to change rather than a chair*"

g. On support from BGas when asked whether she was happy with support from manager and company "*Except for chair and I feel the target days were not enough"*. Mrs McGuiness described asking for help to get to work but it was refused "*I was on a phased return and had to rely on my daughter. My first day back was the first time I had been out of the house and it put strain on my foot and it was throbbing. It is getting better every day and I am making an effort to come in"* she described that *BGas would not pay for a taxi for her." Mrs McGuiness described that she had been complaining about her knees and ankles before the accident"* She described that she last had had a bone scan 2 year earlier.

h. In relation to attendance which may have related to post cancer assessment she described that at the end of February she had an appointment but had to cancel and she needed to reschedule. She described that she had "*a letter 2 months before but forgot about the appointment."* On being asked if she had rescheduled, Mrs McGuiness advised that she needed to phone to reschedule.

i. Mrs McGuiness confirmed that she had not taken up the offer to call MyCare as counsellors.

j. After reviewing matters, it was put to Mrs McGuiness that BGas didn't think it had not followed through on any matters except for shift changes and in response to "*anything else we can do to help"* Mrs McGuiness responded "no"

k. Mrs McGuiness's trade union representative put to BGas that she was only a month away from coming off Stage 3, she showed a sustained improvement and if the accident hadn't happened would have been off it in January. She was on target with 4 weeks to go and showed a sustained improvement and that's what you wanted".

l. In response the question of anything else. Mrs McGuiness stated that in 2010 she had "*come to work during my treatment when I had chemo every 3 weeks and was only off during the radiotherapy which was Monday to Friday for 4 weeks, 20 sessions in total"*

m. In response to the statement that her fracture cast came off in January why did she not come back till March, Mrs McGuiness explained that the cast was on for 7 weeks, she was still wearing a brace, she had no muscle and she was still building and working on it, and it could take up to 6 months, she described that at this time her leg was not strong enough to hold her weight.

n. Mrs McGuiness did not advise BGas that her surgeon was willing to provide a report.

o. The meeting was adjourned for a decision to be made.

115. On **Tuesday 3 April 2018** Mrs McGuiness attended the April 2018 Stage 4 Outcome Meeting with a union rep:

a. Ms V Carson confirmed that BGas panel was herself and a Ms T Morrison.

b. It was confirmed the panel had taken all matters into consideration, everything discussed and all points raised.

c. It was BGas view that they had acted on all MyHealth recommendations. In relation same Mrs McGuiness had been asked to identify any gaps and those were:

ii. the provision of a taxi after her fall. BGas view was that this had had no impact

iii. change to alternate shift. BGas position was that they had not declined, rather Mrs McGuiness had not followed the correct procedure.

d. In relation to Mrs McGuiness's health it was noted that there had been no formal diagnosis of pain in bones or brittle bones given by her GP or consultant. Mrs McGuiness had not arranged further medical examination and was set out that she had chosen not to use the vertical mouse. Ms McGuiness indicated that she was getting cramps holding the vertical mouse and would rather have a traditional computer mouse.

e. In response to her Trade Union indication that she was one month away from exiting Stage 3 when the most recent absence occurred, it was set out for BGas that that 8 day target was set in anticipation of Mr McGuiness restarting on Tamoxifen, while that did not occur Mrs McGuiness had used the 8 days absence up to November 2017 before the most recent 69 day absence. "*The total of 77 days set would have exceeded an absence target that would have been set for you. Your absence levels decreased in each year between 2010 and 2015. Since then, it has increased almost every year. You have been on Stage 3 … 4 times and on the 2 occasion you did not exceed the target absence, you used the exact amount of target days set for you.*

f. Ms Carson in conclusion stated "*Whilst you have made small improvements in your attendance levels over the years its something that the business cannot sustain therefore I have taken the decision to terminate your employment based on unacceptable levels of attendance."* It was confirmed that Mrs McGuiness would be paid 1 week for every year *"you have been with the business; ... however this will be to a maximum of 12 weeks. You were last paid for March… any untaken holidays will be taken into consideration in your final payment. You have the right to appeal within 7 days to myself in writing with any new evidence…"*

g. Ms Carson asked *"any questions"* Mrs McGuiness responded "*no"*

h. Ms Carson confirmed that the outcome letter would be with Ms McGuiness within 7 days.

116. The Tribunal is satisfied that no offer was made at the hearing that a medical report would be provided. No medical report was provided for the Appeal and no medical report has been provided for this Final Hearing. The Tribunal is satisfied that the **April 2018 Stage 4 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. The Tribunal is satisfied that the decision to dismiss arrived at the **April 2018 Stage 4 ARM** is not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

117. On **Wednesday 4 April 2018** BGas issued the outcome letter to the April 2018 Stage 4 Outcome Meeting to Ms McGuiness.

> "*You confirmed you stopped taking the Tamoxifen ... as advised by you consultant you were free from the previous side effects caused by the medication. We previously discussed the long term side effects of your previous chemotherapy treatment including dizziness and lack of concentration and you told me you were no longer suffering from this and required no additional support.*

I have reviewed the support that the business has given you and you felt that there was nothing more the business could have done to support you.

I asked if you thought there were any gaps in the support given to you and you highlighted:

i. *the provision of a taxi after her fall."* BGas view was that this had had no impact.

ii. *change to alternate shift".* BGas position was that they had not declined, rather Mrs McGuiness had not followed the correct procedure.

a. Further and in relation to Mrs McGuiness's health it was noted that had been no formal diagnosis of pain in bones or brittle bones given by her GP or consultant. Mrs McGuiness had not arranged further medical examination. The repeat prescription of Tamoxifen had stopped. Mrs McGuiness had chosen not to use the recommend vertical mouse.

b. The TU rep highlighted, when asked that he thought they should take into consideration, the fact that Mrs McGuiness was one month away from existing Stage 3 when the most recent absence started

c. It was noted that the 8-day target which was set was a higher target as Mrs McGuiness had been expected to restart on Tamoxifen."*Tamoxifen medical has a lot of side effects which caused most of your previous absences and if you were returning on to the medication, there was a higher risk of absence so the 8 days was put in place to incorporate this. You didn't return on to the medication but still used the 8 day target absence between May 2017 and November 2017, You went onto have you most recent absence of 69 days, This total of 77 days absence would have exceeded an target absence that would have been set for you."*

d. It set out that the absence levels decreased each year between 2010 and 2015. Since then it has increased almost every year. Mrs

McGuiness had been on Stage 3 of the process 4 times and on the 2 occasions that she did not exceed the target absence, she had used the exact amount of target days set. There was also an occasion in 2016 when trigger to be reinstated to Stage 3 was missed by the Team Manager.

e. It concluded *"that you haven't demonstrated a sufficient improvement in your attendance and you level of attendance remains at a level which is not operationally acceptable to the company. In conclusion have decided that we should end your employment because of unacceptable levels of attendance. Your employment will end with immediate effect and you will receive payment in lieu of your 12 weeks notice.*

f. *Any final salary adjustment will be made and your P45 sent to you at the appropriate time."*

118. The Tribunal is satisfied that no offer was made at the hearing that a medical report would be provided. No medical report was provided for the Appeal and no medical report has been provided for this Final Hearing. The Tribunal is satisfied that the comment that side effects caused most of Ms McGuiness's previous absences was an attempt to be supportive of Ms McGuiness and does not retrospectively alter the factual matrix in respect of the **January 2012 Stage 1 ARM in** respect of on the evidence adduced the Tribunal does not conclude was something arising in consequence of Ms McGuiness' cancer including its treatment, nor the **November 2012 Stage 2 ARM, October 2014 Stage 3 ARM, January 2015 Stage 3 ARM, April 2016 Stage 3 ARM, the May 2017 Stage 3 Arm** or the **March 2018 Stage 4 ARM** which were not something arising in consequence of Ms McGuiness' cancer including its treatment and in respect of which the setting of targets from each reflected an individualised and justified approach.

119. Insofar as the **August 2016 Stage 3 ARM** arose because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment, the appointment of the August 2016 Stage 3 ARM was

proportionate. In particular, it was an appropriate means of achieving a legitimate aim, that is the limitation of workplace absences and reasonably necessary to do so.

120. The setting of the absence target however at the **August 2016 Stage 3 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. In particular it was set in the context that Ms. McGuiness had ceased Tamoxifen. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

121. The Tribunal is satisfied that the **April 2018 Stage 4 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. The Tribunal is satisfied that the decision to dismiss arrived at the **April 2018 Stage 4 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

122. On **Tuesday 10 April 2018** Ms. McGuiness submitted a written letter appeal (her **April 2018 Letter of Appeal**) against the dismissal in the following terms "*I wish to appeal against the decision of Terminating my Employment under grounds of Disability Discrimination which falls into the category of the Equality Act 2010. I feel that the business hasn't treated me fairly and taken into consideration of my Medical History of being a Cancer Survivor. I am most disappointed that this most serious illness and 4 other major operations going on from February 2010 onwards haven't been documented and there isn't anything on file I shall be accompanied by John Fallon (union rep)"*. Ms. McGuiness continued to be supported by her Trade Union.

123. The April 2018 Letter of Appeal made no reference to Mrs McGuiness providing any further medical report. It did not set out that any further medical report would be required. The Tribunal is satisfied that Ms. McGuiness knew, as set out in her April 2018 Letter of Appeal that her employment had been terminated, with effect from 3 April 2018.

124. On **Friday 13 April 2018** Ms. McGuiness received pay in lieu of notice.

125. The Tribunal notes that Sunday 19 April 2018 earliest date an act could be in time, applying EC etc stop the clock etc for a claim presented on 2 August 2018.

126. On **Tuesday 24 April 2018,** reflecting the **April 2019 GP letter**, the Tribunal is satisfied that Ms. McGuiness first presented with symptoms of ankle pain on this date.

127. On **Thursday 24 April 2018 BGas** issued P45 to Ms McGuiness which confirmed a leaving date **3 April 2018** accepted that "*they may have issued this*" and that she received same.

128. Ms McGuiness was awarded Universal Credit with effect from **Tuesday 1 May 2018.**

129. **Thursday 3 May 2018** the date of termination provided on Ms. McGuiness's ET1 was not the correct date of termination. A calculation of 3 months, less one day, from that date gives the date of 2 August 2018 being the date Ms. McGuiness's ET1 was presented.

130. On **Friday 4 May 2018** Ms. McGuiness missed a medical appointment without explanation being provided her GP on that date.

131. On **Tuesday 8 May 2018** Ms. McGuiness notified ACAS of her dispute (the date of receipt by ACAS of the EC Notification)

132. On **Friday 18 May 2018** Ms. McGuiness attended her appeal along with her Trade Union representative.

133. The Tribunal is satisfied that no offer was made at the hearing that a medical report would be provided. No medical report was provided for the Appeal and no medical report has been provided for this Final Hearing.

134. The Tribunal is satisfied that the May 2018 Appeal was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. The Tribunal is satisfied that the decision to uphold the dismissal at the May 2018 Appeal was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was

not strictly mandated by the ARM and reflected an individualised and justified approach.

135. On **Wednesday 23 May 2018** ACAS issued EC Certificate to Ms. McGuiness.

136. On **Thursday 31 May 2018** Ms. McGuiness missed a medical appointment without explanation being provided her GP on that date.

137. On **Friday 1 June 2018** Ms. McGuiness missed medical appoint without explanation being provided her GP on that date.

138. On **Friday 25 Jun 2018** BGas issued the appeal outcome letter to Ms McGuiness confirming its decision to uphold the decision to dismiss.

139. The Tribunal is satisfied that the **May 2018 Appeal** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. The Tribunal is satisfied that the decision to uphold the dismissal at the **May 2018 Appeal** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. Further it was not strictly mandated by the ARM and reflected an individualised and justified approach.

140. On **Saturday 26 June 2018** Ms. McGuiness received the outcome to appeal letter. While Mrs McGuiness asserts at Final Hearing that she was not advised by any party as to time limits. Ms McGuiness's reasonable enquiries had identified the statutory basis of her appeal as set out in her April 2018 Letter of Appeal, her reasonable enquiries had identified that in order to proceed to Employment Tribunal she would require to comply with the ACAS Early Conciliation process introduced in 2014, further and when ultimately Mrs McGuiness instructed the presentation of her ET1 the date of termination was 3 months less one day before it was presented, it was reasonable to expect that which was possible to have been done, being ascertaining the relevant time limit for presenting her claim within such time as she was advised that her employment had been terminated. In all the circumstances her asserted lack of knowledge from the date she was advised that her employment was terminated is not consider by us to be reasonable. In any event, in all the

circumstances her asserted lack of knowledge of the relevant time limit from the date she was advised that her employment was terminated is not accepted.

141. On **Wednesday 4 July 2018** Ms. McGuiness missed a medical appointment without explanation being provided her GP on that date.

142. On **Tuesday 24 July 2018** Ms. McGuiness missed medical appoint without explanation being provided her GP on that date.

143. **On Friday 27 July 2018** Ms. McGuiness reports that e-mail communication from ACAS was the trigger to her phoning her present representative to seek an appointment to discuss the termination of employment.

