EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106122/2015; 4100137/2016; 4105282/2016; and 4100153/2017 (V)

Final Hearing held at Glasgow on 26, 27 and 28 February 2020;

2, 3, 4, 5, 9, 10 and 16 March 2020;

4 June 2020 (reading day); 5, 8, 9, 10, 11, 12 and 16 June 2020 (By CVP);

3 July 2020 (Closing Submissions by CVP);

20 July 2020 (Members' Meeting by CVP); and

14 June 2021 (Members' Meeting by Teams)

Employment Judge: Ian McPherson

Tribunal Members: Mr Peter O'Hagan

Mr Jim Burnett

Mr Brian F. Gourlay	**Claimant** **Represented by:** **Mr Simon John** **Barrister** **(instructed by** **McGrade & Co,** **Solicitors)**
West Dunbartonshire Council	**Respondents** **Represented by:** **Mr. Nigel Ettles** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that: -

(1) **Unanimously,** the Tribunal finds that the respondents failed to make reasonable adjustments for the claimant's MS disability, and so discriminated against him, on the grounds of his disability, contrary to **Sections 20 and 21 of the Equality Act 2010**, and the Tribunal accordingly **orders** that a Remedy Hearing shall be fixed to determine the amount of any compensation for injury to feelings to be paid by the respondents to the claimant for that unlawful disability discrimination.

(2) **Unanimously,** the Tribunal finds that the respondents did not victimise the claimant, contrary to **Section 27 of the Equality Act 2010**, by (a) substantial redaction of his argument and documents for his stage 3 grievance (number 3) dated 25 July 2014; (b) the stopping of his grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015; (c) investigating him under the Code of Conduct from about 6 March 2015; (d) dismissing him on 24 September 2015; and (e) rejection of his appeal against dismissal on 25 August 2016; and so dismisses those parts of his complaint to the Tribunal.

(3) **By majority**, the Employment Judge dissenting, the Tribunal finds that the respondents did not discriminate against the claimant, on the grounds of his disability, contrary to **Section 15 of the Equality Act 2010**, by treating him unfavourably because of something arising in consequence of his MS disability, by issuing him with the informal Improvement Note dated 14 January 2015 under the respondents' Attendance Management Policy, and so dismisses that part of his complaint to the Tribunal.

(4) **By majority,** Mr Burnett dissenting, the Tribunal finds that the respondents did victimise the claimant, contrary to **Section 27 of the Equality Act 2010**, by suspending him on 17 June 2015, and the Tribunal accordingly **orders** that a Remedy Hearing shall be fixed to determine the amount of any

compensation for injury to feelings to be paid by the respondents to the claimant for that victimisation.

(5) **By majority**, Mr Burnett dissenting, the Tribunal finds that the claimant was unfairly dismissed by the respondents, contrary to **Section 98 of the Employment Rights Act 1996**, and the Tribunal accordingly **orders** that a Remedy Hearing shall be fixed to determine the amount of any compensation to be paid by the respondents to the claimant for that unfair dismissal.

REASONS

Introduction

1. This case first called before us, as a full Tribunal, on the morning of Wednesday, 26 February 2020, for what was then listed as a 15-day Final Hearing at the Eagle Building, Glasgow, further to a Notice of Final Hearing previously intimated to both parties' representatives by the Tribunal under cover of a letter dated 30 December 2019.

2. At that stage, the case was listed for a Final Hearing, for full disposal, including remedy if appropriate, on various dates between 26 February 2020 and 27 March 2020. In the event, the matter did not proceed, as listed, and the Final Hearing had to be adjourned, part heard, on 16 March 2020, when one of the two non-legal members of the Tribunal became indisposed, parties did not jointly agree to proceed with a panel of 2, the Judge and other member only, and so the case then had to be relisted for a Continued Final Hearing, as is more fully explained later in these Reasons.

3. With 10 days in person at the Eagle Building, we then continued the Final Hearing, conducted remotely, after a reading day for the Tribunal only, by a further 8 days by CVP, and thereafter private deliberation by the full Tribunal over 2 separate days. In total, this Final Hearing has involved 21 sitting days for the full Tribunal.

4. While it was hoped that a draft Judgment and Reasons could be completed by the Judge, within a few months of the first Members' meeting held on CVP

on 20 July 2020, and that draft issued for discussion by the Judge, along with the non-legal members of the Tribunal, at a further Members' meeting, on a date then to be arranged, and the finalised Judgment issued as soon as possible thereafter, unfortunately that did not happen.

