Case No.:1602165/2019
(Admin Code: V)

EMPLOYMENT TRIBUNALS

Claimant: Mr. J B Bithell
Respondent: Ministry of Defence

HELD BY: CVP **ON:** 12th – 16th April 2021
In chambers 6th May 2021
BEFORE: Employment Judge T. Vincent Ryan
Ms. S. Atkinson
Mr. P Bradney

REPRESENTATION:

Claimant: Mr. J. Castle, Counsel
Respondent: Mr. O. James, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant made protected disclosures as alleged in respect of PPE, the boat and mountain bike fleets only;

2. The claimant was subjected to the detriment of being reprimanded in the manner alleged, and of PPE equipment for which he was responsible being inaccurately recorded and his concerns in that regard being dismissed (albeit the recording was allocated to a colleague, nevertheless his concerns were not otherwise addressed) on the ground that:
    a. he made a protected disclosure and
    b. carried out his health and safety activities as a suitably designated employee.

3. The claimant is a disabled person as conceded by the respondent by reason of a physical impairment.

4. The claimant is not disabled by dyslexia.

5. The respondent breached the statutory duty to make reasonable adjustments in respect of the physical feature of the two-storey store and the practices in relation to lifting and carrying kit and equipment up and down stairs, only.

6. The claimant's claim of harassment and direct discrimination in relation to "parking issues" were presented out of time in circumstances when it would not be just and equitable to extend time to the date of the presentation of the claim.

7. The claimant was constructively unfairly dismissed by the respondent on 30th August 2019.

8. The respondent made unauthorised deductions from wages/failed to pay accrued holiday pay totalling £486.25.

9. All the claimant's other claims, that is other than referred to above, fail and are dismissed.

10. Save in respect of the judgment at paragraph 8 above, the remedy to which the claimant is entitled, if any, shall be determined at a remedy hearing on a date and at a venue/in a format to be confirmed. Case management Orders in respect of the remedy hearing and a Notice of Hearing will be issued in due course.

REASONS

1.The Issues: The parties submitted the following agreed list of issues, the complexity and formatting are of their devising; in so far as we have been unable to simplify them any more than we have done we apologise:

FACTUAL ALLEGATIONS

Re: disclosures/health and safety activities

1. Climbing PPE
    a. Did the Claimant raise with Major Seaton and /or Major Wilson, by email and/or verbally, that the climbing PPE paperwork was deficient in summer 2018?
    b. Did the Respondent tell the Claimant to insert 'April 2014' for the date of manufacture and date of first use?
    c. Did the Claimant raise issues with this with?
        i. The Respondent, in late August/early September 2018?
        ii. Lyon, by email on 5 September 2018?
    d. Did Major Seaton, following the Claimant's email to Lyon, summon the Claimant to his office and shout at him?

e. Did the Claimant refuse to insert a date on PPE forms which was incorrect or not verified?

2. Buoyancy aids

   a. Was the Claimant, as part of his role, tasked with fitting buoyancy aids to the Centre's canoes?

   b. Did the Claimant inform the Respondent that the adhesive provided, RiverBond, was inadequate?

   c. Did the Claimant make the Respondent aware that a canoe instructor, Mr Damon Jones, had attached the buoyancy aids to the canoes in a way that was inadequate?

   d. Did the Claimant seek to ensure the buoyancy aids were fitted with due care and skill and the correct adhesive?

3. Mountain bikes

   a. In late 2018/early 2019 were the Centre's fleet of mountain bikes past their regular servicing interval?

   b. Did the Claimant inform Major Seaton of this in person, by telephone and/or by an email on 26 March 2018?

   c. Did the Claimant inform the Respondent that there was insufficient manpower to maintain a fleet of bikes compliant with health & safety checks?

4. Security gate

   a. Did the Claimant inform Major Seaton on 26 March 2019 that the side security gate to the Centre was being left open?

   b. Did the Claimant take steps to the gate to the centre would close automatically, thus ensuring the centre was secure against risks from unauthorised personnel?

Disability (s.6 EqA)

5. Is the Claimant disabled within the meaning of the EqA due to dyslexia, i.e., was the Claimant suffering from a mental impairment that had a substantial long-term effect on his normal day-to-day activities?

6. Did the Respondent know, or could it have been reasonably expected to know that the Claimant was a person with [a] disability/ies, specifically?

   a. Problems with his back, knee, and hip?

   b. Dyslexia?

Workplace issues

7. Did the workplace have the following physical features and/or did the Respondent fail to provide the following provide auxiliary aids:

   a. Was the building on two levels, which required the Claimant to use stairs regularly and to carry equipment up and down stairs?

b. Failed to arrange the workplace or practices to reduce or eliminate the need to carry equipment from one floor to another by hand up and down stairs?

c. Failed to provide a handrail on both sides of the workplace stairs, and/or extension of the current single handrail to cover the full length of the stairs?

d. Failed to provide suitable office furniture?

e. Failed to provide disabled or adequate parking?

Workload issues

8. Did the Respondent fail to provide adequate maternity cover, in that it failed to recruit someone with appropriate skills, qualifications and/or experience to assist the Claimant adequately in fulfilling the workload of the stores?

9. Did the Respondent:

a. Require a consistently high level of physical and engineering work from the Claimant?

b. Understaff the stores following the departure of Ms Howes for maternity leave?

c. Fail to recruit a colleague with appropriate skills, qualifications and/or experience to assist adequately in engineering/repairs tasks;

d. Require that stores staff, including the Claimant, were to carry by hand, up and down stairs to several different locations within the complex, equipment to issue to students on Monday mornings and collect it on Friday evenings, and in particular freshly washed clothing?

e. Take a military-like ethos to the above and any pain caused, or endurance required?

DETRIMENT/UNFAVOURABLE TREATMENT

Respondent's perception of the Claimant

10. Did the Respondent

a. Consider the Claimant to be underperforming?

b. Consider him to be irritating?

c. Consider him to be disobedient?

d. Treat him as though he was considered any of the above?

e. Take a dismissive attitude to the Claimant's concerns about his workload, and his concerns about health and safety?

Allegations of verbal abuse etc.

11. Did the Respondent subject the Claimant to bullying and inappropriate behaviour?

12. Did this include:

a. Major Wilson shouting and swearing at the Claimant in September 2018;

b. Major Seaton failing to take any action following the above being reported to him?

c. Major Wilson verbally threatening the Claimant in Llanrwst boat house in October 2018?

d. Major Seaton failing to take any action following the above being reported to him?

e. Major Seaton verbally abusing and chastising the Claimant on 11 June 2019 in the stores?

13. Did this also include complaints that the Claimant could easily walk to work and should not drive to work?

WHISTLEBLOWING

14. Were the communications made at 1(c)(i), 2(b) and (c), 3(b) and (c) and/or 4(a) above qualifying disclosures, in that they were made in the reasonable belief of the Claimant that:

    a. They were made in the public interest

    b. They tend to show either that:

        i. A person had failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject (S.43B(1)(b))?

        ii. The health and safety of any individual has been, is being or is likely to be endangered (s.43B(1)(d)?

15. Alternatively, were these communications merely ‘statements of position’?

16. Were these qualifying disclosures communicated to the Respondent (i.e., were protected disclosures)?

17. Was the communication at 1(c)(ii) made in accordance with a procedure authorised by his employer, in that WSM Arkless allowed the Claimant to do so?

18. Alternatively, was the communication at 1(c)(ii) made in circumstances where:

    a. The Claimant reasonably believed that the information disclosed, and any allegation contained in it was substantially true;

    b. It was not made for personal gain;

    c. The Claimant had previously made a disclosure of substantially the same information to his employer (s.43G(2)(c));

    d. It was reasonable in all the circumstances to make the disclosure (i.e., was a protected disclosure)?

HEALTH AND SAFETY

19. Was the Claimant designated to carry out activities in connection with preventing or reducing risks of health and safety as regards:
    a. Climbing PPE;
    b. The canoe fleet;
    c. Mountain bikes;
    d. Overall security of the Centre.
20. By the matters at [1]–[4], did the Claimant carry out or propose to carry out such activities?
21. Alternatively:
    a. Was the Centre a place where there was no health and safety representative or safety committee?
    b. By the matters at [1]–[4], did the Claimant bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

WHISTLEBLOWING/HEALTH AND SAFETY DETRIMENT

22. Was the Claimant subjected to any detriment as set out in [10]–[12] due to:
    a. His protected disclosures?
    b. Health and safety activities?

DISCRIMINATORY DETRIMENT/UNFAVOURABLE TREATMENT

23. *EqA, section 13 Direct discrimination*
    a. Was the Respondent's treatment of the Claimant at [10]–[13] significantly influenced, consciously or subconsciously, by the Claimant's disability?
    b. Was this treatment less favourable than the Respondent would treat a hypothetical comparator?
    c. Are there facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned? If so:
        i. Can the Respondent show it did not contravene this provision?
24. *EqA, section 15, Direct Discrimination arising from disability*
    a. Did the Claimant, as a consequence of his disability:
        i. Perform merely satisfactorily his work?
        ii. Have an inability to work at a high rate for a prolonged period of time?
        iii. Raise issues with the work rate of the stores and his inability to cope?

b. Was the Claimant subjected to unfavourable treatment as per [10]–[13]?

c. Did that treatment arise in consequence of the Claimant's disability, in that it was a more than trivial reason for the treatment?

d. Are there facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned? If so:

   i. Can the Respondent show it did not contravene this provision?

e. Was this treatment a proportionate means of achieving a legitimate aim?

Provisions, Criteria or Practices (PCP)

25. For the matters at [7]–[9]:

   a. Are any of them a PCP?

   b. Would they apply to persons who were not disabled?

26. *EqA, section 19, Indirect discrimination on grounds of disability*

   a. Did any PCP (or combination thereof) put a person sharing the Claimant's disabilities at a particular disadvantage compared to people who were not disabled, in that they would:

      i. Be unable to meet the already high workload required due to difficulty lifting and carrying objects around the stores, or manoeuvring objects to be repaired, without considerable additional effort?

      ii. Take additional time to perform administrative tasks, slowing his work rate?

      iii. Be caused more pain and discomfort in the course of their work, and/or it would take them longer to complete?

      iv. Find it more difficult to "fit in" to the ethos of the armed forces?

      v. Risk having the above attributed to an alleged lack of ability and/or poor time management?

   b. Did they put the Claimant at those disadvantages, in that?

      i. He was unable to work at a high rate for a prolonged period of time, and this was attributed to an alleged lack of ability and/or poor time management?

      ii. Major Seaton considered him to be underperforming, including as manifested in the 11 June 2019 incident.

      iii. He was subjected to the treatment at [10]–[13].

   c. Are any applicable PCPs a proportionate means of achieving a legitimate aim?

27. *EqA, sections 20 & 21, Reasonable adjustments*

   a. Did any PCP (or combination thereof) put the Claimant at any of the following disadvantages in relation to a relevant matter in comparison

with someone who is not disabled (physically, due to dyslexia, or in combination):

1.1.1. Inability to meet the already high workload required due to difficulty lifting and carrying objects around the stores, or manoeuvring objects to be repaired, without considerable additional effort?

1.1.2. He took additional time to perform administrative tasks, slowing his work rate?

1.1.3. His work caused him more pain, discomfort, and/or took longer to complete?

1.1.4. He found it more difficult to "fit in" to the ethos of the armed forces than an able-bodied person?

1.1.5. The above were attributed to an alleged lack of ability and/or poor time management?

1.1.6. Major Seaton accusing him of underperforming, including as manifested in the 11 June 2019 incident?

1.1.7. He was subjected to the matters at [10]–[13]?

1.2. Were any of the above disadvantages "substantial"?

1.3. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

1.4. If so, were there steps that were not taken that could have been taken by the Respondent to avoid the disadvantage, such as:

i. Providing regular assistance to the Claimant in the performance of his engineering and repair duties?

ii. Provide adequate staffing levels to assist with manual handling tasks?

iii. Recruitment of a colleague with appropriate skills, qualifications and/or experience to assist adequately in engineering/repairs tasks

iv. Arranging the workplace or practices to reduce or eliminate the need to carry equipment from one floor to another by hand up and down stairs?

v. Treating the Claimant's disabilities with understanding and forbearance in that, knowing the Claimant was disabled, he would be unable to undertake certain tasks either at the same rate or at all without physical discomfort?

vi. Providing suitable handrails?

vii. Providing suitable office furniture?

viii. Providing disabled or adequate parking?

1.5. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

28. *EqA, section 26, Harassment*

a. Alternatively, did the Respondent's conduct at [10]–[13] constitute unwanted conduct related to a protected characteristic?

b. Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

29. *EqA, section 27, Victimisation*

a. Was the Claimant subjected to the detriment by set out at [10]–[13] by the Respondent?

b. Was this because the Claimant did a protected act, namely:

i. Reminding/informing the Respondent he was disabled and unable to perform certain activities as if he was not disabled;

ii. Requesting, formally or informally, reasonable adjustments.

CONSTRUCTIVE UNFAIR DISMISSAL

30. Was the Claimant constructively dismissed?

a. Did the Respondent breach:

i. The express term prohibiting unlawful discrimination (Clause 7.1)?

ii. The implied term of mutual trust and confidence, i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?

b. If so, did the Claimant "affirm" the contract of employment before resigning?

c. If not, did the Claimant resign in response to the breach of contract (was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)?

31. If the Claimant was dismissed, was the principal reason for dismissal one falling within:

a. Section 103A ERA;

b. Section 100 ERA;

32. If the Claimant was dismissed, was the repudiatory breach of contract caused by the Respondent's unlawful discrimination per [23]–[29] above?

33. *Time limit/limitation issues*

a. Regarding the ERA detriment claims at [22], do the matters at [10]–[12] constitute an act extending over a period or a series of similar acts or failures by the Respondent until:

i. 7 August 2019, being the date of the Claimant's purported resignation?

ii. Alternatively, 11 July 2019 being the date of the incident at 12(e)?

b. Should the Tribunal extend time to any of the dates above on the basis that it was not reasonably practicable to present the claim within the time limit?

c. Regarding the EqA claims at [23]–[29], are the matters set out above at [7]–[13] "conduct extending over a period", in that they are continuing acts that constitute an ongoing situation or a continuing state of affairs until:

i. 7 August 2019, being the date of the Claimant's purported resignation?

ii. Alternatively, 11 July 2019 being the date of the incident at 12(e)?

d. Should the Tribunal extend time to any of the dates above on a '*just and equitable'* basis?