144. On **Monday 30 July 2018** Ms. McGuiness first met her present representative.

145. On **Thursday 2 August 2018** the ET1 was presented as follows:

    a. The ET1 identifies the date of termination as 3 May 2018, that is within 3 months less one day of the date the ET1 was presented.

    b. In the ET1 Ms. McGuiness set out that she "*contends that she possesses (and possessed at all material times) the protected characteristics of disability within the meaning of Section 6 of the Equality Act 2010. The Claimant relies upon two distinct conditions which she contends each amount to a disability".*

    c. In relation to the first of these conditions, cancer, the Ms. McGuiness set out in the ET1 that she "*was diagnosed with breast cancer in February 2010*", she set out operations between that date and March 2011, 6 months of chemotherapy to August 2011 and radiotherapy in November 2010 together with further surgery in 2013. The ET1 further sets out that *"she required to take Tamoxifen from February 2010 onwards" and* described side effects. At para 6 of the ET1 is said that BGas were aware of the condition "*as she made all her managers aware of same both at the point of diagnosis and in all subsequent relevant discussions (including*

discussions about her absence). This condition has (and has at all material times) a substantial adverse impact of her ability to carry out day to day activities. The adverse impact included (but was not limited to) the ... suffering fatigue, nausea and significant, short term illness (due to viral conditions). The consequence of prescribed medication was to the effect that her risk of cancerous tumours was reduced, however this treatment of itself caused the side effects referred to above".

d. Ms. McGuiness' ET1 set out that "*between February 2010 and December, the absences which the claimant Claimants suffered were either exclusively due (or materially contributed to by) the Claimant's cancer and cancer treatment. From December 2017 to date of dismissal, the Claimant's absences were exclusively due to the facture sustained due to her osteoarthritis"*.

e. The ET1 described that BGas operate a four-stage attendance management policy. The ET1 provided description of events in January 2012, October 2012, September 2013, November 2014, January 2015, January 2016, May 2017, August 2017, October 2017, December 2017, March 2018 and set out "*She was invited to a stage 4 meeting on 29 March 2018. By letter of 4 April 2018, she was dismissed with 12 weeks' notice"*. The ET1 sets out criticism of BGas at para 20 "*No referral was made to OH prior to the dismissal. The Claimant had not been the subject of an OH report since October 2017, 2 months before this unconnected ill health. Additionally, the respondent knew that the Claimant likely had osteoarthritis (in order words that the cause of the Claimants' triggering absence was now known). Insofar as the principal cause of the Claimant's absence to date, her cancer and associated treatment, by this point there had been a material change of circumstances. The Claimant had now ceased requiring to take her medication, the cause of her absences. The Claimant confirmed during the meeting on 29 March 2018 that her Surgeon, Mr Murphy was willing to provide a report. This offer was not taken up. Neither was a GP report sought. No medical enquiry was made at all, despite the (a) the nature of the claimant's absences; (b) the*

knowledge that the claimants conditions were disabilities which attracted special consideration, including reasonable adjustments; and (c) The Claimant giving information to the effect that there had been a material change in circumstances, namely the cessation of the treatment causing her absences since 2010".

f. The ET1 set out a complaint in terms of Section 20 of the Equality Act 2010, the provision, criteria or practice which put Ms. McGuiness at a substantial disadvantage when compared with a hypothetical comparator was the strict imposition of the absence management policy- and in particular (although each individually and or cumulatively) the strict imposition of a threshold for absence; secondly the practice (whether formal or not) to not refer to an employee to occupational health or seek medical advice where the employee has exceeded the imposed maximum of allowable absences, and a practice of requiring someone such as Ms. McGuiness to work strict hours without either flexitime or rest days.

g. The ET1 identified reasonable adjustments which could have been implemented **prior** to 29 March 2018 were; relaxation of absence management policy, exclusion from calculation of absences of operations and associated causation, adjustment of shifts by example allocating rest days when suffering fatigue due to her cancer treatment, imposition of flexible working hours to truncate her shifts in the event she had fatigue and make them up on other days, the referral to occupational health to secure appropriate medical advice, in respect of any further adjustments that might be available; and from 29 March 2018 adjustments which BGas could have reasonably implemented (instead of dismissal) were; relaxation or disapplication of the absence management policy particular given Ms. McGuiness now had a diagnosis of osteoarthritis, and had a positive prognosis, a relaxation or disapplication of same given Ms. McGuiness had ceased taking the medication causing her shifts, adjustments of her shifts as above, flexible hours as above.

h. The ET1 set out complaint of Unfair Dismissal from para 28, arguing that it was procedurally unfair, objectively unfair, there was incongruent treatment and BGas acted in bad faith.

i. The ET1 did not describe that Ms. McGuiness had appealed her dismissal.

146. On **4 September 2018** BGas presented its ET3 as follows:

a. The ET3 was silent on the date of termination and set out that Ms. McGuiness had not appealed the dismissal.

b. The ET3 set out were said to be Ms. McGuiness's absences in each of the years 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018. The ET3 set out what BGas said was its absence management process so far as applied to Ms. McGuiness. From paragraph 10 of the ET3 it was stated that "*Matters culminated in the Claimant being invited to attend a stage 4 attendance hearing on 29 March 2018…It was discussed that the claimant's absences had increased year on year since 2015. In particular they had not improved since the claimant has stopped taking Tamoxifen in 2016…* ". The ET3 at Para 13 set out that BGas "*wrote to inform her of* "the decision to dismiss and at Para 14 set out that Ms. McGuiness "*did not appeal her dismissal".*

c. The ET3 set out did not accept that the claimant, Ms. McGuiness was disabled at all material times and raised issues as to what BGas knew or ought to have known.

d. In particular BGas at the ET3 para 34 set out that it makes *"no admission as to whether the Claimant was disabled within the meaning of section 6 of the Equality Act 2010 for the duration of the relevant period.* The ET3 at para 35 set out that it was accepted that the Claimant was disabled for the period of time that she suffered from cancer**.** *"The information available to the Respondent is that the Claimant suffered from breast cancer in or around 2010 to 2012. The Respondents records indicate that the Claimant had an operation in 2012 (rather than*

2013 as set out in the claim form). Further the Claimant informed the Respondent on more than once occasions that that she had ceased to take Tamoxifen in 2016."

e. The ET3 set out that BGas denied that Ms. McGuiness was unfairly dismissed, it being argued that she was fairly dismissed for capability.

f. The ET3 set out that BGas denied that it failed to comply with a duty to make reasonable adjustments contrary to s21 of EA 2010 and that BGas did not know and could not reasonably be expected to know that Ms. McGuiness had a disability nor that she was likely to be placed at a substantial disadvantage. The ET3 set out that BGas denied that it applied a provision, criterion or practice (PCP) that placed Ms. McGuiness at a substantial disadvantage in comparison with person who are not disabled. Further and insofar as BGas applied a PCP, the ET3 set out that it asserted that it took such steps as was reasonable for it to take and in particular; at no time during the her sickness absence did Ms. McGuiness indicate it was caused by a failure to make reasonable adjustments or that making further adjustments would facilitate her return to work, as soon as BGas became aware that she was suffering from health problems it sought advice from its occupational health advisers, BGas acted at all time in accordance with the medical information it received, Ms. McGuiness did not indicate that she required BGas to make reasonable adjustments to enable her to carry out the role and/or suggest what adjustments were required or could be made. Further BGas denied that it was under a duty to make further reasonable adjustment and set out that no further reasonable adjustments would have been effective, practicable or within its resources.

147. The Tribunal makes no findings in fact, regarding any procedure in operation from July 2019 including around, what were asserted by Mrs McGuiness to be a system of duvet days operating after the termination of Ms McGuiness' employment with BGas.

148. Ms McGuiness had applied for a number of alternate posts following the termination of her employment and was awarded Universal Credit from **Tuesday 1 May 2018.**

149. Ms McGuiness secured employment with Virgin Media from **Monday 5 November 2018** and elected to terminate that employment on **Thursday 7 March 2019**, taking up alternate employment with Capita in a full-time role from **Monday 15 April 2019.**

Submissions

150. Written submissions were provided for Ms. McGuiness and BGas. Both parties were afforded the opportunity to exchange and revise their respective submissions, in light of their opponent's submissions, before submitting them to the Tribunal. Where relevant below we have identified authorities referred to for either party.

Submissions for Ms McGuiness

151. For Ms McGuiness, it was argued that both her unfair dismissal and disability discrimination claims should succeed.

152. In relation to her claim for Unfair Dismissal the issue of time bar in terms of s111 ERA 1996 is jurisdictional and requires to be considered irrespective of whether BGas had raised it.

a. the claim was presented within primary limitation period set out ins 111(2) (a); and

b. esto it was not, it was not reasonably practicable to submit the claim within that period and further it was submitted within a reasonable period of time thereafter; and

c. Ms McGuiness was unfairly dismissed in terms of s98(4) of ERA 1996; and

d. Ms McGuiness is entitled to the financial remedy as calculated.

In relation to disability discrimination

a. The issue of time bar in terms of s123(1) of ERA 1996 is not jurisdictional; and

b. BGas are personally barred from raising the issue having failed to raised it in the ET3 or prior to day 5 of the Final Hearing and the Tribunal is not required to consider it.

c. Esto BGas are not personally barred, it is a matter of discretion whether the Tribunal should permit BGas, to do so, and should refuse.

d. The claims have been lodged within the time period set out in s123(1)(a) of EA 2010 having regard to s123(3).

e. It is in any event just and equitable for the claim to proceed in the whole circumstances of the case.

153. Ms McGuiness has had – at all material times- the protected characteristic of disability in terms of s6 of the EA 2010.

154. BGas discriminated against Ms McGuiness on grounds of disability;

155. BGas failed in its duty to make reasonable adjustments contract of s21 of EA 2010 and

156. BGas treated Ms McGuiness unfavourably due to something arising in consequence of her disability, being her propensity for a higher frequency of/predisposition to short term absences than someone without her disability and the treatment was not a proportionate means of achieving a legitimate aim.

For Ms McGuiness in respect of Time Bar:

157. It is argued that she was told of her dismissal at a meeting on Tuesday 3 April 2018. It was not recorded in minutes that this was immediate effect or that she was being paid in lieu of notice

158. BGas issued a letter on Wednesday 4 April 2018 which told her that she was being dismissed with immediate effect and that she would be paid in lieu of

notice, however she was not paid on that date and was not told in the letter when she would be paid. While there was reference to salary adjustment and a P45 it was just intimated it would be done at the appropriate time.

159. Ms McGuinness was paid a sum on Friday 13 April 2018 which corresponds to her payslip which did refer to pay in lieu but that was accessible on line from the worksite to which Ms McGuiness did not return.

160. Ms McGuiness' P45 was dated Tuesday 24 April 2018, McGuiness accepts she received this but does not recall when. It is argued that these circumstances place this case within the reasoning set out in **Société Générale v Geys** [2012] UKSC 63 (**Geys**), and if the P45 was received on Tuesday 24 April 2018, or after that day, limitation, applying the ACAS extension brings the limitation to Tuesday 7 August 2018.

161. On extension of time (Unfair dismissal) it was argued:

a. That if the argument for Ms McGuiness is wrong that the issue arises on the question of what was reasonably practicable. Reference was made to the Court of Appeals decision in Marks and Spenser Plc v Williams Ryan [2005] EWCA 470 (**Williams Ryan**), **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53 (**Dedman**). It was Ms McGuiness' evidence that she knew of her right to bring a claim but not the timescale, she asserted that neither her trader union nor ACAS advised her. While it was suggested for BGas, that she could have carried out a "*simple internet search*" there was no evidence underpinning same. It was argued that Ms McGuiness was reasonably unaware of the time limits, she saw a solicitor after what is said to be the first primary limitation period had expired, her appeal was ongoing, ACAS continued to be involved and it is argued that she was suffered impaired mood manifesting in disruption of her ability to leave her house for medical appointments. It was in the circumstances not reasonably practicable to submit the claim in time and the claim was submitted within a reasonable period of time thereafter.

162. **Disability Discrimination – Relevant Date.** It was argued there are two alternate limitation periods and as her claims related to ongoing conduct s123(3) of EA 2010 was engaged.

a. In relation to s15 of EA 2010 she had submitted an appeal, and it was said that the appeal's express terms related to BGas' treatment of her absences and this was reinforced by what was said in the outcome letter issued to her.

b. In relation to s20/21 of EA 2010 there was continuing duty. Reference was made to **Hinsley v Chief Constable of West Mercia** UKEAT/0200/10 (**Hinsley**). In so far as BGas may seek to argue that Ms McGuiness did not complain about misconduct after dismissal as the ET1 refers to adjustments which out to have been made "*after 29 March 2018" a*nd the claims of disability discrimination are inextricably linked with the core facts of the unfair dismissal claim.

c. BGas knew or ought to have known that the Tribunal would be considering the appeal, and that Ms McGuiness contended that their duties extended accordingly and BGas elected to proceed with its response without evidence from the Appeal Manager after, it is said, they became aware immediately prior to the Final Hearing that Ms McGuiness had proceeded with an appeal. It was argued that there are strong public reasons for enforcing the EA 2010 and those should not be defeated by what is said to be a self-serving technical argument. Esto the Tribunal considers that Ms McGuiness had not given sufficient notice of her reliance on same, in accordance with **Ladbrokes Racing Ltd v Traynor** UKEATS/0067/06 (**Traynor**) a proposed amendment is set out, to the effect that the conduct complained of, including failure to make reasonable adjustment, continued up to the conclusion of the appeal submitted on Tuesday 10 April 2018 and which is said to have been determined on Monday 25 June 2018.

163. **Submission outwith the Fixed Time Period.** It was argued that should the Tribunal not accept that the claim was lodged in time (referencing the appeal

and a written amendment) then the Tribunal requires to consider whether it should consider time bar at all

164. It is argued that unlike s111 of ERA, s123 of EA 2010 is not jurisdictional, reference was made to **Radakovits v Abbey National Plc** [2010] IRLR 307 (**Radakovits**). It was argued that the wording of s123(1) of EA 2010 is comparable to the wording in s17,18A and 18B of the Prescription and Limitation (Scotland) Act 1973; "*It is be trite that in proceedings to which the 1973 Act applies time bar is a matter for the Defender to raise and can be waived (which means necessarily that it is not a jurisdictional issue. There facts were recognised by the Scottish law Commission in their 2007 review of Prescription and Limitation (see para 1.16*)" – a link was provided.

165. It is indicated that there is no specific case law on this issue but there is no case law which says s123(1) of EA 2010 is jurisdictional. It is said that the EA 2010 is drafted to ensure that enforcement of the rights under the EA can be achieved in the same way as enforcement of what are said to be other delictual rights and reparation for other legal wrongs in the civil court (s124(6)), and the preamble to s118 EA 2010 is identical to s123 of EA 2010. It is argued that if "*the issue is not jurisdictional the Tribunal is not obliged to consider it unless expressly raised",* while there are "*catch all"* statements used by BGas in the ET3 they do not raise any express issue. It would be inappropriate to place reliance on generalised averments given the issue of fair notice.

166. However, and if the Tribunal concludes that the claims were submitted out with the time period in s123(1) (a), Ms McGuiness relies on s 123(1)(b), in which context 123(1) of EA 2010 is said to sets out alternatives rather than a primary time limit and a discretion to extend. Consideration of the balance of prejudice are acutely important and the factors already set out for Ms McGuiness are equally relevant to what is just and equitable and the *"fact that the Tribunal has already heard the claim and the respondent has fully responded to it without sustaining any prejudice is critical. The merits of the claims are an important consideration, for public policy reasons".* It is said that the extension of time does not require exceptional circumstances. No such

threshold exists. What is just and equitable is fact sensitive and is a matter for the Tribunal based on those facts.