5. The considerable amount of evidence, oral and documentary, which required to be analysed and written up by the Judge, in context of the many factual and legal issues before the Tribunal for determination in light of parties' competing closing submissions, meant the task has been not insignificant. On account of a combination of factors, relating to other judicial commitments, and, more recently, two extended periods of sickness absence for the Judge, and subsequent phased returns to work, there has been an unfortunate delay in producing this our final Judgment and Reasons.

6. Draft findings were issued by the Judge to the lay members of the Tribunal, on 11 March 2021, with a view to a Members' Meeting being arranged on a date to be fixed in March / April 2021, but the Judge's sickness absence, from 18 March 2021 to 3 May 2021, meant that was not then progressed, although the Members did submit written comments to the Judge for his consideration, and these were discussed at a Members' Meeting on Teams on 14 June 2021. His second sickness absence from 22 June 2021 to 3 August 2021 impacted thereafter. The Judge recognises that this delay is most regrettable, from the perspective of both parties, and a written apology from him to them has already been conveyed to their legal representatives.

Background

7. This Final Hearing relates to various claims brought by the claimant against the respondents. It has had a long and winding road to get to our door for this Final Hearing and, for present purposes, it will suffice to note the following chronology: -

    a. These claims are Nos. 3 to 6 of a series of 7 claims brought by the claimant against the respondents.

b. Claims Nos. 1 and 2 (being case numbers 4100134/2014 and 4102906/2014) were case managed by Employment Judge Ian McPherson, but when they proceeded to a Final Hearing, it was before a full Tribunal chaired by Employment Judge Robert Gall, sitting with Mr John Kerr and Mr Iain McFarlane. The claimant acted on his own behalf, as an unrepresented party litigant, and the respondents were then represented by their in-house solicitor, Mr Gavin Walsh. His ET1 claim form in the first claim was presented on 20 January 2014.

c. The Gall Tribunal sat and heard 19 days of evidence, between 27 July 2015 and 15 January 2016, with a day for submissions on 10 March 2016, thereafter further submissions and a Members Meeting, resulting in their unanimous written Judgment, with Reasons, dated 23 May 2016, as entered in the register and copied to parties on 25 May 2016 (Folio 705/043). The claimant's various complaints were unanimously dismissed by that Gall Tribunal, and an appeal by the claimant was dismissed by Mrs Justice Simler, then President of the Employment Appeal Tribunal, on 15 May 2017.

d. The claimant's third claim (case number 4106122/2015) was presented on 12 April 2015, with claim No.4 (case number 4100137/2016) presented on 20 January 2016; claim No.5 (case number 4105282/2016) presented on 4 November 2016, and claim No.6 (case number 4100153/2017) presented on 21 January 2017. The claimant was again acting on his own behalf, as an unrepresented party litigant, and the respondents were again represented by Mr Walsh.

e. A seventh claim (case number 4101712/2017) presented on 10 June 2017 was withdrawn by the claimant, and a **Rule 52** Judgment issued by Employment Judge Muriel Robison on 6 July 2017. On 7 September 2017, Employment Judge Ian McPherson granted a formal Combining Order, combining all four remaining claims (Nos. 3 to 6 inclusive) for the purposes of further procedure before the Tribunal.

f. Following a Preliminary Hearing held on 13 July 2015, where the claimant appeared on his own behalf, and Mr Walsh for the respondents, Employment Judge Ian McPherson, by Judgment dated 6 August 2015, issued to parties on 10 August 2015, in claim No 3 (case number 4106122/2015) refused the respondents' application to strike out parts of the claim for unreasonable conduct, but the Judge made a Deposit Order of £1,500 for the claimant to pay as a condition of being permitted to take part in the Tribunal proceedings relating to certain specific allegations. Written Reasons, dated 28 August 2015, were subsequently issued on 31 August 2015.

g. The claimant was dismissed from his employment by the respondents on 24 September 2015, and proceeded with an internal appeal against that dismissal. That internal appeal process, which ran over six days starting on 18 February 2016, and later dates, did not conclude until 25 August 2016. Fixing a Final Hearing in these four combined cases before the Tribunal was, as per standard practice, sisted pending conclusion of the internal appeal process, and ongoing procedure in respect of claims Nos. 1 and 2 being dealt with by the Gall Tribunal.