UNPAID ANNUAL LEAVE – WORKING TIME DIRECTIVE

34. What was the Claimant's weekly pay, without overtime?

35. Was the Claimant's overtime sufficiently settled and regular to amount to normal remuneration?

36. How long was that overtime, and what was the remuneration?

37. How much annual leave has already been credited, and what is the total unpaid annual leave due?

2. **Background findings of fact**:

2.1. **The respondent (R)**:

2.1.1. R operates what is referred to a Joint Service Mountain Training Wing (**JSMTW**) which comprises several sites, including the centre at Llanrwst (the JSMTW centre at Llanrwst just being referred to as "the centre" or "Llanrwst" henceforth) which are used to deliver adventurous training Leader and Instructor courses in mountaineering, mountain biking, skiing, climbing, canoeing, and kayaking. The claimant was employed in the stores at the Llanrwst as Storekeeper/Driver. The centres are staffed by military, ex-military, and civil service personnel with administrative, stores, maintenance, and catering staff in addition to the instructors; the courses are both residential and non-residential and vary in duration from a week to several months. Whilst some course attendees will come partially equipped (such as by using their own mountain bikes by choice) Llanrwst is fully equipped and the equipment is bought, serviced, and maintained by staff at the centre.

2.1.2. Mr. A C Wilson, a retired Major, is employed by R as Quartermaster responsible for Llanrwst; he is based at another centre or unit in Anglesey which is the JSMTC headquarters for Wales (referred to

hereafter as Anglesey). Mr Wilson is responsible, as safety advisor, for policies and he is responsible for the supply, purchase, and distribution of equipment throughout Wales. Llanrwst is a sub-unit under Mr Wilson's authority. Mr Wilson gave evidence at the hearing.

2.1.3. Each sub-unit has an Officer Commanding (**OC**), responsible for the various functions at that site, including catering, cleaning, and delivery of courses. Major A Seaton is the OC at Llanrwst; he line-manages approximately ten military and civilian staff at the centre, and in addition there are contracted staff members providing catering and cleaning services who are not directly managed by him. Major Seaton gave evidence at the hearing.

2.1.4. Significant others who were named but did not give evidence:

2.1.4.1. Wing Sergeant Major (**WSM**) Arkless – the claimant's day to day line manager;

2.1.4.2. Lance Corporal Bullard – a "Temporary Employed Elsewhere" (**TEE**) who was sent to Llanrwst by his regiment to develop outdoor skills with a view to becoming an instructor and for leadership training, and who provided some (limited) administrative, driving, and instructional support at Llanrwst;

2.1.4.3. Corporal D. Falloon - a **TEE** who provided administrative, driving, and instructional support at Llanrwst. Cpl Falloon principally manged military transport. He assisted in the stores when available.

2.1.4.4. Ms Sarah Howes – Storekeeper. Ms Howes was in post when the claimant was recruited by R. She was a skilled and experienced administrator with a high level of IT skills, but she was not physically or technically as experienced and able as the claimant when it came to maintaining and repairing bikes and boats. Ms Howes was to deal with the claimant's induction and to train him in the use of R's computerised accounting system called Management of the Joint Deployed Inventory (**MJDI**) following his recruitment in October 2017; she did not, for whatever reason, spend much time on, or effectively complete, the claimant's induction and training on MJDI. She took maternity leave from the end of August 2018 until September 2019 (the claimant's employment having terminated in August 2019). Ms Hawes therefore worked with the claimant in the stores from October 2017 until late August 2018, ten months; he worked-on without her until taking sick leave, from which he did not return to work, in June 2019, ten months;

2.1.4.5. Staff Instructor Officer (**SIO**) Damon Jones – he was the Subject Matter Expert for canoeing and kayaking who was responsible for the canoe fleet. He was available to assist with some maintenance of equipment but principally of the fleet and he was not qualified or

experienced to the level of the claimant such as to enable him to make technical repairs or to upgrade boats.

2.1.4.6. Manoj Piaja – he is the Quarter Master Department Deputy based at Anglesey; he assisted the claimant with the use of MJDI when Ms Howes was on maternity leave and gave some guidance but did not train the claimant on its use.

2.1.4.7. Staff Sergeant J. Pratt – he is the Storekeeper at Anglesey; he assisted the claimant with the use of MJDI when Ms Howes was on maternity leave and gave some guidance but did not train the claimant on its use.

2.1.4.8. Corporal K. Pritchard – he was a full-time army reservist (in the Territorial Army) who was seconded to Llanrwst to cover for Ms Howes' maternity leave of absence, subject to the requirements of his regiment and having to return periodically to its field hospital. He was a willing additional pair of hands in the store, but he had no formal training nor much experience in stores work; he had no working knowledge of MJDI; his relevant IT skills were rudimentary; he had no background in, or experience of, outdoor pursuits such as went on at Llanrwst and he was not mechanically skilled in relation to the Centre's equipment. Cpl Pritchard had some experience of ascertaining from colleagues what supplies they required, passing on that information for orders to be placed by someone familiar with MJDI, collecting and distributing it. He got on well with the claimant. Cpl Pritchard resigned to take up a civilian job in December 2019.

2.1.5. The ethos at Llanrwst and Anglesey: The centres are military establishments; their security measures are low-key, but a system of security alerts applies as with any military establishment. Llanrwst was effectively hiding in plain sight; it has a partial perimeter fence and a pedestrian gate that is left open during the day but is locked at night so that it is safe to open windows in the sleeping quarters; the vehicular access is secured day and night. Uniforms are not generally, and in fact rarely worn, although the use of some military titles is observed. There is a recognised "chain of command" but everyday work and management is generally dictated by the mix of military and civilian staff affected and the outdoors, adventurous, activities at the core of the establishment's function. The regime is not what one might stereotypically describe as barracks style, square-bashing, spartan or "militaristic". All that said, those in the military would defer, as trained, to officers or give orders to subordinates, and ultimately that would be done robustly if an instruction was challenged or not completed satisfactorily; voices would be raised on occasions. Generally, however we find that there was a relatively relaxed atmosphere where the practical took precedence over form or status, as befitting an outdoor pursuit centre. The military and civilian staff were for the most part, apparently, outdoor-types who generally made do and got on without fuss or ceremony. The ethos was to get on with the job in hand with the minimum fuss. We find it was not a place where orders

were barked out and people were deliberately dismissive of each other's needs as they enforced discipline. There was however a lack of sensitivity at times to the claimant's needs, perhaps as a combination of the military background of Mr Wilson and Major Seaton but also the hands-on, self-sufficient, practical approach of those, both military and civilian, who are engaged in adventurous outdoor pursuits. We find that the claimant generally shared this ethos, trying to "get on" with the minimum fuss as befitted his experience and enthusiasm for outdoor door pursuits, albeit he found the ultimate military discipline challenging; he tried not to complain or draw attention to himself when he found work physically challenging although he did make known his issues over workload in terms of the amount of work that he felt was required in what he considered short-time. He resisted drawing attention to any physical limitations that he had.

2.2. **The claimant**: The claimant was the only other witness to give evidence at this hearing, in addition that is to Mr Wilson and Major Seaton. The claimant has a background and history of being keen on outdoor pursuits and of mechanics. He has travelled widely pursuing these activities both professionally and personally, as attested in his witness statement at paragraphs 1 – 8, which were not challenged. The claimant lives with dyslexia and attended a specialist school unit for his secondary education. He was involved in a serious road traffic accident in 2016 and sustained disabling injuries to his back and hip, (similarly affecting his knees and gait) as conceded by the respondent; these disabling conditions will be referred to as collectively as "musculo-skeletal conditions". He was employed by R at Llanrwst from 17th October 2017 until his resignation, by notice of 8th August 2019 and effective 30th August 2019, which he terms a constructive dismissal. He was employed as Storekeeper/Driver.

2.3. **Outline chronology**:

2.3.1. In January 2017 the claimant attended at Llanrwst for interview under the guaranteed interview scheme (to facilitate access to employment for people with disabilities) and whilst not initially appointed was put on a reserve list. The claimant was not a soldier and remained a civilian worker whilst employed by the respondent. During the interview Maj Seaton asked the claimant whether he realised that he had ticked the guarantee interview box and Mr Wilson asked about the nature of the disabilities. The claimant explained the musculo-skeletal conditions and that he was receiving treatment emphasising that whilst he could climb stairs and lift, repetition or excessive use caused him difficulties. Mr Wilson asked him whether it would affect his ability to perform his duties and the claimant confirmed he did not think so in general, subject to the comment about repetitious lifting and use of the stairs. Whilst the respondent's witnesses said they had no recollection of these details the tribunal finds that they were put on notice of all such matters by the claimant, that more likely than not he accentuated the positive as he wanted the job but that Maj Seaton and Mr Wilson either discounted what

they had been told or just failed to explore the issue properly in keeping with their ethos, as described above.

2.3.2. In October 2017 the claimant was appointed as storekeeper as the preferred candidate was no longer available; the role included maintenance of a fleet of 20 mountain bikes and approximately 45 canoes, and partial responsibility for laundering kit.

2.3.3. The centre would generally have 6 weeks' prior notice of any course booking; the maximum number of students on each course was 12. Most courses ran Monday – Friday with kit issued on the Monday and being collected in for cleaning/laundry/inspection on the Friday. In terms of the store, Monday mornings and Friday afternoons were busy with kit distribution and collection with the midweek being used for routine servicing, maintenance, ordering and requisitioning and administrative work. Some students used their own kit such as their own mountain bikes, but the centre maintained a fleet of 20 bikes.

2.3.4. In June 2018 an issue arose over buoyancy aids.

2.3.5. August 2018 – Ms Howes commenced maternity leave.

2.3.6. September 2018 an issue arose over PPE paperwork.

2.3.7. 4th September 2018 – incident involving Mr Wilson and the claimant as Anglesey ("the first incident with Mr Wilson").

2.3.8. 22 November 2018 incident involving Mr Wilson and the claimant in the boathouse at Llanrwst ("the boathouse incident").

2.3.9. **Early March and 25th** March 2019 the claimant informed Maj Seaton that a considerable number of the fleet of mountain bikes needed servicing and some were past their scheduled service date.

2.3.10. Maj Seaton emailed the claimant about the prioritisation of his work.

2.3.11. in April 2019 owing to a reorganisation the claimant was required to reapply for his role although this was not a competitive process, and he was duly appointed. This effectively amounted to a promotion.

2.3.12. May/June 2019 Maj Seaton became conscious of what he considered to be a dip in the claimant's performance.

2.3.13. 11 June 2019 there was an incident involving Maj Seaton and the claimant; the claimant left the site and did not return to work but commenced a period of sick leave where the certified absence was due to stress ("the final incident").

2.3.14. 25 June 2019 the claimant presented a formal written grievance to R.

2.3.15. 23 July 2019 Richard Wells' email: In the light of the claimant's grievance his line management was passed Richard Wells. The claimant perceived that Mr Wells wanted the claimant to return to work as soon as possible, even without resolution of the issues raised in his grievance. On 23rd July 2019 Mr Wells sent emails to the claimant that the claimant describes in his witness statement as "the final straw in terms of leaving the MoD" (678-679). Mr Wells confirmed firstly that as from 12th July 2019 his pay would be reduced by 50% and he would not receive pay from 10th September (this was in view of his protracted sick leave and in accordance with HR advice). At 10.31 on the same date Mr Wells wrote to the claimant about meeting off-site to discuss his employment. He did not envisage any "realistic control measures…. That will ensure a satisfactory working environment" for the claimant and invited his "thoughts". Regarding a supported transfer, as the claimant was not happy to return to work in Llanrwst nor to work in Anglesey, the only options were in Yorkshire, Scotland, Northern Ireland, or Germany; the workplace assessment was put on hold pending any return to work.

2.3.16. 8 August 2019 the claimant tendered his resignation and notice of termination of his employment on 30 August 2019.

3. **Claim specific findings of facts**: We made the following findings of fact specific to the listed issues, where the issues are repeated in italics and our findings are not italicised (and we have tried to simplify the format and paragraph identification, which remains as complex as the list of issues requires of us). All page references are to the hearing bundle unless otherwise stated:

3.1 Climbing PPE

3.1.1 Did the Claimant raise with Major Seaton and /or Major Wilson, by email and/or verbally, that the climbing PPE paperwork was deficient in summer 2018? Yes. Safety regulations require that PPE is inspected at six monthly intervals and assessed before use; the equipment must be sourced from reliable and identifiable sources and ought to have a record of the date of manufacture and of first use. Textiles were understood to have a lifespan of five years and metalwork of 10 years. The regulations changed such that textiles' lifespan was extended to 10 years and metalwork to an indefinite period, always provided that there was regular suitable inspection and maintenance by a competent person. Because of missing paperwork, Mr Wilson introduced a scheme, which in evidence he accepted was not best practice, whereby the dates of manufacture and of first use were deemed to be April 2014 rather than the actual accurate dates. He felt that he had sufficient assurance as to the provenance of the equipment in store and that it had been properly maintained throughout its life such that he was not concerned about the exact accuracy of the record in terms of dates; Mr Wilson was concerned that the alternative to making up dates was to discard serviceable equipment. On Tuesday 4th September 2018 the claimant discussed the planned dating of PPE records

with Maj Seaton expressing his disquiet at the proposed inaccurate recording of dates of manufacture of first use which he thought were safety critical matters. That date is evident from Major Seaton's email to the claimant of 6 September 2018 at page 379. On 5 September 2018 (page 380) the claimant raised enquiries about Mr Wilson's proposal with a company that had provided PPE training, Lyon, and he sent a copy of his enquiry to Maj Seaton, and WSM Arkless. It is apparent from the wording of his question to Lyon that he did not consider it safe to relabel the PPE and create new PPE datasheets; this was the interpretation shared by Maj Seaton.

3.1.2 Did the Respondent tell the Claimant to insert 'April 2014' for the date of manufacture and date of first use? Yes; see above.

3.1.3 Did the Claimant raise issues with this with:

3.1.3.1 The Respondent, in late August/early September 2018? Yes; see above.

3.1.3.2 Lyon, by email on 5 September 2018? Yes; see above.

3.1.4 Did Major Seaton, following the Claimant's email to Lyon, summon the Claimant to his office and shout at him? On 6 September 2018 Maj Seaton emailed the claimant, copying in Mr Wilson, WSM Arkless and Mr Piaja telling the claimant to come and see him in his office and reminding him instructions given on 4th September not to take the matter further except in-house using SOPs as a point of reference. Major Seaton referred to the claimant's actions as a direct contradiction to instruction and an unwarranted escalation of the issue. That email is at page 379. The claimant duly attended at Major Seaton's office where he was given what the tribunal considers having been a firm ticking off. Major Seaton denies shouting and gave credible evidence; the claimant gave credible evidence too; neither provided any corroboration. The tone and content of the email at page 379 leads the tribunal to infer that the claimant was ticked off, upbraided, and it further accepts that voices were raised for emphasis and to reflect frustration, but the tribunal considered it unlikely that there was shouting. The claimant was robustly chastised and upbraided.

3.1.5 Did the Claimant refuse to insert a date on PPE forms which was incorrect or not verified? Yes. The claimant refused to carry through Mr Wilson's planned re-dating of records. It appears from email correspondence that he was not the only storekeeper to take the same view. The issue arose during Ms Howes' maternity leave and the task of relabelling PPE and creating PPE records reflecting the assumed date of April 2014 was delegated to Cpl Pritchard. It was an administratively burdensome task.