167. **On disability status:** it was observed that the claimant, who has given notice that she no longer insists upon impairment of osteoarthritis, was diagnosed with cancer in 2010. It was indicated that Schedule 1 para 6(1) of EA 2010 provides that cancer is a qualifying condition without having to consider the qualifying test in s6 of EA 2010 Act. Further and in so far as BGas seek to argue that Ms McGuiness had ceased to suffer effects of cancer, "*any such approach misunderstands the parliamentary intention of para 6(1) in relation to deemed disabilities. As was made clear by Judge Eady QC in"* **Lofty v Hamis (t/a First Café)** UKEAT/01777/17(**Lofty**) *"at para 37 a person with cancer is deemed disabled "irrespective of whether they exhibit symptoms of their condition" [see also the additional reasoning at para 38-40]".* It was further argued that, esto the condition had or could have been treated as resolved at any time, the Tribunal still required to have regard to the s6(4) of EA 2010. It was argued that the discriminatory conduct was predicated upon past absences which dated back to 2012 when Ms McGuiness "*unequivocally was suffering from cancer, and so disabled*". It was argued that the ARM necessitated discriminatory treatment by virtue of its cumulative nature, earlier periods of absence leading to her being at Stage 4 and thus at risk of dismissal. *"Any such distinction, therefore, is wholly artificial and illusory".* The concept of "substantial, adverse effect … does not apply – and does not need to be considered – in relation to a deemed disability". It was argued that Mrs McGuiness was "*reasonably entitled to rely upon the Respondent's continued, tacit acceptance of her account of causation. If the Respondent was under any doubt about that, principals of natural justice would have required to the Respondent to (i) flag that to the Claimant, for her comment; and (ii) request that she provide additional medical evidence. The Respondent did neither."*

168. In respect of **s15 EA 2010 (discrimination arising from disability),** for Ms McGuiness reference was made to **Baildon & Thurrock NHS foundation Trust v Weerasinghe** UKEAT/0397/14 (**Weerasinghe**) identify the questions

as being did the disability cause, have the consequence of, or result in something and Did the employer treat the employee unfavourably because of that something. It was noted that absences caused by disability are given as example of a s15 claim in the EHRC code. It was suggested that there could be no dispute hat the dismissal was unfavourable, and, it was argued that Ms McGuiness had established that her absences were due to disability. It was argued that BGas had not put causation in issue, but rather only referred to absence "*from May 2016 onwards, when the last form of treatment ceased"*. It was argued that Ms McGuiness continued to suffer symptom attributed to Tamoxifen through to at least September 2017. She had no other health issues which might cause these, the comparative level of absence made it clear that this was the most likely cause. A common sense reading of the patient information provided made it clear that side effects were not limited to when taking Tamoxifen. It was argued that the Tribunal ought to conclude that her absences until the 43rd absence were caused by, or in consequence of, cancer treatment. Further it was argued Ms McGuiness was only dismissed because of reliance on those, because the ARM only allowed for dismissal for persistent short-term absence at Stage 4. Mrs McGuiness, it is said, would not have got to Stage 4 but for the disability related absence. Reference was made to **Pnaiser v NHS England & anr** [2016] IRLR 170 (**Pnaiser**) and **City of York Council v Grosset** [2018] EWCA Civ 11105 (**Grosset**), **Hall v Chief Constable of West Yorkshire Police** UKEAT/0057/15 (**Hall**), **Rigsby v London Borough of Waltham Forest** UKEA/0318/1 (**Rigsby**), **Hensman v Ministry of Defence** UKEAT/006714 (**Hensman**), **Land Registry v Houghton and oths** UKEAT/0149/14 (**Houghton**), **Naeem v Secretary of State for Justice** [2017] UKSC27 (**Naeem**) and **Cunningham v Financial Conduct Authority** ET/3201141 (**Cunningham**) and, in respect of an assertion that there was a failure to get an up to date medical report **Williams v Ystrad Myynach College** ET/16000092/11 (**Williams**).

169. In respect of **s20/21 EA 2010 (failure to make reasonable adjustments)** it was argued that "*The Claimant enjoyed the protection provided for by section 20 of the EA 2010. The respondent was under a duty to make reasonable adjustments"*. The ARM was not in itself the PCP relied upon, rather it was

the use of trigger points which, it is said are fixed once set and are set at a lower point than recent absence. In addition, the practice of requiring employees to work strict hours without flexitime or rest days is a distinct PCP. It is said that the first PCP put Ms McGuiness at as substantial disadvantage, it was argued that the triggers points put Mrs McGuiness at a substantial disadvantage. It was argued that not allowing rest days or flexi-working (which was argued to be a duvet day policy in operation from July 2019), put her at a substantial disadvantage as she could not avoid the consequences of "totting up" under the ARM. Specific reasonable adjustments were argued to be relaxation of disapplication of the Arm, provision of additional allowance days and exclusion of calculation of trigger points of disability related absences. In relation to what is said to be the second PCP reasonable adjustment would be flexible working hours. It was argued that BGas could not say that they did not know of the disadvantage as Ms McGuiness had continuously advised that the trigger points were not enough (with the example given that Ms McGuiness during her Stage 4 had indicated that previous target absence levels were too low). It was indicated that BGas had been advised "*that there was a need to adjust these by 2 separate OH advisers prior to dismissal"* and that witnesses accepted they had done nothing with this information. Reference was made to **General Dynamic Information Technology Ltd v Carranza** UKEAT/0107/14 (**Carranza**), **Smith v Churchill Chairlifts plc** [2006] ICR 542 (**Smith**), **Duckworth v British Airways plc** ET/330470/11(**Duckworth**), **Commissioner for HMRC v Whiteley** UKEAT/0581/12(**Whiteley**). It was argued that the triggers points were *"wholly arbitrary… to the extent that there were adjustments to those made, it cannot be said that those were all that can reasonably have been expected".* It was noted that McGuiness exited Stage 3 twice, it being argued that this showed Ms McGuiness "*had the potential to meet expectations of reasonable attendance".* It was argued that "*Had the Respondent actually treated the… the leg fracture as long term absence in the way they were required under the policy, the further absences of 5 + 2 days … would have been unlikely to trigger a stage 3 at all, and she would have exited the procedure altogether, meaning an further absences would have to start at*

stage 1." For Mrs McGuiness it is argued that BGas (since July 2019) operate a system of "*duvet days that applies to all employees while maintaining the same absence management procedure".* It is argued that what is said to be a failure to make reasonable adjustments continued until the outcome of the appeal.

170. In relation to **unfair dismissal**, it was argued that s98(4) of ERA 1996 requires to be addressed and that staff absence which bears upon capability is a potentially fair reason. For Ms McGuiness, it was intimated that the guidance given in **East Lindsey DC v Daubney** [1977] ICR 566 (**Daubney**) and **Lyncock v Cereal Packaging Ltd** [1988] ICR 670 (**Lyncock**) applies - and "*as the law presently stands- the Burchell test applies to capability dismissal per Lady Smith in"* **DB Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09 (Doolan)**. Attention was drawn to the Court of Appeal in **Daubney** at para 18. It was argued that BGas ought to have investigated whether the absences were caused by disability. It was argued that BGas did not address what was said to be the **Lyncock** criteria and references was made to para 18 of **Daubney.** Reference was also made to **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ (**O'Brien**) in which the Court of Appeal (incl at para 53) indicated that the test for unfair dismissal and s15 EA 2010 discrimination are different, the considerations for the Tribunal are likely to be similar. Thus, it was argued factors such a lesser step being available and **Cunningham,** were relevant.

171. For Ms McGuiness it was argued that there were **complaints of procedural unfairness** including what is said to be a failure to make any referral to occupational health after October 2017. It was argued that none of the procedural failings were cured on appeal and that Ms McGuiness's disabled status meant that these issues were not only procedural but went to the root of whether BGas acted reasonably or not. It was argued that the dismissal "*was arbitrary based on a "strict liability" of exceed a stage 3 trigger point, without any evaluative judgment be applied.*

172. For Ms McGuiness a schedule of loss was provided and it was argued that the guidance in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15

(**Cooper Contracting**) applied and that there was no challenge to whether Ms McGuiness had mitigated her loss applying for numerous jobs and took a "*a lesser paying job on 5 November 2018 where she had been out of work for more than 6 months without income"* .It was argued that Ms McGuiness ought to be entitled to an ACAS uplift in her award.

Submissions for BGas

173. For BGas it was argued that the effective date of termination was 4 April 2018. Further that following a number of absences due to ill health, which continued to increase despite BGas properly managing same, BGas was dismissed fairly.

a. In relation to the compliant of Unfair Dismissal, it was argued that Mrs McGuiness had not discharged what was said to be the burden of demonstrating that it was not reasonably practicable to present the claim on time having regard to the test set out at s111 ERA 1996. Reference was made to **Porter v Bandridge** [1978] CA (**Porter**), **Palmer v Southend-on-Sea BC** [1984] ICR 372 (**Palmer**). Further it was argued that should it be found it was not reasonably practicable to present the claim in consideration required to be given to whether it was presented within a further reasonable period. Reference was additionally made to **Nolan v Balfour Beatty Engineering Services** UKEAT/0109/11 (**Nolan**) and **Cullinane v Balfour Beatty Engineering Services** UKEAT/0637/10 (**Cullinane**).

b. In relation to the complaint of Disability Discrimination, it was argued that in terms of s123 of the EA 2010 the appropriate authority for the "*just and equitable"* test is found at **Abertawe Bro Morgannwg University Morgan** [2018] ICR 1194 (**Morgan**) and onus is on a claimant in terms of **Outokumpu Stainless Ltd v Law** UKEAT/0199/07 (**Outokumpu**), and the grant of extension is the extension rather the rule **Robertson v Bexley Community Centre (t/a) Leisure Link** [2003]IRLR 434 (**Robertson**).

c. In relation to the question of whether BGas (or Tribunal) is barred from raising the issue of time bar it was noted that a time bar issue was identified and in respect what are said to be a two-pronged argument;

i) BGas says it was misled by the ET1 and the issue was raised as soon as it became apparent.

ii) In relation to the effective date of termination the facts of **Geys** are distinguishable. Reference was made to **Duniec v Travis Perkins Trading Co Ltd** UKEAT/048213/DA (**Duniec**) and **Robert Cort & Son v Chapman** UKEAT248/81 (**Chapman**), **The Feltham Management Ltd v Mrs Feltham & oths** UKEAT/0201/16/RN (**Feltham**), Humphries **v Chevler Packaging** Ltd UKEAT/0224/06DM (**Humphries**). It was argued that the relevant date for calculation was 4 April 2018 and the period of appeal (ref **Rabess v London Fire & Emergency Planning Authority** [2016] EWCA Civ 1017 (**Rabess**)) does not act to extend same.

d. In relation to the reasonably practicable question, it was argued that the evidence did not justify such an extension, reference was made to **Malcolm v Dundee CC** [2007] CSOH 38 (**Malcolm**).

e. On the just and equitable test on the evidence, the time limit should not be extended.

f. In relation to the issue of Unfair Dismissal it was observed that the statutory regime was set out s98 of ERA 1996. Reference was made to **Daubney**. **Lyncock**, **Doolan** UKEAT/0053/09 which referred to **British Home Stores v Burchell** [1978] IRLR 379 (**Burchel**l), **Iceland Frozen Foods v Jones** [1982] IRLR 439 (**Iceland Frozen Foods**) as approved in **HSBC v Madden** [2000] ICR 1283 (**Madden**), **Holmes v Quinetiq** UKEAT/02026/15 (Holmes) and **London Borough of Brent v Finch** EAT/0418/11(**Finch**) .

g. For BGas it was argued that, having regard to the factual matrix it had carried out a reasonable investigation;

h. For BGas it was argued that, BGas had formed a reasonable belief that there was little prospect that Ms McGuiness's leaves of absence would improve to an acceptable level and reference was made to Lyncock.

i. For BGas it was argued that the manner in which BGas's process was applied and the resultant dismissal fell within the range of reasonable responses having regard to the evidence

j. In relation to Disability Discrimination it noted that no overall medical report was produced, was accepted that cancer is a disability in terms of the EA 2010. It was argued that there was no evidence to support Mrs McGuiness' contention that absences after 2016 were connected to cancer; or that the cancer or anything related to it impacted on her day to day activities after 2016. The Tribunal was invited to draw an adverse inference from the non provision of an overall medical report. It was argued that while Mrs McGuiness was, in terms of the legislation disabled there was no basis to assert that that the disability hand any impact on or was relevant to her absences after 2016.

k. **In relation to s 20 and s 21 of EA 2010 (reasonable adjustments)** reference was made to **Watkins v HSBC Bank Plc** UKEAT/0018/18 (**Watkins**), that a disadvantage must be substantial and it would be for a Tribunal to determine was adjustments would be reasonable ref to **Environmental Agency v Rowan** [2008] IRLT 20 (**Rowan**).Reference was additionally made to **Archibald v Fife** [2004] IRLR 65 (**Archibald**), **Walters v Fareham College Corp** [2019] 991 (**Walters**) and Court of Appeal in **Smith v Churchill Stairlifts plc** [2006] ICR 542 (**Smith**) , **RBS v Ashton** [2011] ICR 63 (**Ashton**) as upheld by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA (**Sanders**) , the EHRC Code and particularly **para 6.28, Chief Constable of Lincolnshire Police v Weaver** UKEAT/0622/07 (**Weaver**). It was argued in summary that it would not have been reasonable adjustment to exclude Ms McGuiness from the operation of the ARM.

l. **In relation to s15 of EA 2010 (Discrimination arising from disability)** it was argued that the EHRC codes demonstrates that that unfavourable means that the disabled person must have been put at a disadvantage. Reference was made to **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65 (**Williams**), **Pnaiser v NHS England and anr** [2016] IRLR 170 (**Pnaiser**), **Homer v Chief Constable of West Yorkshire** [2012] UKSC IRLR 601 (**Homer**). It was argued the Tribunal had heard evidence on absence which were not counted and the approach before 2016 did not represent unfavourable treatment. It was argued that if absences after 2016 were connected with cancer the application of the ARM was not unfavourable to Ms McGuiness. It was argued that BGas's approach did not amount to discrimination arising from disability, again noting that Ms McGuiness had an opportunity to produce a medical report but did not do so. It was argued that Ms McGuiness had not previously argued that there were any ongoing failures after 3 April 2018 and that any attempt to do so would require amendment on behalf of Ms McGuiness, it being argued that applying the test in **Selkent Bus Co v Moore** EAT/151/96 (**Selkent**) there was no basis for any amendment.

m. **In relation to remedy** an alternate schedule of loss was provided.

n. In conclusion for BGas it was argued that Ms McGuiness was not unfairly dismissed nor was she discriminated against on the basis of her disability and her claims should be dismissed.

Issues in this Tribunal claim

Non-Disclosure of Claimant Commissioned Medical Report.

Relevant Law

174. **Rule 2** of Schedule 1 to Employment Tribunals (Constitution & Rules and Procedures) Regulations 2013 (**the 2013 Rules**) sets out that:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

175. **Rule 31** of the **2013 Rules** provides:

"31 Disclosure of documents and information

The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff."

176. There is no general requirement of discovery in tribunal proceedings. However, if a party chooses to make voluntary disclosure of any documents, that party must not be unfairly selective and must disclose further documents if failure to do so might leave the other party with a false or misleading impression of the true nature, purpose or effect of the voluntary disclosed documents: **Birds Eye Walls Ltd v Harrison** [1985] IRLR 47 EAT (**Harrison**).