h. The claimant was thereafter represented, for a time, by an employment consultant, Mr Gavin Booth. An application was made to consolidate and amend the ET1 claim form in the combined claims. A Preliminary Hearing on 4 April 2018, where Mr Booth represented the claimant, and Mr Walsh represented the respondents, was postponed, to be relisted at a later date.

i. At that Hearing, Mr Booth confirmed that claims Nos. 1 and 2 were concluded, following the Gall Tribunal having made an award of £20,000 expenses against the claimant, by Judgment dated 12, and entered in register on 13, February 2016, and that there was no appeal to the Employment Appeal Tribunal. Thereafter, the claimant confirmed to the Tribunal that he no longer wished Mr Booth to

represent him, and he instructed Ms Morag Dalziel, solicitor with McGrade & Company, Glasgow.

j. Following a Case Management Preliminary Hearing, held before Employment Judge Ian McPherson, on 29 October 2018, where Ms Dalziel represented the claimant, and the respondents were represented by Mr Nigel Ettles, solicitor with the Council, Employment Judge McPherson signed off a **Rule 64** consent Judgment, in terms agreed by both parties' representatives, dated 31 October 2018, and issued to parties on 2 November 2018.

k. Various parts of the four combined claims Nos. 3 to 6, totalling eight heads of complaint, were, at that stage, withdrawn by the claimant, and so dismissed by the Tribunal under **Rule 52**, but without prejudice to the remaining parts of the claims, which the claimant was insisting upon, and in respect of which Judge McPherson ordered further procedure before the Tribunal.

l. Thereafter, following a Preliminary Hearing held on 21 December 2018, by Note and Orders dated 24 December 2018, issued to parties on 7 January 2019, Employment Judge McPherson assigned the combined cases to be heard by a full Tribunal, for full disposal, including remedy if appropriate, over 15 days between 3 and 21 June 2019, with a sixteenth day for closing submissions on 30 July 2019, and he made various case management orders relating to the conduct of that Final Hearing.

m. That Preliminary Hearing on 21 December 2018 was assigned to allow Employment Judge McPherson to consider the claimant's opposed amendment application, dated 10 September 2018, to amend and consolidate the ET1 claim forms.

n. Having heard Ms Dalziel, solicitor for the claimant, and Mr Ettles, solicitor for the respondents, Employment Judge McPherson allowed the claimant's amendments in full, being satisfied that it was in the

interests of justice, and in accordance with the Tribunal's overriding objective, to allow them, and he allowed the respondents four weeks to reply, which they duly did. The judgment issued further stated that, being satisfied that it was just and equitable to extend time, under **Section 123(1) (b) of the Equality Act 2010**, the Tribunal allowed the claimant to bring his new cause of action, in respect of the respondents' alleged failure to make reasonable adjustments, contrary to **Section 20 of the Equality Act 2010.**

o. The Judgment, dated 31 January 2019, as issued to parties' representatives on 1 February 2019, followed, and the cases were ordered to proceed to the listed Final Hearing in June/July 2019. The respondents were allowed to lodge their own further and better particulars in reply, so as to answer the claimant's additional claim relating to their alleged failure to make reasonable adjustments, and so augment their own consolidated grounds of ET3 response dated 20 September 2018. On 1 March 2019, Mr Ettles, solicitor for the respondents, intimated the respondents' response to claims relating to reasonable adjustments, to be added to the respondents' consolidated grounds of ET3 response, which was previously submitted.

p. In the event, those listed dates for that Final Hearing had to be postponed, on account of Ms Dalziel being unable to attend for medical reasons and so, after parties agreed that the case be postponed, and relisted at a later time, it was only on 30 December 2019, after discussion with both parties about mutually agreed dates, that the case was relisted for 15 set days between 26 February and 27 March 2020, again for full disposal, including remedy, if appropriate.

q. Consolidated Case Management Orders were made by Employment Judge McPherson, acting on his own initiative, on 7 February 2020, and issued to parties' representatives for the efficient and effective conduct of this Final Hearing, directed to start on Wednesday, 26 February 2020.

r. Given parties' representatives' correspondence of 6 and 7 February 2020 to the Employment Tribunal, relating to an ongoing appeal to the Scottish Public Pensions Agency, and complaint to the Pensions Ombudsman, in respect of the claimant's treatment and entitlements under the Scottish Local Government Pension Scheme, Employment Judge McPherson agreed that the Final Hearing be restricted to liability only.