3.2 Buoyancy aids

3.2.1 Was the Claimant, as part of his role, tasked with fitting buoyancy aids to the Centre's canoes? Upon the claimant's appointment it became apparent that the repair and upgrading of the canoe fleet was outstanding. The claimant was charged with fitting new buoyancy bags to each canoe and lacing the side of each canoe with rope to allow the attachment of objects so that if the canoe was to capsize the equipment would be fixed to the canoe and not float away. Instructions on how to perform these tasks were issued in writing and pictorially, and in addition to rope an adhesive called RiverBond was supplied.

3.2.2 Did the Claimant inform the Respondent that the adhesive provided, RiverBond, was inadequate? The claimant attempted to carry out the work as above on a canoe but overnight the said adhesive failed. Based on his experience as a marine engineer he concluded that RiverBond was not a strong enough adhesive and that an alternative product named Sikaflex would be required together with lacing over the top of the buoyancy bags for additional protection. He used some Sikaflex that he had of his own and placed an order for more such stock, but it took several months to arrive.

3.2.2 Did the Claimant make the Respondent aware that a canoe instructor, Mr Damon Jones, had attached the buoyancy aids to the canoes in a way that was inadequate? In June 2018 SIO Jones took some buoyancy bags and river bond adhesive with him and attempted to upgrade a canoe whilst with some students on a beach in Anglesey. Unfortunately, whilst returning to Llanrwst with the canoe on a trailer the adhesive failed, and some bags dropped out; the lacing had not been done. The claimant informed Maj Seaton.

3.2.3 Did the Claimant seek to ensure the buoyancy aids were fitted with due care and skill and the correct adhesive? Yes, as above. There also ensued on 6 September 2018 at pages 972 – 983 email correspondence during which the claimant questioned the buoyancy aid issue, making comments and proposals. This all went beyond using the correct adhesive but that was part of the claimant's concern as he wished to source what he considered a better product. The claimant's correspondence was with Maj Seaton and WSM Arkless amongst others.

3.3 Mountain bikes

3.3.1 In late 2018/early 2019 were the Centre's fleet of mountain bikes past their regular servicing interval? The regime was that mountain bikes would receive a routine service after 60 hours usage and that forks would be maintained after 50 hours usage. Routine maintenance and/or servicing could be required on each bike at fortnightly intervals because of heavy usage. At the material time the claimant indicated that of 20 bikes 10 were serviceable (when up to 12 may be required for any particular course). On 26 March 2019 the claimant sent an email to Maj Seaton and WSM Arkless (page 1041) confirming servicing requirements of the fleet of bikes and sending a picture copy of the board on which details of the bikes were set out (page 488 – 489); the tribunal accepts that these are accurate records. Some of the bikes had passed the regular servicing intervals and others were very close to the requirement for servicing. There is further correspondence at pages 304 – 307 between the claimant and Maj Seaton which accurately reflects the situation regarding the fleet of bikes.

3.3.2 Did the Claimant inform Major Seaton of this in person, by telephone and/or by an email on 26 March 2018? Yes, as above.

3.3.4 Did the Claimant inform the Respondent that there was insufficient manpower to maintain a fleet of bikes compliant with health & safety checks? The claimant was the only member of staff charged with and qualified to carry out the servicing. Major Seaton was an expert, but this was not part of his role. Cpl Pritchard had no experience or expertise in this area. A local resident named Mr Cornfield was called in but only occasionally to assist. The claimant expressed the view that there was a need for each bike to undergo 2 to 3 hours

of service and repairs every fortnight and that more time was needed to allow for a thorough attempt to bring servicing records up to date. It was the claimant's stated view that a concerted effort was required to bring the fleet up to an acceptable standard and that he would have to dedicate time to this but there was insufficient time and staff. Major Seaton instructed the claimant to spend less time on cleaning, maintenance and, repair and to replace parts more often such as bearings, as this was quicker. Major Seaton instructed the claimant to ensure that half of the fleet were on an 80-hour service schedule and the other half on a 60-hour service schedule, to use the full fleet to share the wear and tear, and to ensure that the bikes were all put out for issue and use. On 5 December 2018 the claimant sent an email to Maj Seaton (page 435) confirming that he was trying to catch up on servicing and he stated that 10 bikes were past their service schedule and 11 pairs of forks required major service; he was concerned because the PPE checks were "well behind" and that neither he nor Cpl Pritchard had sufficient time to complete the required tasks. In response Maj Seaton issued his priorities which in respect of bikes (listed fourth in a list of four) included that the claimant was to prepare the bikes for a particular course being run for students from Sandhurst, and he stated "forks to be serviced before and after Christmas break"; Cpl Pritchard was to prioritise the PPE paperwork.

3.4 Security gate

3.4.1 Did the Claimant inform Major Seaton on 26 March 2019 that the side security gate to the Centre was being left open? On 26th of March 2019 a delivery person who was authorised to enter the centre gained unauthorised access to the canteen and helped himself to a breakfast. The site was fenced on three sides. The pedestrian gate was kept open during the day and the vehicular gate was more secure. Security fell within Maj Seaton's direct responsibility and he was satisfied with arrangements. The delivery driver's opportunistic theft of a breakfast did not reflect on the adequacy of perimeter security measures. The claimant took it upon himself to research various gate closing mechanisms and he also took it upon himself to fit a bungee cord to the pedestrian gate so that it would self-close. Major Seaton informed the claimant that he had the situation under his cover, that it was not the claimant's concern and that he was to remove the bungee cord. The claimant complained that the side gate or pedestrian gate was open, and he did not like people having access to the centre through it without authority. Major Seaton wanted the gate open for ease of access during the day but the ability to lock it at night so that accommodation windows could be left open for ventilation without the risk of anyone entering the accommodation block without authority. The site security measures had been assessed by the Royal Military Police and was subject to audit and review. Major Seaton was not only the person responsible for security of the site, but he was also appropriately trained. He understood the claimant's preference to keep the side gate locked but he did not consider this a security matter or that the claimant was raising any issue of health and safety; he just wanted the claimant's bungee rope removed.

3.4.2 Did the Claimant take steps to the gate to the centre would close automatically, thus ensuring the centre was secure against risks from unauthorised personnel? The claimant affixed the bungee cord as explained but the tribunal does not find that this ensured the centre was secure against

risks from unauthorised personnel and does not find that prior to such a step the centre was insecure from unauthorised personnel.

Disability (s.6 EqA)

3.5 Is the Claimant disabled within the meaning of the EqA due to dyslexia, i.e., was the Claimant suffering from a mental impairment that had a substantial long-term effect on his normal day-to-day activities? The claimant has been diagnosed as living with dyslexia; he attended a specialised unit at secondary school to assist him in the light of his dyslexia. The claimant's dyslexia is a long-term condition. The claimant tended not to take notes when being instructed although his email correspondence attests his ability with written communication. The evidence is suggestive also that the claimant was able to keep track of tasks that were required, to diarise and prioritise, and to maintain accurate records. There was no evidence to suggest that the claimant's memory was impaired by his dyslexia as he asserted (save for his impact statement). The tribunal was not satisfied based on the evidence heard and read that the claimant lived with any substantial disadvantage regarding memory and speed of writing as a result of dyslexia. The claimant gave evidence that his difficulty in operating the respondent's MJDI system was down to training provided to him by Ms Howes, inadequate as to the standard and time spent, its complexity and the pressure of other tasks upon him; his skills were more technical engineering than administrative. He was however capable of conducting extensive research as he saw fit such as into alternative sources of equipment, corresponding directly with suppliers, and raising queries of trainers. Whilst the claimant asserts that his memory and written skills were slow and his use of IT impaired by dyslexia the tribunal finds the fact that any such impairment was minor or trivial; the claimant satisfied the tribunal as regards his memory, written skills, and IT skills (save in respect of using the technical and esoteric MJDI system) and that he did not suffer a significant let alone a substantial disadvantage because of dyslexia. The tribunal also noted that Cpl Pritchard, who was not said to live with dyslexia, also encountered difficulty operating the MJDI system.

3.6 Did the Respondent know, or could it have been reasonably expected to know that the Claimant was a person with [a] disability/ies, specifically:

3.6.1 Problems with his back, knee, and hip (Musculo-skeletal conditions)? When the claimant applied for the post, he ticked the box on the application form for a guaranteed interview. This signified that he had a disability. During his job interview the claimant was asked whether he had ticked the box deliberately and whether any disability would affect his performance. The claimant explained his musculoskeletal conditions and at least started to explain the difficulties that he would encounter on stairs with frequent use and with lifting if it was heavy and repetitive. Occupational Health certified that the claimant was fit for work. At the end of 2017 there was an issue about the availability of parking near to the centre and the claimant was challenged as to why he did not walk from his home nearby but instead drove and occupied a parking space; the claimant confirmed that he could not walk far because of difficulties with his knee and hip. This was known to both colleagues and senior staff such as Major Seaton. The claimant spoke openly about orthopaedic and physiotherapy appointments between May 2018 and September 2018 and that by March 2019 nothing further could be done for him regarding those musculoskeletal conditions. All this information was canvassed with Major

Seaton who authorised the claimant's absences for appointments as required. The respondent knew of the claimant's musculo-skeletal conditions, that he was undergoing treatment, and that surgery had been recommended but that ultimately, he was advised nothing further could be done for him.

3.6.2 *Dyslexia*: The claimant did not mention to the respondent that he was diagnosed with dyslexia, but he mentioned the name of the school that he went to; the claimant's secondary school was part of "mainstream" secondary education although it had a unit for students with dyslexia. The claimant did not say that he attended the school because of the unit or that he was educated in the unit. The respondent was aware that the claimant was not competent in the use of MJDI, needed some assistance and that he was critical of his induction and training by Ms Howes; it was aware that he tended not to take notes. The respondent had no reason to suspect that the claimant's memory was impaired or that he was slow in writing or acquiring skills and using IT. The respondent did not know and ought not reasonably have known that the claimant was, or considered himself, disabled by dyslexia.

Workplace issues

3.7 Did the workplace have the following physical features and/or did the Respondent fail to provide the following provide auxiliary aids:

3.7.1 Was the building on two levels, which required the Claimant to use stairs regularly and to carry equipment up and down stairs? Yes.

3.7.2 Failed to arrange the workplace or practices to reduce or eliminate the need to carry equipment from one floor to another by hand up and down stairs? The system in operation was for any member of staff or instructor who was on hand to make themselves available to assist each other generally in relation to lifting and carrying; this was not a specific arrangement to accommodate the claimant. The system of mutual assistance only assisted the claimant if and when there was a spare pair of hands available. Prior to her maternity leave Ms Howes was available and in her absence, Cpl Pritchard was available to assist the claimant. There was however always the need to carry equipment from one floor to another by hand up and down stairs. The storage of equipment was not rearranged to facilitate it being kept at ground level. There were no mechanical aids. Throughout the claimant's employment there was the same need to carry equipment from one floor to another by hand up and down stairs.

3.7.3 Failed to provide a handrail on both sides of the workplace stairs, and/or extension of the current single handrail to cover the full length of the stairs? The claimant suffered a stroke on 18 April 2019 following which he was referred to occupational health. The report was sent to Maj Seaton on 2 May 2019 (page 560). The report highlighted issues not only with the consequences of the stroke but also his need for a hip replacement operation which was long overdue. The occupational health advisor confirmed her opinion that the claimant was fit for work with regards to the stroke but that he was struggling with hip pain and would benefit from a workstation assessment with particular reference to a more supportive chair. Her interpretation of domestic legislation was that the claimant was likely to be considered a disabled person because of pain as it would have a significant impact on his normal daily activities. She advised a workstation assessment. It was following the consultation that led to this report that the claimant commenced correspondence with the respondent,

specifically Maj Seaton, regarding the assessment and furniture requests. On 7 May 2019 Maj Seaton asked the claimant to complete a Reasonable Adjustments Service Team Referral Form. The claimant completed the form and, in the section, asking the effect of his condition on his working life he referred to the stairs as being a problem because his work was split between two levels and there was only a single handrail to the left when going upstairs; he did not believe that one rail conformed to regulations and he had a problem with his left wrist. He requested a second handrail to the right-hand side (page 570). Maj Seaton did not refuse the claimant and the respondent did not fail to address the issue over the stairs and handrail following the occupational health report referred to but there was delay until 7 June when the assessment was requisitioned by Maj Seaton. On 10 June 2019 the respondent's provider DBS people services confirmed in an email to Maj Seaton, and copied to the claimant, that the request for the assessment was being processed and contact would be made with the claimant (page 626). On 14 June 2019 the claimant began a long period of sickness absence and in the light of his grievance against Maj Seaton line management responsibilities transferred to Richard Wells. The assessments were suspended pending the claimant's return to work; the claimant did not return to work. Suspension was standard practice and related to the requirement of the claimant's involvement in assessing the workplace. The tribunal also finds that there was a differentiation by Maj Seaton between a workstation assessment of a workplace assessment where he felt that structural works such as to the stairwell should be dealt with under separate bureaucratic and administrative processes. None of these matters were in any event considered by the respondent or raised by the claimant until May 2019. The tribunal finds that Maj Seaton was somewhat dismissive in that he attached no priority or urgency to the matter, and he adopted a bureaucratic approach which lacked sensitivity, in keeping with the ethos we have described above. He reinforced with the claimant that he must not research matters online and was only to obtain any auxiliary aids through the respondent's internal procedures. This gave the impression of him being more dismissive or defensive than may have been the case as he was not refusing to cooperate and to provide.

3.7.4 Failed to provide suitable office furniture? As above the question of furniture only arose following the May 2019 occupational health referral. Until this time the claimant had not indicated that he experienced a substantial disadvantage by virtue of his office furniture. There was no refusal to provide suitable office furniture. There was a delay in its consideration. There was delay in triggering the administrative processes. The tribunal made the same findings in respect of Maj Seaton's approach as set out in the above paragraph 3.7.3.

3.7.4 Failed to provide disabled or adequate parking? The on-site parking was reserved for the arrival of vans used to transport students on training courses. Staff parking was provided in an adjacent chapel car park. There were no designated parking spaces. The claimant was permitted to park as and when he required in the staff parking provided. Some of the claimant's colleagues commented on why he needed to drive to work when he lived close to the centre. He explained why he chose to do so, and this was in terms of his disability. The claimant did not request either a designated parking space at the staff parking or for parking facilities at the centre instead of at the chapel. As far

as the respondent was aware at the material time the claimant was content with parking at the chapel and this did not create a substantial disadvantage to him.