177. In **Harrison**, representatives of an employee who had been successful in an unfair dismissal complaint became aware, before an appeal, that the former employer had not disclosed all the relevant documents in the Tribunal proceedings (because they had done so in other proceedings). The undisclosed documents revealed that a decision had apparently been taken to dismiss the employee before he had an opportunity to put his case at his disciplinary interview. Accordingly, at the appeal hearing, the employee sought leave to bring an alternative claim based on a fundamental breach of the rules of natural justice, it was held that

(1) in proceedings before a Tribunal, unlike in English Civil Court proceedings, in the absence of a formal order for disclosure, there was no duty on a party to disclose any of the documents in his possession relevant to issues raised in the proceedings beyond those he chose to disclose. However, where a party voluntarily disclosed any documents in his possession, he should not be unfairly selective in his disclosure. Once a party had disclosed certain documents, he came under a duty not to withhold from disclosure any further documents in his possession if, by withholding them, documents already disclosed would be seen in a false or misleading light. Furthermore, tribunals should regard that duty as a high duty to be broadly interpreted and strictly enforced. In **Harrison**, the disclosed documents, if taken in isolation from the undisclosed documents, provided a misleading view of the employer's disciplinary process. Therefore, the employer was under a duty not to withhold those documents and his non-disclosure was a breach of that duty.

(2) The public policy rule for the protection of documents disclosed in the course of discovery had to be weighed against the public interest in discouraging the holding back of documents that ought to be disclosed in the interests of justice. On balance, the policy rule for the protection of disclosed documents would be

relaxed in the present case and the employee would not be precluded from relying on the employer's documents disclosed in the other proceedings.

(3) In deciding whether to allow the employee, who had succeeded before the industrial tribunal, to bring an alternative claim based on a breach of the rules of natural justice it was necessary to balance considerations of fairness and convenience. In the circumstances it was appropriate to grant the employee's application to bring the additional claim.

178. The Tribunal panel have reminded ourselves that the position in Scotland, in civil proceedings, is that "*The general rule is that no party can recover from another material which that other party has made in preparing his case*" **Anderson v St Andrews Ambulance Association** 1942 SC 555 at 557 (**Anderson**), and any report obtained after the action has commenced is regarded as confidential (**Walker & Walker Evidence** para 10.3.1).

Non-Disclosure of Claimant Commissioned Medical Report.

Discussion and Decision

179. In all the circumstances, it would not have been open to the BGas or the Tribunal to order disclosure of the non-joint medical report obtained by Ms. McGuinness' representative for the purpose of this hearing.

180. BGas assert that an adverse inference can be drawn from non-disclosure of medical report. No authority is provided for this position. For Ms McGuiness there is no indication of contrary authority. However, the Tribunal disagrees with the assertion on behalf of BGas. Ms McGuiness provided her GP records from which such evidence as she considered appropriate to adduce was presented.

181. It is the Tribunal's conclusion that that the position is neutral, that is to say conclusions can be drawn on the evidence adduced, no adverse inference is drawn from a document which is not before the Tribunal.

Issues in this Tribunal claim

Date of termination

Relevant law

182. Where relevant below we have identified authorities referred to for either party.

183. The claimant referenced the Supreme Court decision of **Société Générale, London Branch v Geys [2013] IRLR 122**

184. Geys concerned the amount of money due to Mr Geys, following his summary dismissal from the bank. Mr Geys' contract entitled him to receive 3 months' notice before his employer could terminate the agreement. It also permitted the bank to terminate his contract without notice by making instead a payment in lieu. In addition to this payment, Mr Geys was entitled to a *'termination payment'*. This comprised several components, the calculation of which was dependent upon the date of termination. On 29 November 2007, the Bank wrote to Mr Geys, explaining it had *'decided to terminate [his] employment with immediate effect'.* No mention was made of making a payment in lieu. He was escorted from the building and did not thereafter return. Mr Geys corresponded through his solicitor to seek information as to the payment he was to receive, preserving his position whilst so doing. On 18 December 2007, the Bank paid £31,899.29 to Mr Geys, which it had indicated would be a *'severance payment'*. Notably it had again made no reference to a payment in lieu of notice. On 21 December Mr Geys' solicitors sought further information as to how the sum had been calculated and on 2 January 2008 wrote further stating Mr Geys *'affirmed'* the contract. In so doing, Mr Geys purported to refuse the repudiatory conduct of the bank (namely the dismissal) and keep the contract alive. On 4 January 2008 the bank's human resources department wrote to Mr Geys and for the first time indicated it was utilising the PILON clause.

185. In allowing the employee's appeal and dismissing the employer's cross-appeal (Lord Sumption dissenting), the Supreme Court ruled on various

issues arising out of the termination of the employee's contract of employment and the contractual terms and conditions contained therein, including in particular, whether a repudiation of a contract of employment by the employer which took the form of an express and immediate dismissal automatically terminated the contract or whether the normal contractual rule that the repudiation should be accepted by the other party applied equally to that case.

186. For BGas reference was made to **Robert Cort & Son Ltd v Chapman** [1981] ICR 816 EAT (**Robert Cort**). In Robert Cort, the employee was summarily dismissed with payment in lieu of notice. The EAT held that the effective date of termination '*was the date of the summary dismissal rather than the expiry of the period in respect of which salary was paid, irrespective of whether or not the contract of employment continued for some purposes after the employer's repudiation."*

187. For BGas reference was made the Court of Appeal decision in **Rabess v London Fire and Emergency Planning Authority [2017] IRLR 147 (Rabess).** That case concerned the ascertainment of the effective date of termination in the context of limitation for the purposes of the 1996 Act. The facts are not material. At paragraph 24 Laws LJ: "*Geys was wholly concerned with common law contractual questions. There was no issue there as to the application of the EDT under s.97; indeed, no issue under the Employment Rights Act 1996 at all. Robert Cort was simply not considered. That was so in Geys where the Supreme Court held that a repudiatory breach of an employment contract would not terminate the contract unless and until the innocent party elected to accept the repudiation. This does not bear at all on the interpretation of statutory rights arising under the 1996 Act."*

188. The Tribunal noted that the issue as to the timing of the termination of employment arose in **Octavius Atkinson & Sons Ltd v Morris** [1989] IRLR 158 CA (**Morris**). It was held that the employment ended at the moment that the employee was told that that was the case.

Issues in this Tribunal claim

Date of termination

Discussion and Decision

189. The Tribunal is satisfied on the evidence that Mrs McGuiness was advised that her employment was at end at the outcome meeting on 3 April 2018, that was confirmed by BGas in their letter of 4 April 2018. That is wholly consistent with case law including **Morris, Robert Cort, Rabess** and in turn **Geys.**

Issues in this Tribunal claim

Unfair Dismissal

Time Limit and Jurisdiction

Relevant law

190. **s 111** of the Employment Rights Act 1996 (ERA 1996) provides:

> ***111 Complaints to employment tribunal.***
>
> *(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2) Subject to the following provisions of this section, an employment tribunal* ***shall not*** *consider a complaint under this section unless it is presented to the tribunal—*
>
> > *(a) before the end of the period of three months beginning with the effective date of termination,* ***or***
> >
> > *(b)* ***within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.***
>
> *(2A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).*

(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

(4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—

(a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,

(b) …

(c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice, and

(d) references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.

191. The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation "*stops the clock"* until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, she will have at least a month from the date of the certificate to present her claim.

192. In the Court of Appeal decision of **Radakovits v Abbey National plc** [2010] IRLR 307 (**Radakovits)**, LJ Elias at para 16 set out:

"The first issue, therefore, is whether the tribunal was entitled to re-open the question of jurisdiction. I have come to the clear conclusion that they were. There is plenty of authority which confirms that time limits in the context of unfair dismissal claims go to jurisdiction, and that jurisdiction cannot be conferred on a tribunal by agreement or waiver: see Rogers v Bodfari Transport [1973] IRLR 172 (NIRC), approved by the

Court of Appeal in Dedman v British Building & Engineering Appliances [1973] IRLR 379. ***Rogers is a particularly powerful case because the point on jurisdiction was not heard until after the tribunal had considered the merits of the case.*** *In Dedman, Lord Denning pointed out that even if an employer actively wishes to have the case heard by a tribunal, the tribunal still cannot hear it if it does not have jurisdiction. The reason is that the language of section 111(2) of the Employment Rights Act (as with its statutory predecessors provides in terms that a tribunal "shall not consider" a claim of unfair dismissal unless it is lodged in time. That is what makes these issues jurisdictional rather than mere limitation issues."*

193. LJ Elias **Radakovits** continues at para 22

"… It is true that a tribunal cannot exercise jurisdiction by concession and equally, in an appropriate case, the tribunal will be obliged to raise the issue of jurisdiction even though it has not been identified by the employers. An obvious example is indeed this case where, on the face of the application, it is out of time. Tribunals have properly to guard against exercising a jurisdiction when the statutory conditions are not met. But they are not bloodhounds who have to sniff out potential grounds on which jurisdiction can be refused. If the parties agree that a particular claimant is an employee, for example, then I think that there would have to be good reason for the tribunal to doubt that that was the case and to require a preliminary hearing to investigate the matter. If, on the face of it, it appears that the tribunal does have jurisdiction or if there appears to have been a satisfactory explanation for extending what would be the usual time limits, then the tribunal can properly act on that. It does not have to explore fully every case where a jurisdictional issue could potentially arise."

194. The burden of proving that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on a claimant as set out in **Porter v Bandridge Ltd** [1978] ICR 943 (**Porter**).

195. Something is *"reasonably practicable*" if it is "*reasonably feasible"* by reference to the Court of Appeal **Palmer v Southend-on-Sea Borough Council** [1984] ICR 372 (**Palmer**).

196. In **Northamptonshire County Council v Entwistle** [2010] IRLR 740 (**Entwhistle**), the EAT reviewed existing authorities including **Marks & Spencer Plc v Williams-Ryan** [2005] EWCA Civ 470 **(Williams-Ryan)**.

197. In **Entwistle** Underhill J, at para 5, summarised as follows:

> *"(1) Section 111(2)(b) should be given 'a liberal construction in favour of the employee'. This was first established in **Dedman.** There have been some changes to the legislation since but this principle has remained: see, most recently, paragraph 20 in the judgment of Lord Phillips MR in **Williams-Ryan**, at p.565.*
>
> *(2) In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit. This was first clearly established in the decision of the Court of Appeal in the **Walls** case, but see most recently paragraph 21 of Lord Phillips' judgment in Williams-Ryan and, in particular, the passage from the judgment of Brandon LJ in Walls there quoted, at p.565.*
>
> *(3) In **Dedman** the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly. Lord Denning MR said this at p.381 'But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was "practicable" for it to have been posted in time. He was not entitled to the benefit of the escape clause:*

*see **Hammond v Haigh Castle & Co Ltd** [1973] IRLR 91. I think that was right. If a man engages skilled advisers to act for him, and they mistake the time limit and present it too late, he is out. His remedy is against them. Summing up, I would suggest that in every case the tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers, so that he had just cause or excuse for not presenting his complaint within the four weeks then it was not practicable for him to present it within that time. A court has then a discretion to allow it to be presented out of time if it thinks it right to do so, **but if he was at fault**, or his advisers were at fault **in allowing the four weeks to slip by**, **he must take the consequences**. **By exercising reasonable diligence the complaint could and should have been presented in time**.'*

198. As set out by Underhill P, obiter, in **John Lewis Partnership v Chapman** [2011] AllER (D) 23 (**Chapman**) following the approach in **Palmer & Saunders v Southend- on-Sea Borough Council** [1984] IRLR 119 (**Palmer**), the existence of an internal appeal does not, render it *not* reasonably practicable to present a claim, before the resolution of that appeal. As the EAT set out in **Palmer,** at para 34:

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic

— "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

199. Again, in **Palmer** the EAT set out at para 35

"What, however, is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It will no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Industrial Tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the Tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there has been any substantial fault on the part of the employee or his advisor which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account."

200. In **Avon County Council v Haywood-Hicks** [1978] IRLR 118 (**Avon**) the EAT overruled a decision of a Tribunal which had allowed a claim out of time

on the basis that the claimant was, in fact, unaware of the time limit and at para 6 commented that *'this was a case where the employee ought to have known of his right even if he did not actually do so'.*

201. Most recently the EAT in **Lowri Beck Services Ltd v Brophy** (12 December 2019) (**Lowri**) UKEAT/0277/18/LA, identified that the issue of time limit for unfair dismissal was "*a jurisdictional point it could still be taken."* In **Lowri** the ET had decided that time should be extended, having found that the Claimant, because of particular vulnerabilities, had reasonably handed the claim to his brother to deal with and that his brother had genuinely believed that the date of dismissal was later than it was due to a unclear Respondent termination letter.

202. The EAT in **Trevelyans (Birmingham) Ltd v Norton** [1991] ICR 488 (**Norton**), in relation to a dismissal in May 1988, observed, so far is relevant, that *"From the cases, it is our view that the following general principles seem to emerge. The first, as time passes, so it is likely to be much more difficult for applicants to persuade a tribunal that they had no knowledge of their rights in front of"* employment *"tribunals to bring proceedings for unfair dismissal under the Act of 1978 and, of course, that is less likely to be acceptable because the time limit has been increased from four weeks to three months. Second, that where an applicant has knowledge of his rights to claim unfair dismissal before an industrial tribunal, then there is an obligation upon him to seek information or advice about the enforcement of those rights. Third, that if his advisers give him unsound advice or fail to give him proper advice, or fail to give him advice on a relevant issue, then the failure of those advisers is the failure of the applicant and does not provide a good excuse for the escape clause."*

203. In **Asda Stores Ltd v Kauser** EAT/0165/07 Lady Smith at para 17 described that the "*relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".*

Issues in this Tribunal claim

Unfair Dismissal

Time Limit and Jurisdiction

Discussion and Decision

204. Ms. McGuiness's evidence was that the ET1 did not give the correct date of termination. BGas did not, in their ET3 challenge the date given in the ET1.

205. As described in **Radakovits,** the timing of the issue jurisdiction being raised in relation to Unfair Dismissal, does not impact. The issue in relation to Unfair Dismissal is jurisdictional. It requires to be addressed.

206. On Ms. McGuiness's evidence, she knew of her right to bring the claim, but not of the timescale. It was her evidence is that neither her Union nor ACAS told her of these.

207. In the present case Ms. McGuiness was aware that there might be a claim. The terms of her appeal set out in some detail the nature of her complaint. She approached ACAS and indeed engaged ACAS Early Conciliation. While in the same period she did not attend her GP for pre-booked appointments, this did not preclude her seeking advice from her trade union or indeed ACAS.

208. The observations in **Norton** were made almost 30 years before Ms. McGuiness was dismissed.

209. Ms. McGuiness could have asked for advice about bringing a claim or time limits if she had thought to do so. While she did not attend her GP there was nothing to prevent her making the enquiry of her Union or ACAS. Indeed, she approached ACAS and engaged Early Conciliation in the period while she was not attending her GP. Similarly, she lodged her appeal, setting out the statutory basis of her appeal was under the "*grounds of Disability Discrimination which falls into the Equality Act 2010"*, in the period she did not attend her GP.

210. It would have been reasonably practicable, for her to have made that enquiry and to have ensured that their Tribunal complaints were presented within time once early conciliation had ended. There is no satisfactory reason for Ms. McGuiness not to have lodged her claim in respect of Unfair Dismissal in time.