Final Hearing before this Tribunal

8. Following discussion with parties' representatives, at the start of the first day of this Final Hearing, on 26 February 2020, the Tribunal noted that there was no agreed Statement of Facts, nor any agreed List of Issues, as previously ordered. We allowed further minor amendment to the conjoined ET1 paper apart, with amendments to paragraph 33(g), 35 and 35A, relating to allegations that the claimant was denied the opportunity to question relevant respondent witnesses during the disciplinary hearing, despite having asked for them to attend, and an allegation that Stephen West, as presenting officer at the appeal, during break offs in the hearing, sat with the appeal panel members.

9. We allowed those amendments to the ET1, notwithstanding objection by the respondents' solicitor, Mr Ettles, for the reasons which we gave orally at the time in our interlocutory ruling on 26 February 2020, as then recorded in writing in the written Note and Orders dated 27 February 2020. While the timing and manner of the claimant's amendment was very late indeed, we allowed it, being satisfied that there was no forensic prejudice to the respondents, when both parties could lead appropriate evidence in that regard before us at the listed Final Hearing.

10. We were provided with a finally revised agreed List of Issues, taking account of the amendment allowed, and while the respondents were given liberty to lodge further and better particulars in reply, they did not do so, but they did lodge supplementary witness statements by Stephen West and Peter Hessett.

11. We were provided with witness statements from the claimant, and his witness, and with witness statements for the respondents' 5 witnesses. We had a Joint Bundle, extending over 5 lever arch volumes, 1, 2, 3A and 3B, and 4, in total comprising some 2,460 pages.

12. The Final Hearing before us proceeded to hear evidence, in person, on 26, 27 and 28 February; 2, 3, 4, 5, 9 and 10 March 2020, as listed, but we had to postpone the Final Hearing, part heard, after nine day's evidence, on Monday, 16 March 2020, when one of the non-legal members of the Tribunal, Mr O'Hagan, was indisposed and unable to attend the remaining listed dates assigned to this Final Hearing.

13. The remaining dates were vacated, as the respondents declined, as is their right, to proceed with a panel of two only, and they asked instead to proceed before the same panel of three, if possible, at a later time. Employment Judge McPherson's written Note and Orders, dated 16 March 2020, was thereafter issued to parties' representatives, under cover of a letter from the Tribunal dated 23 March 2020.

14. Subsequently, the Judge conducted a telephone conference call Case Management Preliminary Hearing with parties' representatives on 29 April 2020, when it was agreed to relist the case for Continued Final Hearing, before the same full Tribunal panel, over a further seven days, 6 for further evidence, and a seventh day for closing submissions, all to be conducted remotely by Kinly CVP (Cloud Video Platform) as mutually agreed by both parties and the Judge.

15. The Judge's written Note and Orders, dated 30 April 2020, was, due to an administrative delay within the Glasgow Tribunal office, not issued to parties' representatives until 15 May 2020, when it was issued to them, along with a supplementary Note and Orders by the Judge, dated 5 May 2020, along with a draft provisional timetable for the Continued Final Hearing, to which both parties' representatives subsequently confirmed, in writing, that they had no modifications to suggest.

Continued Final Hearing

16. The case was relisted for this Continued Final Hearing, by CVP, over an additional six days, being Friday 5 June 2020 to Friday 12 June 2020, with closing submissions on Friday, 3 July 2020, but, in the event, a further day was required to conclude the evidence, and by agreement of parties, it was held on Tuesday, 16 June 2020, with closing submissions remaining as listed for Friday, 3 July 2020.

17. Unlike the first ten days of the Final Hearing, held in person within the then Glasgow Employment Tribunal office, at the Eagle Building, the Continued Final Hearing was conducted remotely using CVP. This was jointly agreed, on account of the ongoing Covid-19 pandemic, and joint Presidential Guidance issued by the President of Employment Tribunals in Scotland, and England & Wales, in March 2020, and on account of there currently being no in person Hearings conducted, and both parties notified accordingly.