Workload issues

3.8 Did the Respondent fail to provide adequate maternity cover, in that it failed to recruit someone with appropriate skills, qualifications and/or experience to assist the Claimant adequately in fulfilling the workload of the stores? The respondent allocated Cpl Pritchard to assist in the stores during the period of maternity leave. The tribunal has already described above Cpl Pritchard's levels of skills and experience . In these circumstances Cpl Pritchard was a willing additional pair of hands, but he lacked the experience and expertise required by the claimant in Ms Howes' absence; he was not a like-for-like replacement. In addition, Cpl Pritchard experienced back pain and he was therefore somewhat limited regarding manual handling. When the claimant expressed his concern about Maj Wilson's projects to relabel and re-date PPE, this extensive bureaucratic task was delegated by Maj Seaton to Cpl Pritchard, and it took up a considerable amount of his time. In addition to Cpl Pritchard the expectation was that other people such as Messrs Bullard and Falloon would help if and when available but that was always the case and there were not always available; they did not represent maternity cover.

3.9 Did the Respondent:

3.9.1 Require a consistently high level of physical and engineering work from the Claimant? The claimant's role was of storekeeper and there was a requirement that he would carry out servicing and repair work in respect of the canoe fleet and bike fleet. He was not expected to produce a consistently high level of engineering work and in fact he spent more time and put in more efforts regarding the bike fleet than the respondent deemed necessary (such as when major Seaton told him to replace rather than repair and clean parts). As regards physicality there would be a busy period on Monday with the distribution of kit to newly arrived students and then collection in and storage on a Friday. At the end of the week also there were laundry duties which involves carrying kit and clothing upstairs to be washed. There were physical activities throughout the week commensurate with being a storekeeper and servicer of equipment, but the tribunal finds that during the weekdays, that is after the distribution of kit on a Monday before its collection a Friday, there was nothing particularly onerous as to amount to "a consistently high level of physical work".

3.9.2 Understaff the stores following the departure of Ms Howes for maternity leave? Insofar as corporal Pritchard was not a like-for-like replacement, and given his lack of experience, his skillset and his physical limitation, whilst the staff number was not under the norm the stores were not so well staffed as previously.

3.9.3 Fail to recruit a colleague with appropriate skills, qualifications and/or experience to assist adequately in engineering/repairs tasks; the respondent did not recruit staff to carry out engineering and repair tasks during the period of maternity leave. A local resident would come to the centre to assist occasionally but not regularly. During the time in question, the tribunal understands, he came to the centre only a couple of times. The respondent did not agree with the claimant as to the servicing requirements and took a more relaxed view as to the frequency of mechanical works on the bike fleet and the depths to which jobs were done. The respondent's view was that the task was

manageable by the claimant whilst corporal Pritchard carried out the administrative work related to PPE as his main priority.

3.9.4 Require that stores staff, including the Claimant, were to carry by hand, up and down stairs to a number of different locations within the complex, equipment to issue to students on Monday mornings and collect it on Friday evenings, and in particular freshly washed clothing? Yes.

3.9.5 Take a military-like ethos to the above and any pain caused, or endurance required? The tribunal has already made a finding of fact as to the ethos at the centre. There was a command structure and there was discipline but principally a spirit of self-sufficiency and that one should just get on with the job. The staff would look after each other insofar as they were able in time permitted. There was an expectation that staff would bring forward their problems but that they would first and foremost try to resolve them practically, albeit commensurate with the respondent's internal procedures. There was a top-down management style. On occasions there would be raised voices through frustration and irritation as might happen in any workplace albeit ultimately the expectation was that military command would be enforced. The tribunal does not accept at face value the claimant's references to "a military - like ethos" where he appears to be suggesting that it was more akin to stereotypical square-bashing and barracks life.

DETRIMENT/UNFAVOURABLE TREATMENT

Respondent's perception of the Claimant

3.10 Did the Respondent

3.10.1 Consider the Claimant to be underperforming? No. The claimant's Performance Appraisal Report (**PAR**) dated 30 April 2019 for the period 1 April 2018 to 31 March 2019 is at pages 1023 – 1026 and it is by and large a positive appraisal. The end of year performance summary says that he met performance standards set for him and that he was carrying out his role effectively; Maj Seaton commented that the claimant needed to develop his ability to prioritise work and recognise that his "drive for perfection sometimes gets in the way of progress", having previously commented within the report that the claimant's drive to save money and repair equipment whilst being "laudable" was at times an overdone strength; "a more efficient option would be to replace rather than repair equipment". This record is consistent with the plausible and credible witness evidence of both Maj Seaton and Mr Wilson which the tribunal accepts.

3.10.2 Consider him to be irritating? Yes at times. Contrary to established practice and the wishes of his line management the claimant returned damaged equipment directly to a supplier on one occasion (he thought incorrectly that the suppler was Palm) and the claimant returned a helmet directly to the (wrong) company, "**the Palm incident**", and on another occasion (as mentioned above with regard to PPE) he emailed a training provider directly with a query about Mr Wilson's scheme to re-date records ("**the Lyon incident**"). This irritated both Mr Wilson and Maj Seaton. The irritation over contacting the supplier was because the respondent, and in particular Mr Wilson, wanted to maintain reasonable control over sourcing and resourcing issues keeping track on any

that arose and dealing with them centrally; Mr Wilson understandably did not want individuals within each centre taking up matters on an individual basis when they could have wider implications. The claimant would take it upon himself on occasions to carry out research and look at alternative sources of provision outside known and established contracts. Whilst in part the respondent welcomed the use of initiative this latter trait is part of what was referred to in the PAR above by Maj. Seaton. The respondent operated administrative systems and wanted to maintain control of their use. The claimant's line management was irritated when he acted independently because it did not suit their management procedures.

3.10.3 Consider him to be disobedient? In respect of the Palm incident and the Lyon incident the respondent's managers considered the claimant to be disobedient. In respect of the Palm incident the claimant wilfully went outside the established practice. In respect of the Lyon incident, he had been expressly told not "to go directly to outside organisations" with issues, but where he had any issue, such as with the PPE documentation, he was to raise it first with his line managers using SOPs as his reference point; if he believed that they were incorrect then the concerns would be raised with the quartermaster's department (confirmed in Maj Seaton's email of 6 September 2018 at page 379).

3.10.4 Treat him as though he was considered any of the above? Yes, in relation to the Palm incident and the Lyon incident. Mr Wilson spoke to the claimant about the Palm incident and Maj Seaton both emailed and spoke to the claimant about the Lyon incident making it clear that he had gone outside procedure, disobeyed what he was told, and that this conduct was irritating. They did not think he was underperforming but, as described in the PAR, they had some concerns about his performance, and they made this known.

3.10.5 Take a dismissive attitude to the Claimant's concerns about his workload, and his concerns about health and safety? The respondent's managers considered that the claimant's workload was not beyond his grade. During Ms Howes' maternity leave and with the limited assistance available from Cpl Pritchard (and others as and when they were available) the claimant was finding it difficult to keep up with the workload efficiently and in accordance with the set standards. The respondent did not appreciate this and expected the claimant to get on with the job without complaint; to that extent they were dismissive of his concerns regarding workload. The respondent's managers did not dismiss his concerns regarding the health and safety issues that he raised in relation to the canoe fleet and bike fleet although they did not share the extent of his concern; Maj Seaton sought alternative ways of addressing the issues about servicing, maintenance, and repair; he gave priorities; he suggested alternative ways of working; he sought to reassure the claimant and this was not a dismissive attitude; the respondent considered that the claimant could work more efficiently and be better organised so that to an extent he was creating a problem for himself and also that he thought he knew better than Maj Seaton. Similarly, Maj Seaton did not see the need for the claimant to involve himself in issues relating to the security gate as the matter was adequately covered and the claimant was unnecessarily interfering. The respondent was however dismissive of the claimant's concerns regarding the PPE documentation,

continuing with the project of re-dating documentation and merely allocating it to corporal Pritchard instead of the claimant. In his oral evidence to the tribunal Mr Wilson conceded that his project of re-dating was not "best practice" and in hindsight it was not something that ought to have been done. When the claimant raised the matter, the job was taken from him but so in effect was Cpl Pritchard who was dedicated then to the burdensome administrative task of re-dating the records with an assumed date of purchase and first use.

Allegations of verbal abuse etc.

3.11 Did the Respondent subject the Claimant to bullying and inappropriate behaviour? The tribunal finds that there was no campaign of bullying and inappropriate treatment against the claimant for any reason. There were isolated incidents when the claimant was taken to task over particular issues when voices were raised, and language used that was not appropriate between a line manager and their report and which could be understood by the claimant to amount to intimidating or hostile words. The incidents, save for the Lyon incident, were not related to health and safety concerns that were raised or the claimant's disability. In so far as either Mr Wilson or Maj Seaton bore in mind previous conduct of the claimant when speaking as described below, the accumulation of events related to similar behaviour by the claimant in the past (not following instructions or not making due progress with work as instructed but doing it his way).

3.11.1 Did this include:

3.11.1.1 Major Wilson shouting and swearing at the Claimant in September 2018: this allegation relates to the Palm incident where a helmet strap was defective, and the claimant sent it back to the company he thought was the supplier, but he sent it to the wrong company. Mr Wilson gave firm instructions to the claimant not to contact suppliers and there was a "heated one-way discussion" in which Mr Wilson spoke sternly and loudly, effectively upbraiding the claimant, raising his voice. The tribunal does not find that there was swearing. Mr Wilson spoke in a way that was unwanted by the claimant; Mr Wilson's purpose was not to harass the claimant but to get his message across in a firm way and to rebuke the claimant; the claimant felt the harassing effect because he had merely made an innocent mistake and he was not used to being spoken to in that manner at work. This finding is based on the grievance interviews and eyewitness accounts at page 762, page 792, and page 796 as well as the witness evidence of the claimant and Mr Wilson.

3.11.1.2Major Seaton failing to take any action following the above being reported to him? The Palm incident occurred at Anglesey and when the claimant returned to the centre, he mentioned it to Maj Seaton. Maj Seaton said words to the effect of leave it to him and he would deal with it. He took no further action. The tribunal finds that Maj Seaton considered that Mr Wilson was within his rights to take up the matter with the claimant and the claimant was in the wrong. He considered the issue closed and that it did not merit any further intervention. The tribunal does not find that this was with the purpose of bullying or being inappropriate but that the claimant felt the lack of action was intimidating and hostile. Having said that he would take up the matter with Mr Wilson, it was inappropriate Maj Seaton not to do so.

3.11.1.3Major Wilson verbally threatening the Claimant in Llanrwst boat house in October 2018? Whilst in the boathouse on this occasion Mr Wilson expressed his irritation and exasperation that the claimant had raised with him an issue over the ordering of paper napkins. Mr Wilson thought this was a trivial matter and not something that he wished to take any time over, but it was something that the claimant persisted with in emails. Mr Wilson considered that an aspect of the claimant's conduct was to get hold of an issue "like a dog with a bone" and not to let go, to carry on raising matters as if they were more important than they were, such as the ordering of paper napkins. The tribunal finds that Mr Wilson expressed his frustration but considers that the claimant's version of events at paragraph 105 paragraph 106 of the claimant's witness statement to be implausible; the claimant purports to quote verbatim a lengthy monologue by Mr Wilson but he did not produce any notes made contemporaneously or any recording. The tribunal considers that some words apparently quoted may have been used, as they will have stuck in the claimant's mind, but overall, he is relating his impression of a conversation that Mr Wilson denies. Mr Wilson was not concerned with the napkins and thought he was being bothered with trivia; he expressed frustration. That may have been appropriate; he was not bullying. The claimant took it to heart against a wider background of dissatisfaction with the respondent and viewed subjectively, and sensitively. The tribunal is unable to find that the words alleged were spoken. There was no independent witness to this brief exchange.

3.11.1.4Major Seaton failing to take any action following the above being reported to him? The tribunal finds as it did in paragraph 3.11.1.2 above.

3.11.1.5Major Seaton verbally abusing and chastising the Claimant on 11 June 2019 in the stores? On 10th June 2019 shortly after 4.30 (by which time the claimant would hope to have left the store) a mountain bike group returned to the centre and an instructor commented that she needed the bike computers to be fitted. The claimant explained that there had been issues with getting them all working, and he left out for her what she needed for her and the students to set them up, saying it was late and he would check them the following morning if they fitted them that afternoon. The instructor's handwritten version is p629, which includes that the claimant gave her a box of parts and said the instructions were up on the board. The instructor complained to Maj Seaton. Maj Seaton had already been discussing the problem with the bike computers with the claimant and had instructed him to order new computers via the Quarter Master Department, but the claimant had not done so; he considered that this is what the claimant should do if he was unable to calibrate the computers and that his failure was a deliberate failure to follow an instruction; furthermore Maj Seaton considered the claimant's approach to the instructor to be unprofessional and inappropriate. Following the instructor's complaint Maj Seaton went to see the claimant in the stores and there was a heated conversation. Both parties raised their voices at times, although the claimant was "mainly calm" (Maj Seaton's statement at para 84). The tribunal does not find that there was shouting but voices were raised, and Maj Seaton was exasperated and frustrated; he made this clear. In a text message subsequently (p.630) the claimant described this as a "bollocking". It was reasonable for the claimant to understand it as such, meaning he was being reprimanded for failing to follow a managerial instruction such that the computers were not calibrating and then he left it for an instructor to set up the

bikes for the course. The claimant thought the instructor did not mind being asked; she did, and she so complained. Major Seaton was taking up the subject matter of the complaint. The claimant did not like being spoken to as he was, and he did consider this to create an intimidating and hostile environment.

3.11.1.6 Did this also include complaints that the Claimant could easily walk to work and should not drive to work? The claimant lived near to the centre; there was no on-site staff parking but there was nearby available parking in a chapel car park. Owing to the shortage of available spaces the claimant was asked why he drove to work and did not walk. When he was first asked by his colleagues, those colleagues had no reason to suspect that he had a physical impairment amounting to disability. The claimant explained his disability. The claimant did not want to be asked the question, but it was a reasonable question when first asked. The claimant says that the question was repeatedly asked, and his answer was doubted on a couple of occasions including in the presence of Maj Seaton. The claimant's colleagues expressed scepticism about his reason, and he felt self-conscious explaining it; he did explain it. The questions and the sceptical comments were unwanted; they embarrassed the claimant particularly when it occurred on more than one occasion. The claimant was allowed to park in the chapel car park. Maj Seaton was aware of the questioning but accepted the claimant's explanation effectively of musculo-skeletal disability and allowed the claimant to continue parking in the carpark at the chapel. Once the claimant had explained the situation it was no longer an issue for Maj Seaton. Some of his colleagues continued to question the claimant about hm not walking to work; this embarrassed the claimant who did not like attention being drawn to any physical limitation in the ethos that prevailed, and to which he largely subscribed.