211. The Tribunal is satisfied that while it was Ms McGuiness's evidence that she was unaware of a time limit within which she required to present her claim to Tribunal; she made herself aware of ACAS Early Conciliation in so far as she engaged same; she made herself aware of the Equality Act 2010, in so far as she expressly made reference to same in the appeal which she submitted, she ought to have known of the time 3 month less one day time, this was a case where the employee ought to have known of his right even if, as she asserts, she did not actually do so. She had engaged ACAS and was represented. She cannot as set out **Norton** seek to rely upon her assertion that she was not advised, that does not offer an "*escape clause".*

212. In reaching this conclusion the Tribunal are applying the authorities set out above.

213. In all the circumstances, Ms. McGuiness has failed to show that it was not reasonably practicable for her complaints for unfair dismissal to have been presented within time, and those claims are therefore dismissed.

Issues in this Tribunal claim

Disability Discrimination

Time Limit- the Statutory provisions

214. **Section 123** of EA 2010 provides:

> *(1) Proceedings on a complaint brought 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.

(2) …

(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.

215. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the Early Conciliation Certificate does not count (Section 140B (3), EA 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B (4), EA 2010).

Issues in this Tribunal claim

Disability Discrimination

Time Limit/Pleading

The Relevant Law

216. On behalf of Ms McGuiness, an analogy with suggested with Sheriff Court procedure which is said to be "*trite"* as set out above.

217. The Tribunal notes that Sheriff Court procedure is governed by its own procedural rules requiring that a "*respondent"* sets out in formal preliminary pleas (which may lead to the disposal or sisting of an action without inquiry into the broader facts) at a particular stage, that a claim may time barred.

218. In the absence of that plea being taken, it is argued, for Ms. McGuiness, that it is of assistance to consider the position in the Sheriff Court. It is argued that

that the "*respondent"* in a Sheriff Court action cannot insist on the point if not taken, in effect in pleadings before Final Hearing.

219. What Ms McGuiness seeks to refer to as trite, is a position set out within the 2007 Scottish Law Commission Review of Prescription and Limitation in Scotland and to which a link has been provided. It is believed that what, on behalf of Ms McGuiness, is being referenced are paragraphs 1.6 and 1.7 which set out

1.6 The practical effect of the rules relating to limitation and prescription is very similar, but the rules are conceptually different. Limitation is essentially a procedural rule. Its effect is to bar an action from proceeding in court after the lapse of the period of time during which the law provides that it must be brought. The time limit for bringing an action of damages for personal injury is governed by sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). It is for the defender to raise the defence of time-bar and if successfully pled, the court will not allow the action to proceed. Where an action is time-barred, however, the defender may choose to waive the limitation defence, in which case the action can proceed.

1.7 By contrast, prescription is a rule of substantive law. The law relating to negative prescription, with which the second reference is concerned, provides that after the requisite period of time an obligation to pay damages is wholly extinguished unless an action has been raised during that period of time or the subsistence of the obligation has been acknowledged. Because prescription is a matter of substantive law, the court itself may take note of the fact that prescription has operated and grant decree of absolvitor, bringing the action to an end.

220. The Tribunal considers that, the position is more fully set out at **McPhail Sheriff Court Practice** (**McPhail**), as an exception to the operation of the concept of ***"****pars judici*" (broadly what a judge has duty to do) at para 2. 09.

Under the inherent jurisdiction of the court to preserve the due administration of justice the sheriff is empowered to take notice of certain matters whether or not they have been urged upon him by any of the parties to the action. It

is thought that such matters include any aspect of the litigation which may cause prejudice to a specific public interest, such as the public interest in the regular conduct of litigation, or to the interests of third parties not called in the action, or which may require the court to exceed its proper powers; but that they do not include objections based on rules conceived only for the benefit of a party to the action. "Parties to litigation are free to waive many advantages designed for their benefit, be they evidential or procedural, and indeed they may have perfectly sound reasons, tactical or otherwise, for doing so." It is thought, accordingly, that where a party waives such an advantage, as by failing to state a plea or objection, and does not thereby infringe any public interest or public policy or the interests of any party not called, it is not for the sheriff to take exception.

221. Further **McPhail** sets out at para 2.15:

"It is also pars judicis to notice and order the deletion from the pleadings of any averment which is scandalous and irrelevant. The court will not, however, dismiss an action ex proprio motu on the ground of irrelevancy, even if some destructive averment, undermining the basic relevancy of the case, is plain to see nor will the court apply and enforce statutory provisions as to limitation of action" (ref **Burns v Glasgow Corp** 1917 1 SLT 301 (**Burns**)) *"for these are both matters which parties may waive or plead without prejudice to the public interest or the interests of third parties."*

222. **Burns** itself is decision from 1917, dealing with different statutory provisions. It considers events, where a local authority was argued to have, in effect, induced a delay in the issue of proceedings.

223. More recently **Humphrey v Royal and Sun Alliance plc** 2005 SLT (Sh Ct) 31 (**Humphrey**), is an appeal following a degree of dispute around what had been set out in accordance with the relevant Court rules. Sheriff Principal Young allowed the issue of Prescription to be taken forward noting at para 8: "*In response, counsel for the pursuer submitted that the sheriff had been correct to hold that the defenders' first plea in law was a preliminary plea with*

the result that, no note under rule 22 having been lodged in support of it, the sheriff had had no discretion but to repel it. Under reference to McLaren's Court of Session Practice p 379, s 17 of the Prescription and Limitation (Scotland) Act 1973 , Walker on Prescription and Limitation (6th ed) at pp 5–6, Johnston on Prescription and Limitation at para 20.04 and Ketteman v Hansel Properties Ltd [1987] AC 189; [1987] 2 WLR 312 , she submitted that a defence that a case was time barred was a preliminary defence which did not touch the merits of the case and that s 17 of the 1973 Act created a rule of procedure only. A plea of prescription had the effect of extinguishing altogether the right upon which a pursuer might otherwise seek to found. In a case of limitation, on the other hand, the right of action still existed but there was a procedural bar to the raising of the action."

224. Sheriff Principal Young in **Humphrey** comments at para 16 *"But the advantage which was given him by the sheriff's decision was essentially of the windfall variety, and I am not much troubled that he should lose such an advantage especially when consideration is given to the injustice that would be done to the defenders if they were not to be relieved from the consequences of their solicitors' misunderstanding of rule 22.1"*

Issues in this Tribunal claim

Disability Discrimination

Time Limit/Pleading

Discussion and Decision

225. The claimant asserts that BGas having not set out in its ET3 (in effect prior to the Final Hearing) that Ms McGuiness's claim is out of time by reason of the date of termination, cannot do so during the Final Hearing including by reference to the date of termination.

226. BGas assert that they were misled by the date Mrs McGuiness set out in the ET3. It may, however be fairly asserted that BGas's position is not a complete answer for the Tribunal's consideration, in circumstances as in the present case where BGas terminated Ms McGuiness's employment.

227. The Tribunal has considered therefore whether BGas are in effect barred from raising this matter and whether that precludes the Tribunal having regard to the issue of time bar.

228. The ET1, the originating document, gave a date of termination which did not reflect the date upon which Ms McGuinness was notified that her employment was terminated. The date provided was 3 May 2018. It was not suggested on behalf of Ms McGuiness that this date was other than an error. The ET1 did not articulate any position that for instance it arose from an interpretation of Geys. As Ms. McGuiness put it when it was suggested that it more than an error (the given termination date being 3 months less one day before the ET1 was presented) it was just coincidence.

229. The ET3 was silent on the date of termination.

230. Taking the terms of the Overriding Objective together the comments of the Sheriff Principal in Humphrey, it is not clear why a claimant should have a windfall arising from their own error. That coincidence did not alert the Tribunal at an earlier stage to the possibility of challenge.

Issues in this Tribunal claim

Disability Discrimination

Time Limit/Amendment

Relevant Law

231. For Ms McGuiness, it is further argued, that if BGas is able at this stage to raise time bar, she should be entitled to argue for a separate amendment (set out in the written submissions) and references **Ladbrokes Racing Ltd v Traynor** [2007] 10 WLUK 62 (**Traynor**).

232. In **Traynor** the EAT indicated that an application to amend in the course of a hearing, called for a full explanation as to why it had not been made earlier. Mr Traynor had been dismissed after 24 years of service and argued that he has not been given an opportunity to improve his performance. Mr Traynor's wife (acting as his representative) sought to raise an issue about the fairness

of the employers investigatory and disciplinary proceedings. Despite an objection the Tribunal allowed him to amend his claim, to include an allegation of procedural unfairness and to cross-examine witnesses on that issue.

233. The EAT in **Traynor** indicated that Tribunals should have regard to the following guidance:

(a) a tribunal could enquire whether an amendment to a claim form was sought in the light of the line of evidence which a claimant explored;

(b) the tribunal should enquire as to the precise terms of the amendment proposed. If it did not do so, it could not begin to consider the principles that needed to be applied when considering an application to amend;

(c) it might be advisable to allow the claimant a short adjournment to formulate the wording of the proposed amendment;

(d) the respondent could only be expected to respond once the wording of the proposed amendment was known;

(e) once the wording of the proposed amendment was known the tribunal should allow both parties to address it before considering its response;

(f) the tribunal's response should be that of all members and should take into account the submissions made and the principles of **Selkent**. The chairman and members might need to retire to consider their decision;

(g) the tribunal should give reasons for its decision on an application to amend.

234. The EAT continued that Traynor had not actually made an application to amend, rather he had sought to follow a line of cross-examination which was not foreshadowed in his claim form.

235. **Traynor** identifies that a Tribunal should have regard to the leading decision on amendment: **Selkent Bus Company v Moore** [1996] IRLR 661(**Selkent).** In Selkent Mummery J sets out the criteria for a Tribunal's exercise of discretion in relation to amendment commenting that the Tribunal "*should take*

into account all the circumstances and should balance the injustice and hardship of refusing it".

236. The EAT in **Selkent** were considering an appeal which arose from an application to amend an existing unfair dismissal claim, where the application had been made a fortnight before the date fixed for the hearing. The amendment sought to introduce a new allegation that the dismissal related to the claimant's trade union membership or activities and was thus automatically unfair. The Tribunal had allowed the amendment but was overturned on appeal, the EAT commented that that factors which had influenced its decisions were:

"(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, s.67 of the 1978 Act.

(c)The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. ***The amendments may be made at any time – before, at, even after the hearing of the***

***case**. Delay in making the application is, however, a discretionary factor. **It is relevant to consider why the application was not made earlier and why it is now being made:** for example, the discovery of new facts or new information appearing from documents disclosed on discovery. **Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.** Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."*

237. In **White v University of Manchester** [1976] IRLR 218 EAT (**White**), J Phillips, considering Further and Better Particulars which could be required to remedy deficiencies as to fair notice comments that *"We fully understand, accept and would endorse … that one of the characteristics of Industrial Tribunals is that they should be of an informal nature. It may be that there are many cases, particularly where the parties are unrepresented, or represented otherwise than by solicitor or counsel, and especially where the issues are simple, where particulars may not be necessary. We do not wish to say anything to encourage unnecessary legalism to creep into the proceedings of Industrial Tribunals; but, while that should be avoided, it should not be avoided at the expense of falling into a different error, namely that of doing injustice by a hearing taking place when the party who has to meet the allegations does not know in advance what those allegations are. The moral of all this is that everybody involved, whether it be solicitors, counsel, non-professional representatives, or the parties themselves where not represented, should bring to the problem common sense and goodwill. This involves, or may involve in anything except the simplest cases, giving, when it is asked, reasonable detail about the nature of complaints which are going to be made at the Tribunal…. It is just a matter of straightforward sense. In one way or another the parties need to know the sort of thing which is going to be the subject of the hearing. Industrial Tribunals understand this very well and, for the most part, seek to ensure that it comes about. … by and large it is much better if matters of this kind can be dealt with in advance so as to prevent*

adjournments taking place which are time-consuming, expensive and inconvenient to all concerned."

238. As the Employment Appeal Tribunal observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) the purpose of the ET1 (and ET3) *"…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".* Further as Langstaff J commented in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) the parties must set out the essence of their respective cases in the ET1 and in the answer to that (the ET3) and that "… *an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings… 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".*

Issues in this Tribunal claim

Disability Discrimination

Time Limit/Amendment for BGas

Discussion and Decision.

239. The claimant asserts that BGas having not set out in its ET3 (in effect prior to the Final Hearing) that Ms McGuiness's claim was presented out with the primary time limit by reason of the date of termination, it cannot do so during the Final Hearing including by reference to the date of termination.

240. BGas assert that they were misled by the date Mrs McGuiness set out in the ET3. It may, however be fairly asserted that BGas's position is not a complete answer for the Tribunal's consideration, in circumstances as in the present case where BGas terminated Ms McGuiness's employment. The Tribunal has considered therefore whether BGas are in effect barred from raising this matter and whether that precludes the Tribunal having regard to the issue of time bar.

241. The starting point is to consider the factors set out in Selkent. There is a simple explanation. The ET1, the originating document, gave a date of termination which did not reflect the date upon which Ms McGuinness was notified that her employment was terminated. The date provided was 3 May 2018. It was not suggested on behalf of Ms McGuiness that this date was other than an error. The ET1 did not articulate any position that for instance it arose from an interpretation of Geys. As Ms. McGuiness put it when it was suggested that it more than an error (the given termination date being 3 months less one day before the ET1 was presented) it was just coincidence.

242. The ET3 was silent on the date of termination.

243. Taking the terms of the Overriding Objective consistent with the comments of Sheriff P in Humphrey, it is not clear why a claimant should have a windfall arising from their own error. Even so it that coincidence did not alter the Tribunal at an earlier stage to the possibility of challenge.

244. In summary, what the BGas are seeking to amend in, is the date of termination in the ET3. It is the Tribunal's conclusion that such an amendment is permissible, it is the introduction of the date "*Tuesday 3 April 2018*" being the date of the meeting at which Ms McGuiness was present and was notified of that her employment was being terminated. The claimant is aware, as a matter of fact of the sequence of events. The issue arises through the claimant's error. Ms McGuiness knew in fact that she was required to address the issue, she had set out a date of termination in the ET1, her own error did not remove her need to do so. A claimant should not be entitled, on this factual matrix, to a windfall from their own error. However, and if this is wrong the date of termination is in any event a matter which falls to be considered by the Tribunal.

Issues in this Tribunal claim

Disability Discrimination

Amendment for Mrs McGuiness

Discussion and Decision

245. The proposed amendment for Ms McGuiness seeks to assert that the conduct complained of (including asserted failures to make reasonable adjustment – s 20 and 21 of EA 2010) continue up to the conclusion of the appeal, including the appeal hearing the outcome of which notified by BGas letter to Ms McGuiness on **Thursday 25 June 2018.**

246. The proposed amendment for Ms McGuiness seeks to invite the Tribunal to accept the alleged acts of discrimination continued to the date of the outcome of the appeal. The ET1 did not refer to any appeal. The ET1 did not foreshadow any such challenge. For Mrs McGuiness it was noted that BGas did not call the appeal manager. The Tribunal also notes that Ms McGuiness did not seek to do so. The proposed amendment for Mrs McGuiness is, after the conclusion of the evidence, by reference to **Chandhok, seeking to** set out now what in essence is being said after the point when BGas can *"properly meet it".*

247. On behalf of Ms McGuiness, reference was made to the November 2010 EAT decision **Hinsey v Chief Constable of West Mercia Constabulary** UKEAT/0200/10/DM (**Hinsey**).