18. This listed Continued Final Hearing took place remotely given the implications of the pandemic. It was a video hearing held entirely by CVP and parties did not object to that format. The Judge and CVP clerk were present in the Glasgow Tribunal office at the Eagle Building, while all other participants joined in remotely. In the Judge's written Note and Orders, dated 30 April 2020, it was ordered that there should be a single, electronic Bundle of Core Documents for use at the Continued Final hearing, comprising documents extracted from the original 5 volume, paper, hard copy Joint Bundle, which were likely to be put to the remaining witnesses.

19. While an electronic Bundle was prepared, in chronological order, and renumbered from the page numbering used in the Joint Bundle at the in person Final Hearing, the respondents had scanned those documents into 7 parts, each in a separate PDF, due to limits on what could be scanned at one time. These were submitted to the Tribunal, with copy

to the claimant's counsel, in a zip file. In total, the E-Bundle comprised 1,275 pages.

20. On Monday, 8 June 2020, during the continued cross-examination of the dismissing officer, Stephen West, no evidence was led before the Tribunal that day, arising from adjournments, and case management, relating to issues arising from the electronic Bundle lodged by the respondents' solicitor being "***marked***", with Mr Ettles' annotations, and requiring "***cleansing"***, before the Tribunal could proceed with a direction from the Tribunal that all witnesses were to delete the original, marked electronic Bundle, and use the new cleansed version. The cleansed version was submitted by the respondents' solicitor as 10 separate PDF files, rather than as a single, electronic Bundle.

21. The Continued Final Hearing was listed on the publicly available CourtServe website as a public Hearing that any interested party could join by contacting the Glasgow ET office. In the event, there was no public or Press attendance at this remote Hearing. Parties were both provided with the opportunity, by the Tribunal administration, to test their ability to join the CVP, and shown how to participate in the Hearing, where we could see and hear each other, although all joining from separate locations.

22. While, from time to time, there were some intermittent connection problems, audio problems, or camera problems, including some interaction from Mr Ettles' dog, all of these difficulties, as and when they arose, were resolved, without adversely affecting the right to a fair hearing, and the case was able to be heard, and all participants, parties, representatives and witnesses, as also the full Tribunal, were able to follow proceedings, and engage in them effectively. The Tribunal is pleased to acknowledge the assistance of all concerned, in particular the significant contribution of the Tribunal's CVP clerk, Callum Dewhurst, and his practical, friendly technical assistance to all as and when required.

23. Participants were told that it was a criminal offence to record the CVP proceedings, and the Tribunal ensured that the remote witnesses, who were all joining from different locations, had access to the relevant written materials. We were satisfied that the witnesses heard on CVP were not coached or assisted by any unseen third party whilst giving their evidence.

24. That said, the use of electronic Bundles, for the Continued Final Hearing, presented some difficulties for the respondents' witnesses, all of whom were giving evidence from home, as the Council offices were closed, on account of the ongoing Covid-19 pandemic, and who were using different screens and devices to view the documents, rather than using paper hard copies, as had been the case for the first tranche of evidence heard in person at the Eagle Building.

25. At this remote Hearing, the Tribunal was alert to the difficulties of some witnesses scrolling through documents in an on-screen PDF, particularly where there were several Bundles, and some additional documents were added, in the course of the Continued Final Hearing, which were separate PDFs in their own right. Again, all of these further matters, as and when they arose, were managed, without adversely affecting the right to a fair hearing, and the witnesses, in particular, were all allowed the time and opportunity to follow proceedings, by finding the right document at the relevant time, and so allowing them to engage effectively in the giving of their evidence to the Tribunal.

26. The Judge had the use of two multi-screens in his chambers at the Eagle Building, plus his judicial laptop, but the multiplicity of different PDF bundles, maximised, and minimised, as required, on that documents screen monitor, as opposed to the main screen monitor used to watch the video proceedings, made for a real challenge in conducting the Hearing, while observing parties, witnesses and the Tribunal on the other, principal viewing screen. The Tribunal members, as well as the

Judge, were also provided with hard, paper copies of the electronic Bundles, to assist them in their role.