WHISTLEBLOWING

*3.12 Were the communications made at 1(c)(i) (**re-dating PPE documents**), 2(b) (**inadequate adhesive being used on buoyancy aids**) and (c) (**SIO Jones attempt to attach the buoyancy aids**), 3(b) **(mountain bikes and their servicing records**) and (c) (**inability to maintain safety checks on the bikes**) and/or 4(a) (**the security gate**) above (in the list of issues) qualifying disclosures, in that they were made in the reasonable belief of the Claimant that:*

3.12.1 They were made in the public interest: the centre was used for the training of military personnel reliant upon the provision of safe equipment in a challenging natural environment and conditions. Significant numbers of military personnel trained at the centre each year and there were many centres employing the same systems using the same equipment and provisions. The tribunal is unable to estimate the number of students and instructors affected by the operations in the JSMTC, but the tribunal is satisfied as a fact that there were very many. There were deficiencies in the amended recording of PPE documents which would mislead as to the actual date of purchase and first use. RiverBond was found to be an inadequate adhesive to use on buoyancy aids on at least one occasion and an alternative adhesive was known by the claimant from experience to be better. SIO Jones and his students had carried out an ineffective upgrade of buoyancy aids on a beach in Anglesey. At various times during the relevant period most bikes in the bike fleet had either passed the planned service date or were rapidly approaching it with insufficient time to

fully service, maintain, and repair them with the available staff. A pedestrian side gate was put in place for security reasons was unlocked during the day. All these matters were therefore of public interest and the claimant believe them to be so.

3.12.2 They tend to show either that:

3.12.2.1A person had failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject (S.43B(1)(b))? There is a legal obligation on service providers to ensure the health and safety of those availing of the service. With the exception of the security gate each of the other matters described in paragraph 3.12 were matters indicating that the obligation to provide a safe service would be breached.

3.12.2.2The health and safety of any individual has been, is being or is likely to be endangered (s.43B(1)(d)? With the exception of the security gate, all the other deficiencies found and described in paragraph 3.12 tend to show endangerment to health and safety.

3.12.2.3 Alternatively, were these communications merely 'statements of position'? The claimant wanted the security gate to be self-closing and to lock so that it was secured both day and night. The centre's perimeter is only partially fenced in any event. The gate was deliberately left open during the day in accordance with security, and health and safety assessments, including an audit by the Royal Military Police. Perimeter security did not fall within the claimant's ambit. He stated his position and sought to make his own adjustment to the gate so that it self-locked. In all the circumstances permitting the gate to be unlocked during the day did not tend to suggest any breach of legal obligations or endangerment to health and safety.

3.12.2.4 Were these qualifying disclosures communicated to the Respondent (i.e., were protected disclosures)? Each of the above disclosures was made to the respondent as described at some length in our earlier findings of fact.

3.12.2.5 Was the communication regarding PPE made in accordance with a procedure authorised by his employer, in that WSM Arkless allowed the Claimant to do so? Yes. WSM Arkless was aware that the claimant was preparing an email to Lyon enquiring about Mr Wilson's project to re-date PPE documentation and records. He authorised it; he was the claimant's immediate line manager.

3.12.2.6 Alternatively, was the communication regarding PPE made in circumstances where:

3.12.2.6.1 The Claimant reasonably believed that the information disclosed, and any allegation contained in it was substantially true; Mr Wilson has conceded that the practice of redating PPE documentation and records was not best practice. The claimant's disclosure was true.

3.12.2.6.2 It was not made for personal gain; the reason for the disclosure was the claimant's concern as to issues of health and safety. It was not made for personal gain.

3.12.2.6.3 The Claimant had previously made a disclosure of substantially the same information to his employer (s.43G(2)(c)); prior to the claimant's email to Lyon, he had discussed the matter with Maj Seaton, and Major Seaton refers

to that conversation in his email to the claimant complaining about a breach of instruction (not to raise the matter externally).

3.12.2.6.4 It was reasonable in all the circumstances to make the disclosure (i.e., was a protected disclosure)? The claimant's concerns were treated dismissively by the respondent. The claimant wanted some corroborative or supporting advice from those entrusted to train personnel in the use of PPE. The claimant had the permission of his immediate line manager to send an email to Lyon about the issue.

HEALTH AND SAFETY

3.13 Was the Claimant designated to carry out activities in connection with preventing or reducing risks of health and safety as regards:

3.13.1 Climbing PPE: yes, until such time as the task was partially delegated to Cpl Pritchard (in so far as paperwork was concerned) following the Lyon issue and the claimant's refusal to re-date the records.

3.13.2 The canoe fleet: the claimant was responsible to service, maintain and repair the canoe fleet and thus he was responsible to prevent or reduce health and safety risks to users.

3.13.3 Mountain bikes: the claimant was responsible to service, maintain and repair the bike fleet and thus he was responsible to prevent or reduce health and safety risks to users.

3.13.4 Overall security of the Centre: No. Maj Seaton was designated to carry out activities in connection with preventing or reducing risks to health and safety in relation to security at the centre. This did not fall within the claimant's remit in the stores.

*3.14 By **the disclosures in relation to climbing PPE, buoyancy aids, mountain bikes, and the security gate**, did the Claimant carry out or propose to carry out such activities?* Yes, as found above.

3.15 Alternatively:

3.15.1 Was the Centre a place where there was no health and safety representative or safety committee? There was no health and safety committee.

*3.15.2 By **the disclosures in relation to climbing PPE, buoyancy aids, mountain bikes, and the security gate**, did the Claimant bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?* Yes, and according to the findings of fact above, save in respect of the security gate where the claimant was given a clear explanation as to why this did not amount to a security risk or endangerment to health and safety when it was left unlocked during the working day.

WHISTLEBLOWING/HEALTH AND SAFETY DETRIMENT

*3.16 Was the Claimant subjected to any detriment due his protected disclosures and health& safety activities?*3.16.1 The respondent did not consider that the claimant was underperforming.

3.16.2 The respondent considered the claimant irritating when he would not follow instructions or let go of relatively minor or trivial issues despite instructions such as when he persisted in carrying out his own enquiries into alternative sources of providing equipment, including paper napkins. He spent time searching online rather than following the established practices and procedures. In such matters he was considered by Mr Wilson to be “like a dog with a bone”.

3.16.3 The respondent considered the claimant to disobedient in respect of the Lyon, Palm, and bike computer issues (in the latter case not ordering new ones when instructed). In respect of each of these matters the respondent, through either or both Mr Wilson and Maj Seaton chastised the claimant and in doing so raised their voices. The only such issue where chastisement was materially influenced by a protected disclosure and health and safety activity was the Lyon issue. Maj Seaton had instructed him not to involve a third party in his concerns but to keep the matter in house; the claimant persisted with his disclosure and he emailed Lyon which led to him being spoken to as he was by Maj Seaton.

3.16.4 The claimant was treated as if he was disobedient in respect of the three isolated issues (Lyon, Palm, and bike computers) but only in respect of the Lyon issue was the treatment materially influenced by the claimant’s protected disclosures and health and safety activities.

3.16.5 The claimant perceived harassment and inappropriate behaviour. The tribunal finds that the persistent questioning and scepticism about the claimant’s disability by his colleagues in the context of car parking was harassing and inappropriate but was not related to protected disclosures or health and safety; different colleagues at different times, ignorant of the claimant’s musculo-skeletal conditions until he explained them (but curious and intolerant as to why he drove to work when he lived locally), questioned him as to why he did not walk to work, but Maj Seaton accepted his explanation and did not hear the repeated questions (in evidence saying “absolutely” not and we accept that evidence). Maj Seaton’s conduct towards the claimant in relation to the Lyon incident was related to protected disclosures and health and safety (but not any protected characteristic).

3.16.6 Mr Wilson’s behaviour to the claimant in September 2018 and Maj Seaton’s failure to take action about it was specific to the nature of the matter in hand, namely the claimant acting on his own and contrary to established practice in sending equipment back to a supplier but then to the wrong supplier and had nothing to do protected disclosures or health and safety activities; the tribunal finds as a fact that this conduct was not materially influenced by those factors.

3.16.7 Mr Wilson’s behaviour to the claimant in the boathouse in October 2018 and Maj Seaton’s failure to take action about it was specific to the nature of the matter in hand namely a trivial concern about the correct ordering of paper napkins and had nothing to do with protected disclosures or health and safety activities; the tribunal finds as a fact that this conduct was not materially influenced by protected disclosures or health and safety activities.

3.16.8 Maj Seaton raised his voice to the claimant on 11 June 2019 in relation to bike computers not being calibrated and the claimant suggesting to an instructor that she and her students set up the computers. The tribunal finds as a fact that this conduct was not materially influenced by protected disclosures or health and safety activities.

DISCRIMINATORY DETRIMENT/UNFAVOURABLE TREATMENT

3.17 EqA, section 13 Direct discrimination

3.17.1 Was the Respondent's treatment of the Claimant significantly influenced, consciously or subconsciously, by the Claimant's disability? The tribunal has made findings of fact above as to the said treatment and finds further that the only conduct of which the claimant complains that was related, or materially influenced, by his disability was the repeated questioning and stated scepticism about why the claimant did not walk from home to work but chose to drive and therefore to take up a parking space; this questioning was by various colleagues and not management once the Musculo-skeletal conditions were explained; the questioning stopped eventually when Maj Seaton clearly had no further issue with the claimant parking at the chapel; the claimant did not raise a grievance or complaint to the respondent about his colleagues' questioning at the time; Maj Seaton was not aware of this being an issue for the claimant requiring action.

3.17.2 Was this treatment less favourable than the Respondent would treat a hypothetical comparator? The claimant explained to his colleagues why he chose to drive to work in terms of his physical disability, the Musculo-skeletal conditions. The claimant's colleagues expressed their scepticism. The tribunal infers that the claimant's colleagues would not have persisted in questioning and doubting an explanation given by a colleague who did not live with a disability in the same situation, that is where an explanation was given for the need to park in the available spaces.

3.18 EqA, section 15, Discrimination arising from disability

3.18.1 Did the Claimant, as a consequence of his disability:

3.18.1.1 Perform merely satisfactorily his work? The claimant's work met expectation and grade requirements, subject to some criticism in the PAR. The criticisms related to the claimant's methods of working in trying to minimise expense and his time management repairing rather than replacing items, rather than being in any sense related to his disability.

3.18.1.2 Have an inability to work at a high rate for a prolonged period of time? No. The claimant's evidence, which the tribunal accepts, was that he did work at a high rate for prolonged periods of time. The issue was the volume of work and the inexperience and lack of qualification of Cpl Pritchard in providing maternity cover for Ms Howes. The claimant was meticulous and conscientious.

3.18.1.3 Raise issues with the work rate of the stores and his inability to cope? The issue related to the volume of work with inadequate support; the claimant was being meticulous and conscientious; the respondent was content for him to follow practices and procedures, spending less time on

research and replacing parts rather than repairing or making good. The claimant raised the matter in terms of requiring more assistance and more dedicated time to carry out tasks.

3.18.1.4Was the Claimant subjected to unfavourable treatment as above? The tribunal has already made its findings of fact as to treatment.

3.18.1.5Did that treatment arise in consequence of the Claimant's disability, in that it was a more than trivial reason for the treatment? The only treatment that the tribunal has found in fact arose in consequence of the claimant's disability was the repeated questioning and scepticism of his colleagues about the need for a parking space. The claimant's compromised ability to walk significant distances and the need to drive to work to avoid pain and discomfort arose in consequence of the claimant's disability. The claimant's colleagues, in the presence of Maj Seaton on one occasion, questioned and challenged him about this. This embarrassed him and intimidated him.

3.18.1.6Was this treatment a proportionate means of achieving a legitimate aim? The respondent had limited staff parking facilities and the tribunal considers its legitimate aim was to maximise the use of its facilities. It was a proportionate means of achieving this aim to enquire once as to why someone who lived near to the centre needed to drive to work. The questioning continued after the claimant explained that he lived with a physical impairment amounting to disability such that he could not walk that distance without pain and discomfort. The claimant's colleagues expressed their cynicism and scepticism, doubting the claimant's explanation and that he had any disability.

3.19 Provisions, Criteria or Practices (PCP)

Claimed PCPs:

a. *Was the building on two levels, which required the Claimant to use stairs regularly and to carry equipment up and down stairs?*

b. *Failed to arrange the workplace or practices to reduce or eliminate the need to carry equipment from one floor to another by hand up and down stairs?*

c. *Failed to provide a handrail on both sides of the workplace stairs, and/or extension of the current single handrail to cover the full length of the stairs?*

d. *Failed to provide suitable office furniture?*

e. *Failed to provide disabled or adequate parking?*

f. *Did the Respondent fail to provide adequate maternity cover, in that it failed to recruit someone with appropriate skills, qualifications and/or experience to assist the Claimant adequately in fulfilling the workload of the stores?*

g. *Require a consistently high level of physical and engineering work from the Claimant?*

h. *Understaff the stores following the departure of Ms Howes for maternity leave?*

i. Fail to recruit a colleague with appropriate skills, qualifications and/or experience to assist adequately in engineering/repairs tasks;

j. Require that stores staff, including the Claimant, were to carry by hand, up and down stairs to a number of different locations within the complex, equipment to issue to students on Monday mornings and collect it on Friday evenings, and in particular freshly washed clothing?

k. Take a military-like ethos to the above and any pain caused, or endurance required?

3.19.1 Are any of them a PCP? The stores were on two levels which required the claimant to use stairs regularly and to carry equipment up and down stairs. The established practices included the claimant's taking equipment from the first floor to the ground floor to issue it and then returning it at the end of each week. Similarly, kit had to be collected on the ground floor and brought upstairs for laundering. There was no handrail. The claimant used standard provision office furniture towards the end of his employment with the intervention of OH requested the provision of adapted office furniture which request was in hand at the time of his resignation.

3.19.2 The respondent provided adequate parking facilities for the claimant. The provision of maternity cover was not like-for-like but was adequate to assist the claimant with lifting and carrying, albeit to a reduced level when Cpl Pritchard was assigned the PPE documentation; there was no understaffing. The maternity cover could have been better, but it was not a PCP to recruit poorly or to understaff. There was no PCP to the effect that the claimant was required to perform a high level of physical or engineering work albeit the physical demands on a Monday morning and Friday afternoon were greater than the rest of the week; the claimant was required to do less engineering in terms of maintenance than he voluntarily undertook. He was required to lift and carry kit, equipment and clothing up and down stairs repeatedly and this amounted to a practice that put him at a substantial disadvantage compared to a person who did not live with disabilities. The claimant did his best to carry on without complaint in accordance with the elements of the ethos that he too adopted as an out-door type; he was self-conscious and embarrassed because he wanted to live up to his own expectations in such surroundings.

3.19.3 Would they apply to persons who were not disabled? Ms Howes and Cpl Pritchard, in fact anyone else who assisted in the stores, were faced by the same physical features, and worked with the same practices, lifting and carrying kit up and down stairs as required.

3.20 EqA, section 19, Indirect discrimination on grounds of disability

3.20.1 Did any PCP (or combination thereof) put a person sharing the Claimant's disabilities at a particular disadvantage compared to people who were not disabled, in that they would:

Be unable to meet the already high workload required due to difficulty lifting and carrying objects around the stores, or manoeuvring objects to be repaired, without considerable additional effort?
Take additional time to perform administrative tasks, slowing his work rate?