248. In **Hinsey,** broadly the issue was whether re-appointment of a probationer PC (akin to reinstatement/re-engagement) by way of a reasonable adjustment under s 16A Disability Discrimination Act was outside the powers of a Chief Constable in light of the relevant Police Act and Regulations. The Employment Tribunal held that it was; EAT disagreed and Ms Hinsey' s claim was allowed.

249. Ms **Hinsey**'s material complaint was one of post-termination disability discrimination in the form of a failure to make a reasonable adjustment contrary s16(A)(A) of the former Disability Discrimination Act 1995 (as

amended (DDA). The EAT identified that the critical issue in the appeal was whether, the Respondent had no power under the relevant statutory provisions to re-appoint her following her resignation from the force effective on 17 January 2007 without her first undergoing the normal recruitment process identified in reg 10 of the Police Regulations 2003 (the 2003 Regulations). The EAT asks itself, in the context of Police Regulation whether the course of re-appointing Ms Hinsey was a permissible option and responds "*On the particular facts of this case, Mr Cooper has persuaded us that it was…. the short answer, so the three heads of department with whom the DCC agreed, was that there was no provision in the Police Regulations for that to happen. True it is that there is no express provision catering for that course; equally there is none prohibiting it. But for that perceived procedural bar it is plain on the tribunal's findings that to take her back into the service, without the need to reapply from scratch, would have been a reasonable adjustment, just as it would be reasonable to consider waiving the competitive interview requirement in the case of Ms Archibald. Put shortly, Mr Cooper has persuaded us, as a matter of construction, that the bar to re-appointment, in the form of reinstatement or re-engagement of the Claimant, perceived by the Respondent and upheld by the tribunal, does not exist. Having so held, we shall allow this appeal."*

250. The EAT in **Hinsey**, at para 15, described that the duty (under the former Disability Discrimination Act 1995 as amended) to *"to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take to prevent"* a provision, criteria or practice placing a disabled person at a substantial disadvantage, in comparison with someone in the same position as the disabled person but who is not disabled, applies post termination.

251. It is considered that the facts of **Hinsey** do not accord with the factual matrix of the present case, there was no offer to adduce evidence of how if at all McGuiness may have been "*taken back"* by BGas. The ET1 does not seek reinstatement, Mrs McGuiness did not at the conclusion of the Final Hearing seek reinstatement.

252. No authority has been provided for a proposition that an appeal of itself amounts to a continuing act in terms of s123 EA 2010(3). The time limit for s123(1)(a) EA 2010 is set out as the period of 3 months starting with the date of the act to which the compliant lies. The date of act to which the complaint lies is the decision to dismiss. That was communicated to Ms McGuiness on "*Tuesday 3 April 2018*" being the date of the meeting at which Ms McGuiness was present and was notified of that her employment was being terminated. Mrs McGuiness's decision to appeal does not alter the date of the act to which the complaint lies. Nor, in the view of the Tribunal does the appeal or the outcome of the appeal being the decision not to overturn their decision communicated on Tuesday 3 April 2018. There is nothing in the terms of s123 (1)(a) EA 2010 which suggests that an employee's decision to mark an appeal operate, of itself, to extend the time the time limit, nor indeed, absent some other factor which itself is an act of discrimination, does the appeal or the appeal create a new act to which the complaint lies. That is consistent with the Court of Appeal in **Apelogun-Gabriels.**

253. It not considered that that proposed amendment for McGuiness is permissible in all the circumstances. However, and in so far as the amendment was argued to be permissible for reasons similar to the amendment for BGas, the Tribunal is satisfied that it would not, operate to extend the time limit in terms s123(1)(a) EA 2010. The Tribunal therefore requires to considers the terms of s 123(1)(b) 2010.

Issues in this Tribunal claim

Disability Discrimination

Time Limit and Just and Equitable Extension

The Relevant Law

254. Section 123 (1) (b) of EA 2010 is set out above.

255. The Tribunal notes that in relation to the question of appeal, **Palmer,** was considering the test for Unfair Dismissal, where an internal appeal had taken, rather than the separate test of was Just and Equitable. The Tribunal notes

that the distinction is seen in **Aniagwu v London Borough of Hackney and Owens** [1999] IRLR 303 **(Aniagwu)** in which the EAT held that where an employee had made a conscious decision to delay a discrimination claim to Tribunal and had made the employer aware, it was just and equitable to allow a claim out of time, although the Court of Appeal **Apelogun-Gabriels v London Borough of Lambeth** [2002] IRLR 116 (**Apelogun-Gabriels**) subsequently, confirmed that the existence of an appeal was simply a factor and not determinative of the operation of whether it is just an equitable to allow a claim which was otherwise out to time.

256. For Ms McGuiness, reference was made to **British Coal Corporation v Keeble [1997] IRLR 336**. 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 once s/he knew of the possibility of taking action.

257. As both parties note, the Limitation Act 1980 to which **Keeble** refers, 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."

258. Section **123** of **EA 2010** does not make reference to either the Limitation Act 1980 or the 1973 Act. It does not seek to define itself by reference to either statutory model.

259. The onus is on a claimant to establish that it is just and equitable for time to be extended (paragraph 25 of **Robertson v Bexley Community Centre (t/a Leisure Link**) [2003] IRLR 434, CA) as referred to for BGas.

260. As set out in **Outokumpu Stainless Ltd v Law** UKEAT/01999/07, as referred to by BGas, evidence is required to be placed before the Tribunal in support of an application.

261. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the respondent (**Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 at paragraph 19).

262. However: *"There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that*

can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (Abertawe at para 25)". It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

263. Awaiting the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim, as noted above **Apelogun-Gabriels** CA per Peter Gibson LJ at para 16)

264. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim, if it was brought within such other period as the Tribunal considers "*just and equitable"*.

265. In **Robertson v. Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 the Court of Appeal identified that for Tribunals considering the exercise of this discretion *"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule."*

Issues in this Tribunal claim

Disability Discrimination

Time Limit and Just and Equitable Extension

Discussion and Decision

266. It is the panel's views that taking in account the factors set out in Keeble, together with the appeal against the operation of ARM in this instance that it is just and equitable for to extend the time limit. The length of delay from the act to which the complaint relates, the notification that she was dismissed on

Tuesday 3 April 2018, is weighed against the evidence that Ms McGuiness did not in fact attend her GP on a number of occasions subsequently. It is recognised that some evidence for BGas is no longer available that relates to historic Occupational Health documentation preceding Thursday 31 October 2013. The Tribunal notes that Ms McGuiness' GP notes however preceded that date encompassing the period of Ms McGuiness employment with BGas. The Tribunal is satisfied that there is no legitimate criticism of BGas that they delayed in providing information which was available to them and which was not otherwise available to Ms McGuiness. Ms McGuiness continued to be absent from work before the date she was notified she was dismissed (**Tuesday 3 April 2018)** and indeed for a period after that notified date of termination of employment. The claim was presented promptly by Ms McGuiness' representative when instructed. While the Tribunal remains critical of the steps taken by Ms McGuiness to progress matters that is, only one of, what may broadly be referred to as, the Keeble factors for the purpose of 123(1)(b).

267. However, Ms McGuiness was notified from the November 2012 Stage 2 ARM, the January 2015 Stage 3 ARM and the August 2016 Stage 3 ARM that further absence may result in termination of her employment. In addition, the Tribunal notes that Ms McGuiness was advised from the October 2014 Stage 3 ARM and April 2016 Stage 3 ARM that absences may result in her being progressed back to Stage 3. In all the circumstances it is not considered just and equitable to the extend the time limit to encompass BGas's acts before the March 2017 Stage 4 ARM.

268. In all the circumstances the Tribunal is satisfied that it is just and equitable that the time limit is extended in relation to Ms McGuiness's claim arising from the act of dismissal notified to her on **Tuesday 3 April 2018.** It is the Tribunals view that it is not just and equitable to extend the time limit to those Stages preceding Stage 4.

Issues in this Tribunal claim

Disability Discrimination Status

The Law

269. The Equality Act 2010 Schedule 1 Part 1 Determination of Disability provides:

> *1.* ***Impairment***
>
> *Regulations may make provision for a condition of a prescribed condition to be, or not to be an impairment*
>
> ***1. Long-term effects***
>
> *(1) The effect of an impairment is long-term if—…*
>
> ***2. Severe disfigurement***
>
> *(1) An impairment which consists of a severe disfigurement is...*
>
> ***3. Substantial adverse effects***
>
> *Regulations may make provision for an effect of a prescribed...*
>
> ***4. Effect of medical treatment***
>
> *(1) An impairment is to be treated as having a...*
>
> ***5. Certain medical conditions***
>
> ***(1) Cancer, HIV infection and multiple sclerosis are each a disability.***
>
> *(2) HIV infection…*
>
> ***6. Deemed disability***
>
> *(1) Regulations may provide for persons of prescribed descriptions to...*
>
> ***7. Progressive conditions***
>
> *(1) This paragraph applies to a person (P) if—*

8. Past disabilities

(1) A question as to whether a person had a...

270. 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 the claimant had a physical or mental impairment at the at the relevant time; and

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

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?

271. The claimant refers to **Lofty v Hamis (t/a First Café)** [2018] IRLR 512 (**Lofty**) HHC Eady QC at para 37 describes that a person with cancer is deemed disabled "*irrespective of whether they exhibit symptoms of their condition"* and the additional reasoning at para 38-40.

272. As from 6 December 2005, persons diagnosed with cancer, HIV, and multiple sclerosis were deemed to suffer from a disability within the scope of the DDA, and hence be a disabled person, irrespective of whether they exhibit symptoms of their disease (DDA 1995 Sch 1 para 6A; the position is identical under the Equality Act 2010 Sch 1 para 6.

273. In **Lofty** the ET described the claimant as having *'pre-cancerous cells',* which they considered insufficient to amount to cancer and thus render her '*disabled'*. The EAT overturned this decision, HHJ Eady QC holding that whilst the information adduced by the respondent (from the website of Cancer

Research UK) distinguished between in situ cancers and invasive cancers, para 6 of Schedule 1 did not do so. HHJ Eady QC stated that Parliament had chosen not to exclude minor cancers from the scope of the deeming provisions, which avoided unnecessary complexity and uncertainty, and accordingly once the claimant adduced evidence of having cancerous cells in the top layer of her skin – cancer in situ – she had discharged the burden of proving she was disabled.

Issues in this Tribunal claim

Disability Discrimination Status.

Discussion and Decision

274. In the present case it is not in dispute that Ms. McGuiness was in her own description in her letter of appeal "*a cancer survivor*". The provisions of EA 2010 Schedule 1 Part 1 (6) apply.

275. However, **Lofty** and the provisions of EA 2010 Schedule 1 Part 1 (6), do not, however establish as a matter of fact that all subsequent events from the date of an initial diagnosis arise in consequence of that protected characteristic.

Issues in this Tribunal claim

Disability Discrimination, s15 EA 2010

The Statutory Provisions

276. s15 of the EA 2010 provides:

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Issues in this Tribunal claim

Disability Discrimination s20 (and s21)

The Statutory Provisions

277. s20 of the EA 2010 provides:

Adjustments for disabled persons

"20. Duty to make adjustments

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

(2) The duty comprises the following three requirements.

*(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a **substantial disadvantage** in relation to a relevant matter in comparison with persons who are not disabled, to take such steps **as it is reasonable** to have to take to avoid the disadvantage.*

(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.

(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.

(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.

(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.

(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 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

(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.

(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."

278. **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 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 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."

Issues in this Tribunal claim

Disability Discrimination

EHRC Code of Practice

The Statutory provisions

279. 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.

Issues in this Tribunal claim

Disability Discrimination EA 2010 s15 and s20

The Relevant Case Law Overview

280. 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.***

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, 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 objective justification."*

The Law

Issues in this Tribunal claim

Disability Discrimination EA 2010 s15 (1)(a)

Relevant Case Law

281. The Tribunal has been referred to both 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**).

282. In **Pnaiser** the EAT notes from para 69:

"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 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 in the period to May 2012. *"If linked, these facts could lead to the conclusion that the claimant had a physical 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. 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."

283. Further **Grosset** is referred to for Mrs McGuiness**.** In **Grosset,** the claimant, who was employed as a teacher in a secondary school, suffered from cystic fibrosis and as such was a disabled person for the purposes of the EA 2010, from para 36 the Court of Appeal notes:

"36 On its proper construction, s 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of B's disability.

37 ***The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'.*** *In this case, it is clear that the respondent dismissed the claimant because he showed the film. That is the relevant 'something' for the purposes of analysis. This is to be contrasted with a case like Charlesworth v Dransfields Engineering Services Ltd, EAT (Simler J), UKEAT/0197/16/JOJ, unreported, 12 January 2017, in which the reason the claimant was dismissed was redundancy, so that no liability arose under s 15 EqA, even though the redundancy of the claimant's job happened to be brought into focus by the ability of the defendant employer to carry on its business in periods when he was absent from work due to a disability. In that case, therefore, the relevant 'something' relied upon by the claimant was the claimant's absence from work due to sickness, but he was not dismissed because of that but because his post was redundant.*

38 ***The second issue is an objective matter, whether there is a causal link between B's disability and the relevant 'something'.*** *In this case, on the findings of the ET there was such a causal link. The claimant showed the film as a result of the exceptionally high stress he was subject to, which arose from the effect of his disability when new and increased demands were made of him at work in the autumn term of 2013.*"

284. Mrs McGuinness further referred to **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893 (**Hall**) the EAT(Mrs. Justice Laing DBE) was considering Ms. Hall's appeal against a tribunal decision that that Miss Hall had been subjected to ten instances of unfavourable treatment, however held that her s15 claim failed, stating that *"We agree that the disability has to be the cause of the [force]'s action; not merely the background circumstance. We do not think that the motivation for the unfavourable treatment was [Miss Hall]'s disability; rather we conclude that it was the genuine, albeit wrong, belief that Miss Hall in taking sick leave was falsely claiming to be sick. The tribunal therefore does not find that the unfavourable treatment was 'because of something arising in consequence of the disability'.*"

285. Mrs. Justice Laing DBE in **Hall** stated "*I allowed an appeal against the dismissal of the Claimant's claim of discrimination contrary to s 15 of the Equality Act 2010. I held that the Employment Tribunal had erred in its interpretation of s 15 by imposing too stringent a causal link between the Claimant's disability and the unfavourable treatment to which she was subjected by the Respondent. I also held that on the true construction of s 15, the only decision open to the Employment Tribunal was that the claim succeeded."*

286. **In summary** Section 15 requires an investigation of two distinct causative issues:(1) Did A treat B unfavourably <u>because of</u> an identified "something"; and (2) Did that something arise <u>in consequence of</u> B's disability.