Findings in fact

27. We have not sought to set out every detail of the evidence which we heard nor to resolve every difference between the parties, but only those which appeared to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

28. On the basis of the sworn evidence heard from the various witnesses led before us over the course of this Final Hearing, and the various documents in the original Joint Bundle of Documents provided to us, and the subsequent electronic Bundle, the Tribunal has found the following essential facts established:-

Background

(1) The respondents are a large local authority in the west of Scotland, employing around 6,500 staff, and they are the local Council for the West Dunbartonshire area. The claimant was formerly employed by the respondents as a corporate health & safety officer, based in the respondents' then offices at Garshake Road, Dumbarton. As a local government officer employed by the respondents, the claimant was subject to terms and conditions of employment set out in an Employee Handbook, a copy of which was produced to the Tribunal. He was also subject to various HR employment policies and procedures, including the respondents' Code of Conduct for Employees, its Attendance Management Policy and Procedure, its Dignity at Work Policy, its Disciplinary Policy and Procedure, and its Grievance Policy and Procedure. Copies of all these policies and procedures were produced to the Tribunal.

(2) A chartered member of the Institute of Occupational Safety and Health (IOSH), his role with the respondents was to ensure compliance with all legislation relating to health and safety, and monitor implementation of corporate and departmental health and safety policies. It was a contractual requirement of his employment contract with the respondents that he maintain membership of that relevant professional body, IOSH.

(3) The claimant was one of several corporate health & safety officers, then employed by the respondents, working in the Risk and Health & Safety Section of their Corporate Services directorate. That Section was headed by his line manager, Mr John Duffy, who reported to a Mr Colin McDougall, Audit & Risk Manager. Mr Stephen West, the respondents' Head of Finance & Resources, was the relevant Head of Service, reporting, along with other Heads of Service, to Ms Angela Wilson, Executive Director of Corporate Services. Reporting to Mr West, there were, amongst others, Mr McDougall, and Ms Annabel Travers, Procurement Manager.

(4) Further, also reporting to Ms Wilson, there were, in addition to Mr West, three other Heads of Service, being Ms Vicki Rogers, Head of People & Transformation; Mr Peter Hessett, Head of Legal, Democratic & Regulatory Services (also the Monitoring Officer); and Mr Peter Barry, Head of Customer & Community Services. Ms Rogers' direct reports included Ms Angela Terry, Organisational Development & Change Manager, and Mr Paul McGowan, HR & Workforce Development Manager.

(5) The claimant commenced employment with the respondents on 28 April 2008, and he remained in their continuous employment until 24 September 2015, on which date he was summarily dismissed by the respondents' dismissing manager, Mr Stephen West, on grounds of gross misconduct. While he appealed internally against that dismissal, his

appeal to a panel of elected local authority councillors was unsuccessful on 25 August 2016, after the conclusion of a 6-day appeal hearing conducted over a period of 6 months.

(6) Throughout his period of employment with the respondents, the claimant suffered from multiple sclerosis (MS), a condition first diagnosed in him in September 1996, and at all material times, while employed by the respondents, the respondents accept that the claimant was a disabled person for the purposes of the Equality Act 2010.

(7) The claimant attended occupational health before his employment with the respondents started, and in an occupational health report dated 15 April 2008 to his line manager, John Duffy, the respondents were advised that as his condition would require long-term management, it was possible that he may experience a higher than average level of absence.

(8) The predominant symptoms which the claimant had, from his MS, while employed by the respondents, were fatigue, heat intolerance, balance, incontinence, visual problems, including retrobulbar neuritis (inflammation of the optic nerve causing vision impairment), numbness and lack of strength and stamina, and this slowly progressed into secondary progressive MS.

(9) The claimant's absence record during his employment with the respondents was as follows: -

a) 28 April 2008 to 31 March 2009: 0 days

b) 1 April 2009 to 31 March 2010: 4 days

c) 1 April 2010 to 31 March 2011: 0 days

d) 1 April 2011 to 31 March 2012: 0 days

e) 1 April 2012 to 31 March 2013: 0 days

f) 1 April 2013 to 31 March 2014: 58 days

g) 1 April 2014 to 31 March 2015: 166 days

h) 1 April 2015 to 25 September 2015: 5 days

(10) But for his summary dismissal by the respondents' dismissing manager, Mr Stephen West, on 24 September 2015, on grounds of gross misconduct, the claimant's disciplinary record with the respondents was clear of default during his 7-year period of continuous employment with the respondents.

Workplace / Office of the Future

(11) Until the commencement of the respondents' Office of the Future project, the claimant worked out of an office on the third floor of the Council offices, then at Garshake Road, Dumbarton. On 27 September 2013, the claimant, along with his department, moved from the 3rd to the 4th floor. This move was in essence a pared down workspace with hot desking and limited storage. This new work environment was not conducive to the claimant's MS condition and within a short timeframe his physical condition/symptoms deteriorated, and he started to suffer stress and anxiety.