Be caused more pain and discomfort in the course of their work, and/or it would take them longer to complete?

Find it more difficult to "fit in" to the ethos of the armed forces?

Risk having the above attributed to an alleged lack of ability and/or poor time management?

In so far as they are relevant, we rely on our findings above. The claimant found it difficult to use the stairs particularly carrying kit and equipment. This slowed him down. It caused him pain and discomfort. This could have risked the respondent attributing elements of his performance to a lack of ability and/or poor time management but it did not. The respondent considered that the claimant took time carrying out independent research concerning himself with matters such as the pedestrian gate, which was not within his remit, whilst also zealously seeking to save cost and in so doing taking longer over tasks of repair when replacement would have been quicker. The respondent ought to have been aware that the claimant was affected as we have found by the physical layout of the building, but it did not consider the point; however neither did it criticise the claimant for any lack of speed or work output related to these matters.

3.20.2 Did they put the Claimant at those disadvantages, in that:

3.20.2.1 He was unable to work at a high rate for a prolonged period of time, and this was attributed to an alleged lack of ability and/or poor time management? The claimant's evidence is accepted that he worked at a high rate for prolonged periods. The respondent did not consider that the claimant lacked ability. The respondent criticised the claimant's poor time management in respect of the time he spent repairing instead of replacing parts and conducting personal Internet searches into the provision of supplies when there was an internal system available.

3.20.2.2 Major Seaton considered him to be underperforming, including as manifested in the 11 June 2019 incident. The tribunal accepts major Seaton's evidence and that of Mr Wilson, corroborated by the PAR that the claimant was not considered to be underperforming. Major Seaton was dissatisfied with the claimant on 11 June 2019 (the bike computer incident) because the computers would not calibrate, and the claimant had failed to replace them as instructed but instead suggested that an instructor set them up with her students.

3.20.2.3 He was subjected to the treatment referred to above: the tribunal has made findings of fact as to the matters listed. The only matter that the tribunal finds related in any sense to the claimant's disability was in connection with car parking.

3.21 EqA, sections 20 & 21, Reasonable adjustments

3.21.1 Did any PCP (or combination thereof) put the Claimant at any of the following disadvantages in relation to a relevant matter in comparison with someone who is not disabled (physically, due to dyslexia, or in combination):

3.21.1.1Inability to meet the already high workload required due to difficulty lifting and carrying objects around the stores, or manoeuvring objects to be repaired, without considerable additional effort? The physical layout of the store, being on two levels, gave rise to the practice of regular and frequent use of stairs including when lifting and carrying kit and equipment. The claimant endured pain and discomfort lifting and carrying items up and down the stairs on a frequent and regular basis. The respondent was alerted to this at the initial interview; the claimant made no secret of his difficulties e.g., expressed over needing car parking facilities and in respect of required treatments.

3.21.1.2 He took additional time to perform administrative tasks, slowing his work rate? The tribunal finds that the claimant did not take additional time to perform administrative tasks, slowing his work rate, for any reason related to his musculoskeletal disability. The claimant was not properly trained on MJDI, was not adept at it. There was a considerable amount of work to do and, in the absence of Ms Hawes, himself and Cpl Pritchard were not able to keep up with it to the standard that the claimant would have liked.

3.21.1.3 His work caused him more pain, discomfort, and/or took longer to complete? Owing to the claimant's musculoskeletal disability he suffered pain and discomfort in the physical aspects of his job exacerbated by the working environment where they stores were on two floors.

3.21.1.4 He found it more difficult to "fit in" to the ethos of the armed forces than an able-bodied person? The tribunal finds that the claimant has mischaracterised the ethos at the centre. Insofar as the ethos was one of self-sufficiency rather than as portrayed, (square bashing or barrack-room style), the claimant found it difficult to fit in because he perceived that he was not as able-bodied as some of his colleagues.

3.21.1.5 The above were attributed to an alleged lack of ability and/or poor time management? The respondent did not consider that the claimant lacked ability. The respondent criticised the claimant's poor time management because of how he chose to use online searches that were unnecessary and his preference to maintain and repair rather than replace parts. He was seen to concern himself in matters outside his responsibility (such as the side gate) and to become too involved with relatively trivial; matters, such as the paper napkins, which took him away from his priorities.

3.21.1.6 Major Seaton accusing him of underperforming, including as manifested in the 11 June 2019 incident? On 11 June 2019 major Seaton was irritated that the claimant was unable in the time he allowed, or was unwilling, to assist in the setting up of the bike computers having failed to replace them as instructed. He was criticised for suggesting that the inspector and her students would set them up.

3.21.1.7He was subjected to the treatment alleged? the tribunal has made findings of fact as to the matters listed. The only matter that the tribunal finds

related in any sense to the claimant's disability was in connection with car parking.

3.21.1.8 Were any of the above disadvantages "substantial"? The physical layout of the building and the working practices that involved frequent and repeated carrying a lifting of items up and down the stairs put the claimant at the substantial disadvantage of his suffering pain and discomfort in his back, hip, and lower limbs.

3.21.1.9 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage? The respondent was aware that the claimant indicated in his job application that he had a disability, and he was questioned about it at his job interview. He explained his physical disability. During his employment the claimant told his line managers and colleagues that he could not walk significant distances to work and therefore needed to drive. The claimant made his colleagues and line management aware he was attending for physiotherapy and tests in relation to his musculoskeletal disabilities and that he was due for a hip replacement. The respondent knew that the claimant suffered pain and discomfort at times particularly in his knees and hip because he told his line managers on more than one occasion.

3.21.1.10 If so, were there steps that were not taken that could have been taken by the Respondent to avoid the disadvantage, such as:

Providing regular assistance to the Claimant in the performance of his engineering and repair duties? The claimant's physical disability did not adversely affect his ability to perform engineering and repairing duties.

Provide adequate staffing levels to assist with manual handling tasks? Cpl Pritchard was assigned to assist the claimant during Ms Hawes' absence, and he was sufficiently fit and able to assist with manual handling tasks.

Recruitment of a colleague with appropriate skills, qualifications and/or experience to assist adequately in engineering/repairs tasks: the claimant's physical disability did not adversely affect his ability to perform engineering and repairing duties

Arranging the workplace or practices to reduce or eliminate the need to carry equipment from one floor to another by hand up and down stairs? The tribunal finds that the claimant would, more likely than not, have suffered less pain and discomfort and would have found working practices easier if he did not have to lift and carry equipment up and down the stairs so frequently. He found it difficult physically. The physical layout and working practices did not consider the claimant's physical disability but assumed a reasonable level of physical fitness commensurate with that of an adventurous pursuits instructor.

Treating the Claimant's disabilities with understanding and forbearance in that, knowing the Claimant was disabled, he would be unable to undertake certain tasks either at the same rate or at all without physical discomfort? The respondent did not take the claimant's physical disability into account until after the occupational health report that followed him suffering a stroke.

Providing suitable handrails? It was only in May 2019 at the time of the claimant's occupational health referral that handrails were raised as an issue. The respondent took somewhat delayed steps to arrange for a workplace assessment and that was not carried out before the claimant's last day of work in June 2019. The occupational health report recommended a workplace assessment particularly with regards to the claimant suffering hip pain but felt that of particular significance would be the provision of a more supportive chair. In this context the claimant suggested handrails and put forward his explanation as to why they would assist but he had not suggested it sooner.

Providing suitable office furniture? The occupational health report of 2 May 2019 recommended a workplace assessment with reference to the provision of a more supportive chair. The Tribunal accepts that this would have assisted the claimant and removed some part of the substantial disadvantage of pain.

Providing disabled or adequate parking? The claimant wanted a parking space and was content with using the space available in the chapel car park adjacent to the centre. Although initially he was challenged about his use of the car park, he was never denied access to it. Parking in the available space did not put him at a substantial disadvantage.

3.22 EqA, section 26, Harassment

3.22.1 Alternatively, did the Respondent's alleged conduct constitute unwanted conduct related to a protected characteristic? The tribunal finds that being questioned about why he drove to work, and his answers being challenged or treated sceptically was related to the claimant's protected characteristic of disability, a physical impairment. None other of the alleged conduct was related to the claimant's disability.

3.22.2 Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? There was an issue over the availability of parking. The claimant's colleagues and indeed Maj Seaton were initially unhappy with the claimant parking in the available space because he lived so close to the centre. The purpose of the questioning and challenging was to test the veracity of what the claimant said, and its purpose was not to harass the claimant. The questioning, challenging and scepticism had a harassing effect upon the claimant.

3.33 EqA, section 27, Victimisation

3.33.1 Was the Claimant subjected to the alleged detriment by the Respondent? See above.

3.33.3 Was this because the Claimant did a protected act, namely:

Reminding/informing the Respondent he was disabled and unable to perform certain activities as if he was not disabled; the reasons for the respondent's treatment of the claimant are set out above and none of the examples or allegations were because the claimant informed or reminded the respondent that he was disabled or unable to perform activities because of that.

Requesting, formally or informally, reasonable adjustments the reasons for the respondent's treatment of the claimant are set out above and none of the examples or allegations were because the claimant made formal or informal request for adjustments.

3.34 CONSTRUCTIVE UNFAIR DISMISSAL

Was the Claimant constructively dismissed?

Did the Respondent breach:

3.34.1 The express term prohibiting unlawful discrimination (Clause 7.1)? The claimant's contract of employment is in the hearing bundle starting at page 577. Part 2 of the contract at paragraph 7.1 (page 581) contains an express contractual clause that there must be no unlawful discrimination in relation to listed protected characteristics including disability. The respondent discriminated against the claimant in respect of the protected characteristic of disability by failing to make reasonable adjustments regarding the need to lift and carry on the stairs, in breach of contract.

3.34.2 The implied term of mutual trust and confidence, i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?

3.34.2.1The respondent failed to consider the claimant's disability from the time of his employment interview in January 2017 and subsequent appointment, until referral to Occupational Health that led to the report of 2nd May 2019. During that period the claimant was required to conduct his duties in the store in a two-level building. The working practices required that he access and egress the first floor by means of a stairway and he would be required to lift and carry kit and equipment up and down the stairs on a regular basis. There was one handrail, but it did not cover the bottom step. No alternative working methods were considered or put into place. The claimant was caused pain and discomfort by the working practices in that layout. Furthermore, the claimant was questioned and challenged with scepticism about his need to drive to work rather than walk, in the context available car parking but by his colleagues and not management; he did not complain at the time it happened.

3.34.2.2. The claimant made a protected disclosure concerning the redating of PPE records. He was chastised by Maj Seaton being called into his office and spoken to in a raised voice when he was upbraided.

3.34.3 If so, did the Claimant "affirm" the contract of employment before resigning? The claimant raised issues about the way he was treated from 4 September 2018 onwards when he spoke to Maj Seaton about the way Mr Wilson had spoken to him. The respondent's disregard of his physical disability continued throughout the claimant's employment until the April 2019 occupational health referral. The claimant opposed Mr Wilson's scheme to re-date PPE, and he was chastised and upbraided for making a disclosure in relation to it; that task was taken from him and he did not

accept the instruction or chastisement. He was never accepting of any of this treatment. He raised a formal grievance on 25 June 2019.

3.34.3 If not, did the Claimant resign in response to the breach of contract (was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)? The claimant resigned for several reasons including:

3.34.3.1 his disquiet about health and safety generally at the centre which included being upbraided by Maj Seaton for making a protected disclosure in respect of the PPE data,

3.34.3.2 his physical working environment and required working practices without any reasonable adjustments (which caused him pain and discomfort),

3.34.3 his feeling overworked and underappreciated when he felt there was undue criticism,

3.34.4 being on occasions spoken to abruptly and with raised voices by both Maj Seaton and Mr Wilson and

3.34.5 the feeling that he did not fit in, highlighted by examples such as being questioned and challenged with scepticism about his disability in the relation to car parking, in circumstances where his colleagues were not living with disabilities and there was an ethos of self-sufficiency, self-reliance, and "can do", commensurate with an outdoor training pursuit centre in a military context. The claimant had a similar mindset (without the underlying military discipline) and was embarrassed because he could not perform as he wished, without compromise for his Musculo-skeletal conditions.

3.36. If the Claimant was dismissed, was the principal reason for dismissal one falling within:

3.36.1 Section 103A ERA: the issue over PPE records, the Lyon issue and being upbraided by Maj Seaton in respect of it all materially influenced the claimant's decision to resign.

3.36.2 Section 100 ERA: the issue over PPE records, the Lyon issue and being upbraided by Maj Seaton in respect of it materially influenced the claimant's decision to resign.

3.37 If the Claimant was dismissed, was the repudiatory breach of contract caused by the Respondent's unlawful discrimination? No effort was made by the respondent to change working practices, or the physical features at work, to reduce pain and discomfort caused to him, or any apparent difficulty when he had to ascend and descend stairs carrying kit and equipment until April 2019. In April 2019 he was referred for occupational health advice. These matters materially influenced the claimant's decision to resign.

3.38 Time limit/limitation issues

Regarding the ERA detriment claims do the matters alleged constitute an act extending over a period or a series of similar acts or failures by the Respondent until:

3.38.1 7 August 2019, being the date of the Claimant's purported resignation? The claimant was chastised in relation to the Lyon incident and pursuing his disclosure generally regarding PPE data in September 2018; although he was

responsible for PPE equipment he was no longer entrusted to deal with its documentation; that situation pertained to the end of his employment. In effect the chastisement, through limiting his role in respect of PPE equipment, was a continuing act.

3.38.2 Alternatively, 11 July 2019 being the date of the incident at 2.12(e)? See above.

3.38.3 Regarding the EqA claims are the matters set out above "conduct extending over a period", in that they are continuing acts that constitute an ongoing situation or a continuing state of affairs until:

3.38.3.1 7 August 2019, being the date of the Claimant's purported resignation? The respondent's disregard for the claimant's disability, which included initially questioning and challenging him sceptically about it, continued from the date of the recruitment interview in January 2017 until the April 2019 occupational health referral. The required assessments were not commissioned in good time and were not done by the date of the claimant's resignation. In the meantime, the claimant raised a grievance on 25 June 2019.

3.38.3.2 Alternatively, 11 July 2019 being the date of the incident at 12(e)? See above.

3.38.3.3 The claimant did not grieve at the time about the harassment by his colleagues over carparking when they repeatedly and sceptically questioned his need to drive to work. That conduct stopped when Maj Seaton accepted the claimant's explanation for driving to work, his disability save that WSM Arkless later asked the same question but that was a one off and again the claimant did not raise the matter with management in a timely fashion. The conduct was not a continuing act until the claimant's resignation but was limited to the early days of his employment. The claim in relation to parking and questioning was presented more than 3 months after the questioning. The claimant has not adduced evidence as to why he failed to present his claim in time or why he did not grieve about it at the time thus raising it with management.

3.34 UNPAID ANNUAL LEAVE – WORKING TIME DIRECTIVE

3.34.1 What was the Claimant's weekly pay, without overtime? £375.60 (his annual salary was £19,531 and he worked a five-day week of 37 hours each week).