Issues in this Tribunal claim

Disability Discrimination Status.

Issues in this Tribunal claim

Disability Discrimination EA 2010 s15 (1) (a)

Discussion and Decision

287. On the first issue s15(1)(a), and in so far as the matter is before the Tribunal, on the evidence adduced the Tribunal does not conclude the January 2012

Stage 1 ARM was something arising in consequence of Ms McGuiness' cancer including its treatment, further the tribunal is satisfied that the November 2012 Stage 2 ARM, October Stage 3 ARM, January 2015 Stage 3 ARM, April 2016 Stage 3 ARM and the May 2017 Arm were not something(s) arising in consequence of Ms McGuiness' cancer including its diagnosis and/or treatment.

288. In so far as the appointment August 2016 Stage 3 ARM was because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment, the outcome of the August 2016 Stage 3 ARM including the targets set were not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

289. Further Tribunal is satisfied that the April 2018 Stage 4 ARM was not something arising in consequence of Ms. McGuiness' cancer including its diagnosis and/or treatment. The Tribunal is satisfied that the decision to dismiss arrived at the April 2018 Stage 4 ARM is not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment.

290. Insofar as the August 2016 Stage 3 ARM arose because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment, the appointment of the August 2016 Stage 3 ARM was proportionate. In particular, it was an appropriate means of achieving a legitimate aim, that is the limitation of workplace absences and reasonably necessary to do so. The setting of the absence target however at the August 2016 Stage 3 ARM was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. In particular it was set in the context that Ms. McGuiness had ceased Tamoxifen.

291. In coming to this assessment, the Tribunal has reviewed the adduced evidence and applied the relevant case law including Pnaiser, Grosset and Hall.

292. Further, and in light of the factual matrix in the present case, having regard to the EHRC 2011 Statutory Code of Practice including para 3.11, the Tribunal is satisfied that there is no relevant matter arising from the Code.

Issues in this Tribunal claim

Disability Discrimination EA 2010 s15 (1)(b)

Relevant Case Law

293. On behalf of Ms McGuiness, reference was made to EAT decision of **Baildon & Thurrock NHS Foundation Trust v Weerasinghe** ICR 2015 305 **(Baildon & Thurrock)**

294. In **Baildon & Thurrock,** a Surgeon with a serious lung condition which fluctuated in its effect on his day-to-day abilities, was able to attend interviews for another job and courses on the continent, despite being on sick leave and in receipt of sick pay, but was unable to come to see his Clinical Director when asked by him to do so. The claimant was disciplined and dismissed, because the decision-maker thought there had been a lack of probity, and assumed (wrongly) that he had been fit enough to see his Director and had not done so.

295. The Employment Tribunal in **Baildon & Thurrock** had held that the employers failures to (a) obtain medical reports and (b) to uphold an appeal against dismissal, together with refusals to (a) refer him to Occupational Health when needed it (b) allow him to travel to Sri Lanka when he request requested to be permitted to do so and (c) to carry over unused holiday from the previous year and threatening to withdraw sick pay, were all acts of unfavourable treatment by the Respondent Trust arising from his disability, contrary to s 15 of the Equality Act 2010. The appeal was allowed as the Tribunal had not applied the correct test, which is in particular to focus on the need to identify two separate causative steps for a claim to be established – first, that the disability has the consequence of "*something"* and second that the treatment complained of as unfavourable was because of that particular "*something".*

296. At para 10 of **Baildon & Thurrock** President J Langstaff notes that the tribunal had taken from the statutory provision of s15 EA 2010 that " *There is no need for the Claimant to show less favourable treatment than a non-disabled comparator, simply 'unfavourable' treatment which, in some way, arises in consequence of the disability . . .".*

297. At para 13 of **Baildon & Thurrock** President J Langstaff comments "Again, *it will be noted that the tribunal did not ask whether the matters arose because of something arising in consequence of disability but simply whether they arose in consequence of disability."*

298. President J Langstaff in **Baildon & Thurrock** set out the correct approach for s15 from para 25:

[25] Section 15 (set out above) involves no question of less favourable treatment. It is therefore distinct from direct discrimination, which does. Nor does s 15 concern discrimination "related to" disability. It would be a mistake to treat it as if it did, for that is a description of statutory provisions superseded by s 15 of the Equality Act 2010.

[26] The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.

[27] In my view, it does not matter precisely in which order the tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it

was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.

[28] The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to.

299. Again, for Ms McGuiness reference is made to **Risby v London Borough of Waltham Forest** UKEAT/0318/15 **(Risby)** in which the EAT notes at para 18:

[18] *If he had not been disabled by paraplegia, he would not have been angered by the Respondent's decision to hold the first workshop in a venue to which he could not gain access. His misconduct was the product of indignation caused by that decision. His disability was an effective cause of that indignation and so of his conduct, as was, of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability. On the Employment Tribunal's own analysis of the facts, this was a case in which there were two causes of conduct that gave rise to his dismissal, one of which arose out of his disability. In concluding otherwise, the Employment Tribunal erred in law. In consequence, it did not go on to answer the question whether the Respondent had shown that the unfavourable treatment to which the Claimant had been subjected, dismissal, was a proportionate means of achieving the legitimate aim… of ensuring and promoting the Respondent's equal opportunities policy. The issue was live….*

[19] *This would appear to be an acknowledgement by the Employment Tribunal that if it had accepted that the Claimant's conduct did arise out of his disability in the sense that we have explained there would have been an alternative to summary dismissal open to the Respondent - a final written warning - and that in that context … that there was nothing that the Claimant could have said to affect the outcome was not a response open to a reasonable employer. The error of law in relation to s 15 therefore is capable*

of affecting the Employment Tribunal's decision on reasonableness as well as on proportionality."

300. Further for Ms McGuiness, reference is made to **Hensman v Ministry of Defence UKEAT/0067/14 (Hensman)**. In **Hensman** a civilian employed by the MOD, lived in shared MOD accommodation. The claimant had pled guilty to a criminal offence and received a custodial sentence. The court accepted Asperger's syndrome and a number of other mental disorders. Following disciplinary proceedings, he was dismissed for gross misconduct. The Employment Tribunal found that the dismissal was unfair because it was outside the range of reasonable responses and that that the dismissal was related to his disability, namely Asperger's syndrome and had breached s 15 of EA 2010.

301. On appeal, the EAT in **Hensman** noted the decision of the Court of Appeal in **Hardy and Hanson plc v Lax** [2005] ICR 1565 (**Lax**) noting from para 41 that it "*set out the correct approach to be adopted by the Employment Tribunal when assessing questions of proportionality … "It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate… I accept that the word 'necessary' . . . has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the Appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission . . . that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it*

is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

302. In **Hensman** from para 43 the EAT sets out that **"***Accordingly it is clear, first, that the role of the Employment Tribunal in assessing proportionality, in contexts such as the present, is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the tribunal itself…. However, secondly, I accept … that the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. This is particularly reinforced in a case such as the present where the Employment Tribunal had already found … that the Respondent had legitimate aims to be served… "*and quoting **Lax** the EAT continues *"This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. . . the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification."*

303. Ms McGuiness also makes reference to **Land Registry v Houghton and others UKEAT/0149/14** (**Houghton**) in which employees**,** who were disabled, had each received a formal warning for disability related absence, leading to the loss of their bonuses under the employer's discretionary bonus scheme. The employment tribunal upheld the employees' claims for disability related discrimination. The EAT dismissed the employer's appeal, deciding that the employees had satisfied the test set out in s15(1)(a) of the Equality Act 2010 with the result that the discrimination had been made out. The EAT rejected the employer's justification defence commenting from para 24 *"… the reason why the Respondent failed to establish the justification defence was*

first, because, having decided to issue a warning for sick absence the manager had no discretion to decide that the employee would not be excluded from receiving the bonus, unlike the position with a warning for conduct (para 29). No explanation for that anomaly was forthcoming. Secondly and it followed from that lack of discretion at any stage, no account could be taken of any improvement in performance post-warning (para 28) and in circumstances where the legitimate aim of the bonus scheme was to reward good performance and attendance.

[25] Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded. I see no evidence of that having happened. Accordingly I am not persuaded that any error of law is shown such as to cause this Appeal Tribunal to interfere with the justification finding."

304. For Ms McGuiness reference is made to the Supreme Court decision in **Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] IRLR 558 **(Naeem)**. Mr Essop was the lead claimant in a group employed by the Home Office. It was common ground that the relevant *"provision, criterion or practice*" ("PCP") was a requirement to pass a Core Skills Assessment ("CSA") as a pre-requisite to promotion to certain civil service grades. The claimants had failed the CSA and were thus not, at that time, eligible for promotion. A report revealed that black and minority ethnic ("BME") candidates and older candidates had lower pass rates than white and younger candidates, although nobody knew why. Proceedings were launched and it was agreed that a pre-hearing review was required to determine whether the claimants were required for the purposes of s.19(2)(b) and/or (c) to prove what the reason for the lower pass rate was. The tribunal held that they did have to prove the reason. The EAT held that they did not ([2014] IRLR 592). The Court of Appeal held that the claimants had to show why the requirement to pass the CSA put the group at a disadvantage and that he or she had failed the test for that same reason ([2015] IRLR 724).

305. The EAT in **Naeem** at [2014] IRLR 520] had held that the pay scheme was not indirectly discriminatory, as chaplains employed before 2002 should have

been excluded from the comparison between the two groups. However, it found that, if it was wrong about that, the pay scheme had not been shown to be a proportionate means of achieving a legitimate aim; there had been various possible ways of modifying the scheme so as to avoid the disadvantage suffered by people such as the claimant, which the tribunal ought to have considered. The Supreme Court, amongst other matters required to consider the impact, in the context of s19 (Indirect Discrimination) the impact of s19(2) (c) A *'cannot show it to be a proportionate means of achieving a legitimate aim*.'.

306. From para 47 the Supreme Court in, **Naeem** described that "*The tribunal had adopted the 'no more than necessary' test of proportionality from the Homer case and can scarcely be criticised by this Court for doing so. But we are here concerned with a system which is in transition. The question was not whether the original pay scheme could be justified but whether the steps being taken to move towards the new system were proportionate. ... Where part of the aim is to move towards a system which will reduce or even eliminate the disadvantage suffered by a group sharing a protected characteristic, it is necessary to consider whether there were other ways of proceeding which would eliminate or reduce the disadvantage more quickly. Otherwise it cannot be said that the means used are 'no more than necessary' to meet the employer's need for an orderly transition. This is a particular and perhaps unusual category of case. The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this Court to do so."*

307. For Ms McGuiness, it was indicated that assistance, on the issue of whether an alleged failure to make allowances could justify a conclusion of disproportionality, could be drawn from the approach taken by a separate Tribunal **Cunningham v Financial Conduct Authority ET/3201141/2018** (**Cunningham**) a decision of a Tribunal in East London from July 2019 which

held that while that claimant's claims including reasonable adjustments failed, the s15 EA 2010 claim succeeded. **Cunningham** was not provided with the submission.

308. It is noted that the Tribunal in **Cunningham**, sets out its position in relation to the s15 EA 2010 claim from para 108. The Respondents in Cunningham accepted that he suffered from serve fatigue in the 207/18 appraisal year and that this was something arising in consequence of his chronic kidney disease. The Tribunal, on the evidence before it concluded that the FCA (the Respondent) treated Mr Cunningham unfavourably because of something arising in consequence of his kidney disease, namely impaired performance caused by severe fatigue. The Tribunal had the benefit of occupational health reports in January 2017 and June 2017 the latter of which confirmed that poor kidney function had caused the symptoms from 2016 and felt able to make findings of fact that his poor reporting to the Board was on the balance of probabilities, caused by the symptoms of his kidney disease. ET in Cunningham set out at para 115 *"However, we find the means adopted; not taking any account of the effect of Mr Cunningham's profound fatigue and poor concentration on his performance, was not a proportionate means of achieving those aims. The discriminatory effect is considerable; because of his illness he performs poorly and because he performs poorly, he does not get a pay rise, does not get a bonus and loses the prestige of being regarded as a good performer. Acknowledging those significant barriers to his erstwhile good performance and making allowance for, taking into account the same, would not have obstructed or hindered those aims. Ignoring them was disproportionate.*

309. Para 116 states: *"The Respondent argues in its submissions on objective justification, that Mr Cunningham made an active choice to perform at a lower level in protest at not being promoted. We do not accept that. His poor performance was caused by his ill health. "*

310. While noting the Tribunal's decision in Cunningham, against the different factual matrix in the present case it is not considered that it is of assistance.

311. On behalf of Ms McGuinness reference was made **O'Brien v Bolton St Catherine's Academy** [2017] IRLR 547, in which the Court of Appeal held that the decision to dismiss a disabled employee was disproportionate and accordingly in breach of section 15 of the EA. The Tribunal noted that there was evidence that the employee was fit to return to work: see Underhill LJ at [56].

312. The Tribunal notes that in **Buchanan v Commissioners of Police of the Metropolis** [2017] ICR 184 (**Buchanan**), a serving disabled police officer was made subject to the "Unsatisfactory Performance Procedure" laid down in the relevant performance Regulations for such officers. He complained to Tribunal that a series of steps taken at the first and second stages of that procedure amounted to discrimination arising from disability. The Employment Tribunal held that the steps amounted to unfavourable treatment because of something arising from the Claimant's disability. The majority held that it was the procedure, rather than its application to the Claimant, which had to be justified; and found for the Respondent on this question. The EAT overturned the decision, the procedure laid down in those Regulations and the policies which the employer developed to apply it allowed for individual assessment in each case at each stage. The steps held by the Employment Tribunal to amount to unfavourable treatment were not mandated by the procedure or by any policy of the Respondent. s 15(1)(b) of the EA 2010 required the Employment Tribunal to consider whether the treatment was justified; and in such a case as this it was not sufficient to ask whether the underlying procedure was justified. **Seldon v Clarkson Wright & Jakes** [2012] ICR 716 SC (**Seldon**) and **Crime Reduction Initiatives v Lawrence** UKEAT/0319/13 (**Lawrence**) were both considered (in Seldon broadly the treatment which was considered was mandated by the policy concerned and that was considered on the facts of **Seldon** to amount to justification).

Issues in this Tribunal claim

Disability Discrimination EA s15 (1) (b)

Discussion and Decision

313. The second arm of s15 (s15(1)(b)) EA 2010 does not arise, other than in so far as, the test for s15(1)(a) has been satisfied for the claim, or part of the claim.

314. In relation to the second issue s15(1)(b) the Tribunal is satisfied on, the evidence adduced, in so far as the appointment **August 2016 Stage 3 ARM** was because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment, the outcome of the **August 2016 Stage 3 ARM** including the targets set were not something arising in consequence.

315. For Ms McGuiness it is argued that argues that the singular issue is whether is whether the treatment was a proportionate means of achieving a legitimate aim. The claimant does not dispute that managing staff absences is a legitimate aim.