(12) In or around July 2013, the claimant and other affected employees learned that they would be moving to the fourth floor of the Council offices as a result of what became known as the Office of the Future. There was a lack of certainty around what the move to the fourth floor would involve, as the respondents' approach was to try new ways of working to establish what worked and what did not work.

(13) The claimant expressed his concerns regarding the proposed move during a telephone call with Colin McDougall on or around 28 July 2013 and then in an email to Colin McDougall of 1 August 2013, copied to John Duffy, which referenced the HSE Stress Management Standards. As he did not receive any satisfactory response to that email, the claimant sent in a more formal letter, dated 5 August 2013, addressed to Colin McDougall, raising his concerns regarding his expanding workload and the uncertainty surrounding the move to the fourth floor and how this was likely to impact on him personally.

(14) Thereafter, on 21 August 2013, the claimant, while still at work, submitted a fit note from his own GP which advised that he required amended duties and physiotherapy. This was as a result of the stress related illness (cervicalgia) and fatigue combined with his heavy workload at the time, which included covering for a colleague who had retired. However, the respondents did not put in place amended duties or arrange physiotherapy, even though he was referred to occupational health, so the claimant had to arrange physiotherapy himself through the NHS, with outpatient appointments on 24 December 2013 and 17 January 2014.

(15) Reverting back to 21 August 2013, Colin McDougall asked the claimant to attend a meeting the following day, which the claimant understood was to discuss his concerns and the stress from which he was suffering, his letter of 5 August 2013 and the fit note of 21 August 2013. He sent an email on the same day to explain that he would not attend because he had not had time to arrange for a representative to accompany him, and so the meeting did not take place on 22 August 2013. Colin McDougall then advised the claimant in an email of 23 August 2013 that being accompanied was a courtesy rather than an entitlement.

(16) As a result of the respondents not following through with the recommendations from the claimant's GP, as noted on the fit note, the

claimant was then absent from work as of 9 September 2013. When he returned to work on 24 September 2013, amended duties had not been implemented, and physiotherapy had still not been arranged, and the claimant was also facing an imminent move to the fourth floor with a great deal of uncertainty over matters including the provision of equipment that would permit a safe working environment.

(17) On 26 September 2013, in an email, the claimant raised concerns regarding his workload and stress, and also regarding suitable lockers on the fourth floor. The following day, he attended an occupational health assessment, where the OH report of 27 September 2013 provided to the respondents confirmed that he felt unsupported at work; he had physical pain, he was suffering from fatigue; and he had an underlying condition which could become exacerbated when stressed. It also stated that it was important for the workplace issues to be considered timeously.

Grievance No 1

(18) As a result of the claimant's fit note of 21 August 2013, he was referred to occupational health on 3 September 2013, and an occupational health visit took place on 27 September 2013. However, the claimant was unhappy about the way the occupational health nurse, Linda Stephen, handled the meeting. He was particularly concerned because the occupational health nurse did not seem to appreciate why the claimant's GP had recommended amended duties and physiotherapy, and this was notwithstanding the fact that he was at that time in a great deal of physical pain.

(19) As a result, the claimant corresponded with the occupational health nurse between 28 September and 7 October 2013, during which he expressed his concerns. Unfortunately, the occupational health nurse did not, in the claimant's opinion, properly address his concerns, and he therefore advised her on 7 October 2013 that he wished to submit a formal complaint.

(20) On 3 November 2013, the claimant submitted his formal complaint in relation to the occupational health assessment which took place on 27 September 2013. He did not receive any response to his complaint, so he followed that up on 3 December 2013 with a letter to the Service Delivery Manager of the occupational health provider.

(21) By email dated 9 December 2013, he was informed by the Service Delivery Manager that because the management of the occupational health contract was through the respondents, the matter would need be dealt with through the respondents' own complaint procedure. He was informed that Tracy Keenan would be dealing with the complaint, and Ms Keenan contacted him by email on 10 December 2013, confirming that she wished to investigate the circumstances thoroughly.