3.34.2 Was the Claimant's overtime sufficiently settled and regular to amount to normal remuneration? The claimant used to work some overtime as and when required from the outset of his employment, but it did not become regular until at latest February 2019. The tribunal finds that the claimant worked some overtime in March 2018, November 2018, and December 2018 but once in January 2019. Following that however he worked overtime in three weeks of February 2019, three weeks of March 2019, four weeks of April 2019, and four weeks of May 2019 (page 846). He worked overtime in one week of June 2020 before the incident of 11 June that led to his lengthy absence prior to resignation. Prior authority was required for overtime. The claimant's immediate line manager WSM Arkless agreed precedent wording to incorporate on the authority form justifying regular overtime. There is a form of authority at page 449 with the precedent wording "stores equipment management to ensure sufficient equipment is ready for the following week's training". The regular amount of overtime was two hours

each week. The form of authority recites that there was a continuing requirement for this overtime work and that it formed part of the claimant's "normal pattern of work". That form was for December 2018 and January 2019, but the same formula was used up to and including June 2019.

3.34.3 How long was that overtime, and what was the remuneration? The claimant was in regular receipt of overtime averaging 2 hours per week and payments of £27.84 per week.

3.34.3 How much annual leave has already been credited, and what is the total unpaid annual leave due? In the claimant's last holiday year, he had accrued 3.7 weeks holidays and entitlement to payment inclusive of regular overtime of £1,492.73. He received £1,016.18 leaving an outstanding balance of £486.25.

4. The Law:

4.1 Disability and Discrimination:

4.1.1 Disability: s 6 Equality Act 2010 defines disability as a physical or mental impairment having a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. The Secretary of State has issued guidance on matters to be considered in determining questions relating to the definition of this disability.

4.1.2 Direct: S.13 EqA:

A person discriminates against another if because of a protected characteristic, such as disability, they treat that other less favourably than a comparator (whether a named comparator or a hypothetical comparator but in either case the person whose material circumstances are the same save in respect of disability).

Unlawful discrimination cannot be inferred from unreasonableness alone (Bahl v The Law Society & others [2004] EWCA Civ 1070) nor can it be established by showing merely a difference in status (e.g., disabled versus non-disabled) and a difference in treatment of the two (Madarassy v Nomura International Plc [2007] ICR 867).

Disability does not have to be the only or main cause of the treatment as long as it had "a significant influence" (Nagarajan v London Regional Transport [2000] 1AC 501).To make a valid comparison there must be no material difference between the circumstances of each case (s.23 EqA).

4.1.3 Arising: S.15 EqA:

A person discriminates against another if they treat that other unfavourably because of something arising in consequence of that person's disability, where the alleged discriminator cannot show that the treatment was a proportionate means of achieving a legitimate aim.

Guidance on how to approach a discrimination arising claim was given in Pnaiser v NHS England [2016] IRLR 170: (a) the tribunal must identify if

there was unfavourable treatment, and by whom; (b) the tribunal must identify what caused the impugned treatment, or what was the reason for it (the 'something arising' need not be the sole reason, but must have at least a significant, or more than trivial, influence on the unfavourable treatment); (c) motives are irrelevant; (d) the tribunal must determine whether the reason (or a reason) is 'something arising in consequence of C's disability; (e) the more links there are in the chain between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact; (f) this stage of the causation test requires an objective question and does not depend on the thought processes of the alleged discriminator; (g) it is not necessary for there to be a discriminatory motive, or for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability; (h) the knowledge required is of disability only; (i) it does not matter precisely in which order these questions are addressed.

A respondent to such a claim may not know that the "something" arose out of disability (City of York Council v Grosset [2018] EWCA Civ 1105. What matters is whether the unfavourable treatment was because of that "something", which arose out of disability.

In deciding whether the treatment complained of was a proportionate means of achieving a legitimate aim(s), the tribunal should consider whether it was reasonably necessary and appropriate to achieve the aim (Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15).

4.1.4 Indirect: S.19 EqA:

Indirect discrimination is where a provision, criterion or practice (PCP) which is discriminatory in relation to relevant protected characteristic is applied in circumstances where it would be applied to people who did not share the characteristic but it puts a person sharing the characteristic at a particular disadvantage compared to others and it in fact puts this person at a disadvantage where the alleged discriminator cannot show it to be a proportionate means of achieving a legitimate aim.

A discriminatory PCP is one which applies to everyone but puts/would put, in this case, a disabled person, at a particular disadvantage compared to others who do not live with a disability, and it must put the claimant at that disadvantage.

S.19 does require that the PCP be applied to the claimant. It must also apply, or be a PCP that would apply, to employees without the disability. If a claimant establishes that a PCP indirectly discriminated against them, a respondent may be able to justify that PCP if it can show that it was a proportionate means of achieving a legitimate aim.

The effect of PCPs may be considered in combination (MoD v DeBique [2010] IRLR 471).

4.1.5 Reasonable adjustments:

S.20 & s.21 EqA: where a PCP, or 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, there is a duty on an employer to make reasonable adjustments to avoid the disadvantage. It is necessary to identify: (a) the PCP applied by or on behalf of the employer; (b) the identity of non-disabled comparators (where appropriate); (c) the nature and extent of the substantial disadvantage suffered by the claimant (see Environment Agency v Rowan [2008] IRLR 20).

'Practice' connotes something which occurs on more than on a one-off occasion and has an element of repetition about it (Nottingham City Transport Ltd v Harvey [2013] EqLR 4).

Substantial means more than minor or trivial. The disadvantage must arise from the disability (Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11). Identification of a substantial disadvantage involves the accumulative assessment of the PCPs. Physical features or lack of auxiliary aids (Environment Agency v Rowan [2008] IRLR 218). Not being able to work as efficiently or productively as colleagues who do not live with disabilities may amount to a substantial disadvantage in this context.

The duty does not arise if R did not know, and could not reasonably have been expected to know, both that C was disabled and that C was likely to be at a substantial disadvantage in comparison with persons who are not disabled (Secretary of State for Work and Pensions v Alam [2010] IRLR 283).

Paragraph 6.28 of the EHRC Code of Practice recommends that when deciding what is a reasonable step for an employer to have to take some of the factors that should be considered are: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (e.g. through Access to Work); the type and size of employer.

Where the duty arises, an employer who was unaware of the duty to make reasonable adjustments may still show that it was not in breach of the relevant duty because a particular step would not have been a reasonable one to take. The question is whether, objectively, the employer complied with its obligations or not (Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 664, paragraph 71).

An employee does not have to suggest any, or any particular, adjustments at the material time and may even first make the suggestion during a final hearing (Project Management Institute v Latif [2007] IRLR 579).

4.1.6 Harassment: S. 26 EqA: a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic that has the

purpose or effect of violating the other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (the harassing effect). In deciding whether the conduct has the harassing effect the tribunal must consider the perception of the employee alleging they were harassed, the other circumstances of the case, and whether it is reasonable for the conduct to have the harassing effect.

4.1.7 Victimisation: S.27. EqA: a person victimises another if they subject them to a detriment because of a protected act or belief in a protected act, where a protected act includes making an allegation of contravention of the Equality Act 2010. In both discrimination and whistleblowing cases treatment will amount to detriment if a reasonable worker would, or might, take the view that the treatment accorded to them had in all the circumstances been to their detriment (Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73).

4.2 . Public Interest Disclosure:

S.43A ERA defines protected disclosures, in the context of public interest disclosures generally referred to as "whistle blowing". S. 43B ERA lists the types of disclosures that qualify for protection at 43B (1) (a) – (f) ERA including disclosures that a person failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and that the health and safety of any individual has been, is being or is likely to be endangered. Any such disclosure must be made appropriately as required by sections 43C – s. 43H ERA.

A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure (S. 47B ERA). S.103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason, (or if more than one, the principal reason), for the dismissal is that the employee made a protected disclosure, an automatically unfair dismissal (s. 1O3A).

It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure, so as to ensure the relevance of any such finding; if the tribunal were to find that the employer's actions were not influenced by any potential disclosure but have a clear and obvious innocent explanation for action or inaction then there is no need to over-deliberate to establish whether in fact the comment or observation made by the employee amounted to a qualifying or protected disclosure. The tribunal should establish the employer's motivation and rationale for action or deliberate inaction.

An "allegation" and "information" are not mutually exclusive; to qualify for protection a disclosure must have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B (1) ERA; if there is sufficient factual content and specificity, and the worker subjectively believes that the information tends to show one of those listed matters, then it is likely that the belief would be a reasonable belief, assessed in

the light of the particular context in which it is made (Kilraine v Wandsworth LBC [2018] ICR 1850).

The tribunal ought to investigate the claimant's state of mind at the time of the disclosure to consider the reasonableness of the claimant's belief and whether this subjective belief was objectively reasonable.

What matters them is whether protected disclosure materially influenced (more than trivially) the employer's treatment of the person who made the disclosure (Fecitt & others v NHS Manchester [2012] ICR 372).

As stated above, in both discrimination and whistleblowing cases treatment will amount to detriment if a reasonable worker would, or might, take the view that the treatment accorded to them had in all the circumstances been to their detriment (Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73).

It is irrelevant that the respondent to a claim involving detriment would have or may have acted in the same way for any other number of reasons if the reason for action in the particular case is because of the protected action. If the treatment was because of a protected action, it is no defence to say that the same treatment could have followed other circumstances too (Balfour Kilpatrick Ltd v Mr S. Acheson & Others EAT/1412/01/TC).

4.3. Health & Safety:

S. 44 ERA: An employee has the right not to be subjected to a detriment done on the ground that having been designated to carry out activities in relation to health and safety, the employee carried out those activities, or in certain circumstances where the employee was a health and safety representative, or where there was no representative they brought to the employer's attention by reasonable means circumstances they reasonably believed were harmful or potentially harmful to health and safety. Furthermore, an employee has a right not to be subjected to detriment in circumstances of danger, reasonably believed to be serious and imminent, if the employee has their place of work refused to work because they did not reasonably expect to be able to otherwise avert the danger, or when, in circumstances reasonably believed to be serious and imminent, the employee took appropriate steps to protect themselves or others.

S.100 ERA: an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal was any one of the circumstances set out in the subparagraph above.

It is irrelevant whether the employer agreed or disagreed with the employee as to whether there were circumstances of danger, or whether steps taken were appropriate (Oudahar v Esparta Group Ltd UKEAT/0566/10/DA)

4.4. Constructive Unfair Dismissal:

S.94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (a constructive dismissal).

It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour as the basis of their resignation and a claimed dismissal.

The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory, meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether there has been a repudiatory breach of contract by the employer is a question of fact for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured, and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro temps).

Alleged breaches of trust and confidence may be cumulative in which case the issue for the tribunal is whether each instance of conduct relied upon when viewed objectively could be said to contributing "something, however slightly". The final instance of conduct does not have to be the most serious or in itself unreasonable or even blameworthy. Furthermore, where discriminatory conduct materially influences that which is found to amount to a fundamental breach of contract, the constructive dismissal is discriminatory (Williams v Governors of Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA).

As to whether a claimant has resigned as a result of a breach of contract, where there is more than one reason why an employee leaves a job, the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions" **Kaur v Leeds Teaching Hosp [2018] EWCA Civ 978** (Per LJ Underhill):

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [that "the function of the Employment Tribunal when faced with a series of actions by the employer is to look at *all* the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer"]) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* [trust and confidence] term? If it was, there is no need for any separate consideration of a possible previous affirmation, [because: "If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so").
(5) Did the employee resign in response (or partly in response) to that breach?

4.5 Holiday Pay:

3 **Application of law to facts**:

3.1 Public interest disclosure claims:

3.1.1 The claimant was concerned, throughout his employment by the respondent, with the standard of the equipment under his purview in the stores, and its maintenance. He was conscientious and diligent in his duties. The claimant was anxious to ensure that safety critical information was properly recorded, and the information retained accurately, and that equipment was serviced and maintained to the established specifications. The claimant was unprepared to compromise on standards or to adopt a relaxed, make-do attitude. The respondent was inclined, confident of their being little risk of compromise to the actual safety of their students in the hands of experienced instructors, to be flexible as to recording and maintaining accurate records and as to maintenance schedules. They did not feel bound by the strict letter of established work and maintenance regimes and they were prepared, without being cavalier as to risk, to get on with practical matters according to the established ethos as described above. The claimant, on the other hand, felt obliged to always maintain a higher standard of adherence to best practice. In this context the claimant, quite properly and appropriately, raised with the respondent issues regarding PPE

records, the fleet of canoes and the fleet of bikes; the side-gate was not his responsibility and did not raise issues tending to show a breach of legal obligation or a risk to health & safety, was properly risk assessed and covered by the respondent. The information he knew to be true about PPE, the canoes and the bikes, the accuracy of which is not contested by the respondent, tended to show regarding those matters a breach of legal obligation to users of the equipment in respect of, and a risk to, health and safety. Where records ought to be accurate and equipment serviced and maintained to a regime then compromise threatens both meeting the obligations undertaken to others and their safety. The claimant correctly considered that it was his duty to draw this to the attention of his managers; he acted in good faith. He raised the matters with his managers and when they carried on with workarounds, or in the case of PPE regardless of the disclosure made, the claimant persisted. He repeated his concerns over the boats and bikes. He went outside to Lyon in respect of the PPE records, sanctioned by his immediate line manager.

3.1.2 Commensurate with the ethos we have described the respondent was mostly unperturbed by the disclosures (save in respect of that to Lyon). They re-ordered work, moderated the maintenance regimes for the bikes, prioritised duties to meet in-part the claimant's concerns and allocated PPE records to Cpl Pritchard. Save as below in respect of the disclosure to Lyon, the respondent did not subject the claimant to any detriment by way of act or omission personal to him and his conditions at work. The claimant felt let down and maybe frustrated that his concerns were not taken more seriously but neither he nor they were dismissed out of hand. The respondent reacted to the disclosures but not to the claimant's satisfaction. He was not however penalised (subject to below); his work was altered in that the PPE records which he refused to alter as instructed were re-allocated to Cpl Pritchard without any issue on the part of the respondent; this saved the claimant having to undertake duties with which he objected. The respondent advised the claimant how quicker to service the bikes (replacing parts instead of cleaning and repairing) but it did not think worse of him for his methods although they were in their view constructively critical. He was allowed to better fix buoyancy aids to the boats. The respondent did not unduly criticise his performance for any reason related to either the boats or the bikes. In so far as he had concerns in those respects the respondent sought working practices that would better its needs and meet the claimant's reservations.