316. Ms McGuiness argues that Tribunal requires to carry out a fair and detailed assessment of the employer's business needs and working practices. In this regard the Tribunal was satisfied on the evidence adduced of the impact of workplace absences, that BGas responses reflected an individualised and justified approach.

317. However and in so far as relevant, the Tribunal notes that while ARM has mandated steps, there were a series of discretionary decisions take under the auspices of ARM, in the setting of targets in relation to the **January 2012 Stage 1 ARM, November 2012 Stage 2 ARM, October Stage 3 ARM, January 2015 Stage 3 ARM, April 2016 Stage 3 ARM, August 2016 Stage 3 ARM, May 2017 ARM** were not strictly mandated by the ARM and reflected an individualised and justified approach.

318. Further Tribunal is satisfied that the outcome of the **April 2018 Stage 4 ARM** reflected an individualised and justified approach.

319. With regard to O'Brien, the position in relation to Ms McGuiness remained, on the basis of the Fit Note, that Ms McGuiness was unfit for work. While it is pled for Ms McGuiness that she offered to BGas to provide additional medical evidence, no such evidence was placed before the Tribunal, the Tribunal finds that the April 2019 GP report was not such additional medical evidence. The Tribunal does not in any event accept that such an offer was made to BGas.

320. On the second issue s15(1)(b), the Tribunal is satisfied that, on the evidence adduced, that insofar as the August 2016 Stage 3 ARM arose because of something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment, the appointment of the August **2016 Stage 3 ARM** was proportionate. In particular, it was an appropriate means of achieving a legitimate aim, that is the limitation of workplace absences and reasonably necessary to do so. The setting of the absence target however at the **August 2016 Stage 3 ARM** was not something arising in consequence of Ms. McGuiness's cancer including its diagnosis and/or treatment. In particular it was set in the context that Ms. McGuiness had ceased Tamoxifen.

321. Against the different factual and legal matrix in Naeem it is not considered that it provides direct assistance to the Tribunal.

322. In coming to this view the Tribunal has applied the relevant case law including the approach set out in Baildon & Thurrock, Buchanan, Hensman, Houghton and Rigsby.

323. Further, and in light of the factual matrix in the present case, having regard to the EHRC 2011 Statutory Code of Practice including para 3.11, the Tribunal is satisfied that there is no relevant matter arising from the Code.

Issues in this Tribunal claim

Disability Discrimination EA s 20 & s21(reasonable adjustments)

Relevant Case Law

324. For Ms McGuiness reference is made to **Smith v Churchill Stairlifts** [2006] ICR 542 (**Smith**). While predating the EA 2010, **Smith** sets out:

> *44 There is no doubt that the test …. is an objective test. The employer must take "such steps as it is reasonable, in all the circumstances of the case …" The objective nature of the test is further illuminated by section 6(4). Thus, in determining whether it is reasonable for an employer to have to take a particular step, regard is to be had, amongst other things, to "(c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities".*
>
> *45 It is significant that the concern is with the extent to which the step would disrupt any of his activities, not the extent to which the employer reasonably believes that such disruption would occur. The objective nature of this test is well established in the authorities: see Collins v Royal National Theatre Board Ltd [2004] 2 All ER 851 in which Sedley LJ said, at para 20: "The test of reasonableness under section 6 … must be objective. One notes in particular that section 6(1)(b) speaks of 'such steps as it is reasonable … for him to have to take'."*

325. The Tribunal further notes the Court of Appeal comments in **Griffiths v SSWP** [2017] ICR 160 (**Griffiths**) on need that is required in framing what is said to be the provision, criterion or practice. In Griffiths the PCP was said to be not the absence policy but the underlying requirement reflected in that policy to *"maintain a level of attendance at work so as avoid disciplinary sanctions".*

326. In Carranza it was held that the ET had correctly identified the PCP as the requirement for consistent attendance.

327. While Mrs McGuiness argues that **Duckworth** is relevant, as is said for Ms McGuiness the issue in **Duckworth** was a delay in implementing an adjustment which was relevant to the disability.

328. The issue for the Tribunal is not disadvantage in a general sense but rather whether there was a disadvantage in comparison with people who were not disabled**. Smith (again)** and **RBS v Ashton [2011] ICR 632** para 14

329. There must be a causative link between the PCP and the substantial disadvantage. It is insufficient that to identify that simply that an employee has been disadvantaged and to conclude that had the employee not been so disabled they would not have suffered, ref **Nottingham City Transport v Harvey** UKEAT/0032/12 (**Harvey**) para 17

"[17] *In applying the words of the DDA, and we have little doubt in cases in future dealing with the successor provisions under the Equality Act 2010, it is essential for the tribunal to have at the front of its mind the terms of the statute. Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer and tracing it back to its cause, as … was indicated ... in* ***Smith …*** *it is essential, at the end of the day, that a tribunal analyses the material in the light of that which the statute requires; Rowan says as much, and* ***Ashton*** *reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in* ***Rowan.*** *It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to 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 PCP. …. there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."*

330. Further the Tribunal has reminded itself that is not necessary that the adjustment be completely effectively for it to be reasonable**;** ref **Noor V Foreign and Commonwealth office** [2011] ICR 695 (**Noor**) at para 33 which described the predecessor as "*a statutory direction to take into account the*

extent to which the step under consideration would prevent the effect in relation to which the duty is imposed. Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective."

331. In **Griffiths** it was concluded that there was no reason in principle why absences relating to disability could not be discounted in the context of whether to dismissal. Equally there was nothing unreasonable in an employer having regard to the whole of the employee's absence record when making that decision.

332. In **Griffiths**, the employee who had been employed since 1976, became disabled in 2011 and, following a 66-day absence (of which 62 days related to her disability), was given a formal written improvement warning in accordance with the employer's attendance management policy. She sought 2 adjustments to the application of the policy to her case, in accordance with s 20 of EA 2010. Firstly, she asked the employer not to treat the lengthy absence that gave rise to the written warning as counting against her under the policy, as it related to the period when her disability was being diagnosed and a treatment plan was being put in place. Secondly, she asked the employer to modify its policy to allow her in future to have longer periods of absence before facing the risk of sanctions. When neither was accepted, she presented a tribunal claim asserting that the employer's failure to make the adjustments constituted a breach of its duty under section 20. The tribunal dismissed the claim, holding that, while there was a relevant provision, criterion or practice within section 20(3), namely a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal, the employer's attendance policy applied equally to all employees and did not put the claimant at a disadvantage, so that the duty to make adjustments did not arise, and that, in any event, neither of the proposed adjustments was a "step" it was "reasonable" for the employer to have to take under section 20(3). While the EAT dismissed her appeal, the Court of Appeal held that the relevant PCP had been formulated, but that it was clear that a

disabled employee whose disability increased the likelihood of absence from work ill-health grounds was disadvantaged by it in a more than minor way; that the comparison exercise under s20 EA 2020 required one simply to ask whether the PCP put the disabled employee at a substantial disadvantage compared with a non-disabled employee, and the fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage when it bit harder on the disabled, or a category of them; and that, accordingly, the section 20 duty did arise in that case.

333. In dismissing the appeal that a modification of the PCP would or might remove the substantial disadvantage it caused was in principle capable of amount to a step, the questions whether they were reasonable steps was a matter for the tribunal and that the tribunal was entitled to take the view that the fact the original period of absence was a period a diagnosis was not a reason for ignoring it and that there was no obviously appropriate extension and that a relatively short extension would be of limited value and had been entitled to conclude that the proposed adjustments were not steps that the employer could reasonably expected to make.

334. For Ms McGuinness reference is made to **Whiteley**. In **Whiteley**, it was agreed between the parties that action the employer had taken did amount to a detriment so that if that detriment resulted from the employer's failure to make a reasonable adjustment on account of the employee's absence then her claim would be made out, in addition the Tribunal had the benefit of an expert report, the only issue before the Tribunal was liability. The EAT concluded that the Tribunal had misunderstood and misapplied the expert evidence about the issue.

335. In the Supreme Court decision of **Chief Constable of West Yorkshire Police & Another v. Homer** [2012] UKSC 2015 (**Homer**) Baroness Hale stressed that: *"To be proportionate, a measure must be both an appropriate means of achieving a legitimate aim (and reasonably) necessary to do so."*

336. The claimant asserts that BGas should have obtained an up to date medical evidence at the point of the unfavourable treatment is a relevant factor referencing the ET decision in **Williams v Ystrad Mynach College ET/16000019/11 (Williams)**. The judgment was not provided with the submission.

337. **Williams** is a Tribunal decision from 2011, at the heart of the dispute was whether the college should have allowed Mr Williams to remain on a reduced hours professional academic contract rather than be re-employed on a short-term lecturer contract.

338. **Williams** had suffered bouts of poor health including depression and blood cancer, however the relevant condition for the Tribunal was hydrocephalus (also known as "water on the brain"), a rare condition for which he received a diagnosis in June 2007. If untreated, it can prove fatal. He had a "*shunt*" inserted in September 2007: a form of catheter enabling excess fluid to be reabsorbed elsewhere by the body. The college accepted that, as a result of that condition, Williams was at all material times a qualifying disabled person within the meaning of the provision enacted at Section 6(1) of the EA 2010.

339. From Para 85 the ET set out ***"****the College still needed to provide a service to its students while keeping the claimant on board. This would be perfectly capable of amounting to a legitimate aim if, on the facts, it had indeed operated on the minds of the respondent's decision-makers when terminating the claimant's employment. But it did not. As we found above, regardless of the <u>legal</u> reason for the termination of the claimant's employment (namely, the contractual change that took effect on 1 January 2011), the <u>factual</u> basis for the Principal's actions was his belief that the claimant was simply no longer capable of doing the job and that the new arrangement would minimise the disruption caused by any future absences.*

Even if we had been minded to accept that this was, contemporaneously, a legitimate aim, we would still have concluded that the respondent went about implementing it in a disproportionate manner. This is not just because of its ignorance of the effect of its own actions in changing his contract, or because

of the failure to get up-to-date medical advice when the situation had changed (or to clarify tensions in the advice already provided), or because of the breach of its own capability procedure, or because the real reason was based on improper assumptions drawn from the scantiest of internet research (in the case of the Principal) or previous experience of a merely clerical nature (in the case of Mrs Lippard), or because of the lack of consultation about the effect of the changes or, finally, because it failed to provide the claimant with an impartial appeal against the Principal's decision. Ultimately, we would say that the unfavourable treatment was incapable of objective justification because there was at hand an obviously less discriminatory means of achieving the same legitimate aim, namely the retention of the claimant on his existing permanent contract, but with reduced hours — the very adjustment he sought"

340. Against the different factual matrix, it is not considered that the Tribunal decision of **Williams** is of assistance to the present analysis.

Issues in this Tribunal claim

Disability Discrimination EA s 20 s21(reasonable adjustments)

Discussion and decision

341. For Ms McGuiness it is argued that the (first) Provision Criterion and Practice is not the ARM itself but what is set to be the use of trigger points which Ms McGuinness asserts are *"fixed once set and set at a lower point than recent absence".*

342. The characterisation of the asserted PCP does not however reflect the actual practice. Factually the Tribunal does not accept that trigger points are fixed once set. Ms McGuiness did not move from the Nov 2012 Stage 2 ARM until the October 2013 Stage 3 ARM when she had well in excess of the 2 days set. Further Ms McGuiness was not re-entered in to the ARM in May 2016 as set out above in the findings of fact.

343. While for Ms McGuiness, it is indicated that there was a practice of requiring employees work strict hours or flexitime or rest that can be allocated as a

distinct second PCP, this is not accept on the factual matrix, Ms McGuiness was permitted to take microbreaks, further she did not make she did not make the application for flexible working.

344. It is argued for Ms McGuinness that the asserted first PCP placed Ms McGuiness as a substantial disadvantage as compared with a hypothetical comparator doing her job not having her disability. On the factual matrix in this case that analysis is not accepted. Ms McGuiness' movement through the various ARM stages (with the exception of being invited to the August 2016 Stage 3 ARM) did not arise from her disability status. There requires to be a causative link between the PCP and the substantial disadvantage relied upon. In so far as the appointment of the August 2016 Stage 3 arose from Ms McGuiness' diagnosis and or treatment that, in the assessment of the Tribunal, did not amount to a substantial disadvantage.

345. Similarly, the Tribunal does not accept that the second proposed PCP reflects the factual position in this case. Ms McGuiness was permitted to take microbreaks, further she did not make an application for flexible working.

346. Further the Tribunal does not accept that there was a modification to the asserted PCPs which would or might have removed, what is asserted for Ms McGuiness to be a substantial disadvantage.

347. While reference is made, for Ms McGuiness, to **Whiteley,** against the different factual matrix for this hearing it is not considered that **Whiteley** is of assistance.

348. While for Ms McGuiness reference is made to **Duckworth** is issue was a delay in implementing an adjustment which was relevant to the disability. There was no such delay in the present case.

349. Taking the approach in **Carranza** it is considered that the correct approach to define a PCP in the present case would be to identify the feature of the ARM which causes the disadvantage. In any event there was, on the facts in this case, no substantial disadvantage arising, having regard to **Harvey.**

350. While for Ms McGuinness a number of speculative outcomes are proposed the Tribunal is satisfied on the factual matrix of the present case that the asserted substantial disadvantage did not arise from Ms McGuiness's cancer diagnosis and or treatment.

351. Further and as set out in **Smith** above the Tribunal does not accept that what is sought by Ms McGuiness amount to such steps, as it is reasonable, in all the circumstances of the case, for BGas to take.

352. Further, and in light of the factual matrix in the present case, having regard to the EHRC 2011 Statutory Code of Practice including para 6.14, the Tribunal is satisfied that there is no relevant matter arising from the Code.

353. Having regard to **Griffiths,** absence relating to Ms McGuiness' cancer and/or treatment were discounted. There was nothing unreasonable in BGas having regard to the whole of Ms McGuiness' absence record. Ms McGuiness protected characteristic did not in fact increase the likelihood of absence from work ill-health grounds and was thus not was disadvantaged by it in a more than minor way. Further the Tribunal is satisfied that the adjustments proposed for Ms McGuiness were not steps that BGas could reasonably expected to make.

354. The claimant argues that proportionality necessarily includes a sliding scale of different measures, and so the Tribunal is obliged to consider whether a lesser measure might have achieved the same outcome, however and against the history of absences and the impact upon the business we were satisfied that as set out in **Homer** it was "*reasonably necessary"* for BGas to dismiss Ms McGuiness as set out in BGas's letter of 4 April 2018.

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

356. 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.

Conclusion

357. The Tribunal does not have jurisdiction to consider Ms McGuiness's claim of unfair dismissal against the respondent.

358. Ms. McGuinness' claim for disability discrimination in terms of s 15 of EA 2010 does not succeed.

359. Ms. McGuinness' claim for disability discrimination in terms of ss 20 and 21 of EA 2010 does not succeed.

Employment Judge: R McPherson
Date of Judgement: 29 April 2020

Entered in Register,
Copied to Parties: 04 May 2020