3.1.3 Maj Seaton had instructed the claimant not to raise the PPE issue externally but at the same time the respondent did not resile from creating inaccurate PPE records, inaccurate as to the date of purchase and first use which are safety critical matters. The claimant would not accept this situation. With the involvement of his immediate line manager WSM Arkless, he approached Lyon and made the same protected disclosure as he had made to Maj Seaton. This was very soon after a telling off from Mr Wilson (the Palm incident) and in the face of an order

to keep matters in-house, but against the clear indication that Mr Wilson's instruction to re-date PPE documents would continue. In that situation and with WSM Arkless' authority the claimant was entitled to take the matter outside the respondent's management. His proper and appropriate disclosure was not getting anywhere internally. The tribunal finds that at least in part Maj Seaton was affronted by the fact of his order being disobeyed and to an extent that motivated him to reprimand the claimant emphatically as he did. That said, the order itself was an attempt to silence the disclosure, to keep matters in-house whilst not addressing the principal issue. The "whistleblowing" legislation is specifically designed for this situation. When Maj Seaton peremptorily summoned the claimant to his office and emphatically upbraided him in a stern and loud voice, that was materially influenced by the fact that the claimant had taken issues of health & safety and legal obligation to an external party. The order was to prevent that happening. His annoyance, which he expressed, was therefore in part because of the fact of what he considered to be disobedience but disobedience in a very particular situation; there were circumstances that he did not want to be aired publicly and which was only going to be addressed by continuance of the bad practice by another staff member; there was to be no remedy to the breach of legal obligation or risk to health and safety; the order was intended to allow that and to shut down the claimant. In a situation where the claimant was principally concerned, as storekeeper, with issues of health and safety in respect of kit and PPE, being silenced and upbraided was demeaning and undermining; he was being side-lined and made to feel insubordinate when he was acting in good faith trying to establish and maintain best practice in respect of the PPE. It was reasonable for him to consider this a detriment notwithstanding that he was not disciplined formally, and there was no continuing detrimental treatment other than that the continuance of the redating of the PPE by Cpl Pritchard concerned and unsettled him, damaging his relationship of trust and confidence in the respondent. The damaging of the relationship caused by the oral, forceful, reprimand and the continuance of the bad practice advocated by Mr Wilson was a detriment; it must be a detriment to undermine the foundation of the employment relationship.

3.1.4 The reprimand in respect of the Lyon disclosure, his being bypassed on the PPE issue while inaccurate records were still being made in respect of PPE for which he was responsible as storekeeper materially influenced the claimant's decision to resign. He considered that his contract had been breached. He did not resign immediately but the relationship was damaged, and that damage continued to occur as long as the inaccurate recording continued and his health and safety issues generally were worked-around rather than remedied. Major Seaton again took the claimant to task sternly over the bike computers in June 2019, although this was not a health and safety issue. There were continuing courses of conduct by the respondent in both failing to fully address the claimant's health and safety concerns and, in respect of that and issues such as the paper napkins and the bike computers (not disclosure or health and safety issues) reprimanding him loudly and forcefully in an

overbearing way. The claimant did not accept that conduct, nor waive damage done to the relationship of trust and confidence by this conduct by the respondent. The claimant did not sign up to the part of the ethos at Llanrwst and Anglesey that ultimately relied on the military command structure with robust discipline unlike civil service employment.

3.2 Health & Safety claims:

3.2.1 The claimant was designated as a person responsible for health and safety of kit and equipment in the stores.

3.2.2 The claimant raised issues and sought to deal with them in respect of PPE, the canoes and the bikes that were within the ambit of his responsibility; in other words, he carried out his due activities in respect of those items. He interfered in respect of the side-gate and the tribunal finds against the claimant in respect of all matters related to that based on the facts found above.

3.2.3 The respondent was not troubled by the claimant's said activities, save for the Lyon incident, and sought to address them by way of compromising on allocation of PPE records, and relaxing maintenance and servicing requirements.

3.2.4 The tribunal finds that the only detrimental treatment of the claimant by the respondent was in consequence of the Lyon incident and the detriments are as found above in respect of "whistleblowing".

3.2.5 As above, the respondent's conduct in the light of the Lyon incident materially influenced the claimant's decision to resign when his concerns remained unremedied and the respondent again chastised him in an overbearing military as opposed to Civil Service way (albeit the June 2019 incident with Maj Seaton was not health and safety related).

3.3 Disability discrimination claims:

3.3.1 The claimant has not established that his dyslexia had a substantial (more than minor or trivial) adverse effect on his day top day activities. The tribunal accepts that the claimant lives with dyslexia. The diagnosis alone is insufficient to satisfy the definition of disability for our purposes. The tribunal considers that the effects of the claimant's dyslexia fell into the arena of minor or trivial not withstanding the claimant's assertions which were not borne out by the evidence. We ought to consider what the claimant cannot do in consequence of his disability, rather than what he can do, but we failed to find anything.

3.3.2 The respondent concedes disability by virtue of the Musculo-skeletal conditions. The respondent was aware from the recruitment interview that the claimant was disabled; he told them; it was evident from his application; it was discussed. There were repeated references to his disabling conditions throughout his employment (the claimant needing to

drive to work although he lived locally and to park at the chapel, medical appointments, treatment having reached the end of the road, the operation waiting list etc). The OH reports refer to him walking with a pronounced limp, albeit Maj Seaton maintains he never noticed. Even if the respondent had not known from the date of the interview it ought reasonably to have known from daily interaction. We do not accept the respondent's assertion of ignorance for these reasons.

3.3.3 Direct discrimination: The tribunal was concerned about the questioning of the claimant when he parked his car in the available spaces rather than walking to work. We accept Maj Seaton's evidence that he was satisfied once the claimant explained his situation in terms of his disability and that he did not hear repeated challenges from colleagues. We accept that the claimant was asked and challenged by various colleagues at various times and that he had to explain his disability which he found embarrassing. He did not grieve or present a claim at the time of these occurrences. They seem to have stopped early in the claimant's employment and he was permitted by Maj Seaton to park where he wished. This was the only example we found of the claimant being treated less favourably than a hypothetical colleague who did not live with a disability (and the claimant did not name a comparator). There is no evidence of the same colleague, or any colleague acting during his or her duty or in a managerial position, repeatedly asking these questions or challenging the claimant. It seems the questions were asked randomly by people who may not have been aware of the claimant's disability. As the claimant did not take the matter to management the respondent could not react and prevent any direct discrimination. The tribunal finds that there was no direct disability discrimination by the respondent and even if that is wrong then any claims related to the parking issue were presented out of time. There is no other related or similar act of discrimination that could be linked in a course of conduct. The claimant was able to claim this sooner and there is no evidence to suggest he was in any way prevented or to support a finding that it would be just and equitable to extend time; the claimant was asked questions; he answered them; he was allowed to park where he wanted unhindered; he carried on parking and working for well over 12 months after the last apparent question and challenge. All other treatment of the claimant that is alleged was for reasons found above, being unrelated to his protected characteristic of disability.

3.3.4 Harassment: Again, the tribunal finds that only the parking issue could have given rise to such a claim. All other alleged issues related to other matters as found above. Questioning and sceptical challenges over the parking issue was unwanted. It did create an intimidating environment and the claimant reasonably felt the harassing effect, considering his sensitivities but also the whole circumstances. That said these seem to be random and largely unattributed comments not done during anyone's duties once the claimant had initially explained his disability. Someone approached the claimant initially seemingly on Maj Seaton's behalf when the claimant's explanation was reasonably required. Major Seaton heard

the questioning and the initial answer and accepted it; it became a non-issue for management. The claimant did not then bring it to management's attention such that the respondent cannot be criticised for failing to stop the conduct/words on later occasions. The claimant did not grieve in a timely fashion. He got on with parking where he wanted. Without repeating the reasoning in the paragraph above we apply it to the harassment claim. In any event the claim was presented out of time and an extension would not be just and equitable in all the circumstances already described. All that said, this issue may have played a small part in the claimant's decision to resign although there was no apparent breach of contract in the claimant being asked to justify parking at the chapel and then being allowed to do so (in the absence of a grievance). The tribunal finds no other potential example of harassment related to the protected characteristic of disability. All other words or conduct by the respondent were for the reasons found above.

3.3.5 Indirect Discrimination/Reasonable adjustments:

a. The only relevant physical feature and PCP found was in respect of the two storey stores and the need to carry kit and equipment yup and downstairs frequently and regularly.

b. That feature and PCP would and did put the claimant at the particular and substantial disadvantage, compared to a non-disabled colleague, of pain and discomfort. The PCP applied to all.

c. The respondent ignored the obvious disadvantage to the claimant as described; it gave no thought at all to it despite what the claimant explained at the job interview and subsequently during his employment. The respondent has failed to show that it had any legitimate aim in mind, other than to carry on business as it always had done, or that even if it had such a legitimate aim that ignoring the obvious in terms of the claimant was a proportionate means of achieving such aim.

d. Prior to the claimant's last OH report the respondent gave no thought to any adjustment to remove the substantial disadvantage to the claimant in consequence of the physical features and working practices across two storeys. The respondent was then slow and bureaucratic, even pedantic rather than understanding or efficient, in arranging the required assessments. Nothing significant was done to ameliorate the situation prior to the claimant's absence from work after 11th June 2019, and then his absence impeded progress. As at the date of the claimant's resignation the situation remained as it had throughout his employment. The claims are in time but even if this were not the case the tribunal considers that it would have been just and equitable to extend time to the date of presentation of the claim in all the circumstances. There was a significant failure to act on the part of the respondent and this situation played a significant role ion the claimant's decision to

resign when he could no longer put up with the whole working environment having tried his best to carry on. He reasonably considered that there was some resistance to accept the need for adjustments, albeit a process was being belatedly followed. Save in respect of the physical feature of the two storey stores and the practices around lifting and carrying on two levels all other claims of indirect discrimination and a failure to make reasonable adjustments fail. The claimant's claims of indirect disability discrimination and a failure to make reasonable adjustments succeed only in respect of working on two levels as described.

e. The tribunal has not found facts from which it could conclude that there was discrimination otherwise. The respondent's evidence in rebuttal is accepted as above in this regard.

3.3.6 Victimisation:

a. The claimant alleged disability discrimination in his grievance to the respondent, his submissions, and emails; he did protected acts as he alleges.

b. The tribunal has found facts as to why the respondent acted as it did when it did and why Maj Seaton and Mr Wilson said what they did when they did. All that was for reasons specific to the circumstances at the time and none was because the claimant had alleged disability discrimination or done anything in relation to the Equality Act. The victimisation claims fail.

3.4 Constructive Unfair Dismissal claim:

3.4.1 The claimant resigned for several reasons but in summary he did not fit in, a square peg in a round hole. His specific reasons were:

a. Qualms over the respondent's health and safety practices and culture, at odds with his best practice adherence;
b. The workload since Ms Hawes went on maternity leave;
c. The respondent's criticism of his approach to his work (replace do not repair; do not raise issues externally, even though the issues are not to be remedied but the work re-allocated);
d. Being upbraided forcefully, in a military commanding way, by Mr Wilson and Maj Seaton repeatedly when he felt it was unjustified and the manner inappropriate for a civilian;
e. The physical environment without any adjustment to the store or practices in a situation where the respondent had been made aware and ought to have been aware of his difficulties.
f. Mr Wells' email 23rd July 2019: the claimant reasonably read this as there being no way back for him save to relocate and move to a new house. Mr Wells confirmed it was not appropriate for him to work at Llanrwst or Anglesey and he could not foresee "realistic control measures" to include in an Action Plan and therefore he

was reluctant to embark on one. Whilst Mr Wells asked for the claimant's views, the claimant saw the writing on the wall and that his days in the respondent's employment were being numbered.

3.4.2 Breach of contract:

4.4.2.1 Express breach; we have found indirect disability discrimination and a related failure to make reasonable adjustments. There is an express contractual provision prohibiting discrimination. The respondent breached the express prohibition. That breach was a fundamental breach as non-discriminatory practice is so important.

4.4.2.2 Breach of the implied term: the respondent was very late to accept that the claimant was living with a disability even though it knew and ought anyway to have known from the circumstances described above. It acted very late to take seriously the need for adjustments. This almost dismissive attitude to the claimant was exacerbated by the way in which both Mr Wilson and Maj Seaton upbraided him. They were relaxed on all safety issues that he raised but forceful in making their views felt when they felt he was not toe-ing their line. Their management of him was not that expected within the civil service, in the way that the claimant was spoken to by Maj Seaton and Mr Wilson. He was not supported when support was obviously required. Having sought adjustments through OH he was faced with pedantry and a bureaucratic approach that he had never witnessed in respect of adherence to good health and safety practice. This conduct towards him in the circumstances of a busy work schedule where he was being required to work contrary to what he knew to be best health and safety practice destroyed the relationship of trust and confidence.

4.4.3 Mr Wells email does not breach the implied term in that Mr Wells does ask for comments and make suggestions in an apparently constructive manner, albeit the claimant could reasonably understand from it that his days were numbered. The significance in terms of this claim is that there was no apparent likely remedy of the above breaches. The claimant was always entitled to act on the breaches themselves s one cannot remedy a breach, but an employee can waive a breach if satisfied. The claimant did not receive satisfaction and he reasonably read the email as indicating satisfaction was not to be had. The email, whilst not in itself a breach of contract finally motivated him to accept that his contract had been breached as described at paragraphs 4.4.2.1 and 4.4.2.2 above, and to resign.

4.4.4 Was/were the breaches the reason(s) for resignation: Yes. The claimant could not envisage his situation materially improving in the

respondent's employment. He had had enough and felt that he had put up with enough. He was no longer willing to work in an environment such as described in paragraphs 4.4.2.1 and 4.4.2.2 above.

4.4.5 Waiver/delay: The claimant hoped to resolve matters through the grievance procedure. He felt he was getting nowhere with it and when this became apparent, he resigned. He did not wait too long in any sense, either effluxion of time or by acquiescing to the respondent's conduct towards him.

4.4.6 The claimant was constructively dismissed. As the dismissal was for discriminatory conduct and conduct that breached the implied term it would only ever be potentially fair in exceptional circumstances. The respondent has not argued that these were such circumstances but has instead denied the conduct. These are not circumstances that would be considered exceptional such as to justify the breaches of contract. The dismissal was not for a potentially fair reason and the way it was effected was not fair and reasonable, given the circumstances and facts found. The unfair constructive dismissal claim succeeds.

4.4.7 For the reasons stated, applying the law as described to the facts of each allegation as found, all other claims fail. The claimant has conflated a number of circumstances and potential issues, viewing some otherwise reasonably explicable words and actions as all relating to his personal circumstances, while at the same time saying that his line managers carried on as they did because that is their military ethos (as he perceived it). The tribunal finds that in part the claimant, by signing up for the ethos as we found it, made his own life difficult; at times his line managers were reasonably likely to feel exasperation with some of his activities for reasons wholly unrelated to disability, health & safety, or his protected disclosures. Save where the tribunal has found for the claimant his other claims fail because he has failed to satisfy us as to the facts of his allegations or the legal tests have not been satisfied.

Employment Judge T.V. Ryan

Date: 11.06.21

JUDGMENT SENT TO THE PARTIES ON 15 June 2021

FOR THE TRIBUNAL OFFICE Mr N Roche