(22) By email dated 10 December 2013, the claimant queried why it was necessary for this matter to be raised internally with the respondents, and he met with Tracy Keenan on 12 December 2013. On 17 December 2013, Tracy Keenan emailed the claimant with her notes of their meeting from 12 December 2013. The claimant replied with comments on the notes and provided her with a revised document. Tracy Keenan replied on 18 December 2013, thanking the claimant for his email which she said was really helpful.

(23) On 4 February 2014, Tracy Keenan sent the claimant an email to explain that she had met with the occupational health nurse, Linda Stephen, the previous day and had sent the occupational health nurse notes of their meeting. The claimant was not provided with a copy of those notes. Thereafter, on 5 March 2014, Tracy Keenan sent the claimant her outcome report. The claimant was concerned with aspects of the report, and in particular with a statement to the effect that the occupational health nurse had stated that he had used derogatory language in relation to the receptionist.

(24) The claimant sent an email to Tracy Keenan on 5 March 2014 clarifying the position, and raising his concern that untruths had been told by the occupational health nurse. He considered this to be a very serious matter, and assumed that Tracy Keenan would take steps to address his concerns. He also referred to the OH appointment he had attended on 20 December 2013 (with Dr Watt) and asked Tracy Kennan if she had seen that report. She replied on 5 March 2014 and made it clear to the claimant that she would not be taking any further steps and that the investigation had been closed. She also stated that she had not seen the report from Dr Watt. However, following a subject access request, the claimant later received an email showing that Tracy Keenan was copied into an email, on 13 January 2014, which attached that report, although it is not clear whether she actually read the report.

(25) Around this time, the claimant's health was deteriorating, and this resulted in his absence from work from 23 April 2014 and he was on a course of steroids and he had been prescribed new medication, and his medication for fatigue had been increased. At this time, therefore, the claimant was not in a state of mind or health which enabled him to progress matters in relation to his OH complaint, even though he was very concerned about the way this had been handled by Tracy Keenan and the lack of investigation, and right of reply, in relation to very serious statements being made about him. The claimant was concerned about Tracy Keenan attending a meeting in relation to his grievance number 3 on 25 February 2015, and the reason for that was because of his concerns regarding the way she had handled this occupational health complaint.

Grievance No.2

(26) On 19 June 2014, the claimant submitted a second grievance, which we refer to as "***grievance number 2***". This was submitted to John Duffy, and it raised five issues of concern:

a) a desk not being available for the claimant when he attended work on 8 April 2014;

b) a parking space not being provided to him;

c) harassment with reference to being asked to attend a meeting in November 2013, when he was absent with work-related stress, and the respondent informing the Employment Tribunal that he had refused to attend the meeting;

d) him being unable to access emails;

e) disregard in relation to the public interest disclosure which the claimant had submitted in November 2013, with the response not received until April 2014.

(27) The claimant received a letter from John Duffy dated 1 July 2014 acknowledging receipt of his grievance, but this letter from Mr Duffy stated that only three of the five issues raised would be considered, meaning that the respondents were not going to address the concerns which the claimant had raised in his grievance regarding harassment and the response to the public interest disclosure which he had submitted. The reason which was given in the letter for these two points not being considered was that these were points which related to the Employment Tribunal claim which the claimant had submitted in January 2014.

(28) Mr Duffy's letter of 1 July 2014 asked the claimant to provide clarification as to the resolution which he was seeking in relation to the three parts of his grievance which he was willing to consider. In response, the claimant sent an email to one of the HR advisors, Michelle McAloon, on 8 July 2014 explaining that in order to help clarify any resolution which he might be seeking, he would need to have a

response to the email that he had sent Craig Jardine on 12 November 2013, which followed the grievance number 1 hearing.

(29) In response, Ms McAloon stated that the claimant's request in that regard did not relate to the grievance points being considered under grievance number 2. Therefore, the claimant was unable to progress this particular point in the context of grievance number 2, and this resulted in grievance number 3. By letter dated 24 July 2014 from John Duffy, the claimant was informed that the grievance hearing would take place on 29 July 2014. That grievance hearing was chaired by John Duffy. The claimant was present with his GMB trade union representative, Billy McEwan. At the conclusion of the meeting, John Duffy informed the claimant that the first issue raised in his grievance (regarding the desk) was upheld in part, but he was not able to provide the claimant with a conclusion in relation to the other two issues being considered, i.e. the emails and the car parking space.

(30) The claimant was subsequently informed by letter from Mr Duffy dated 8 August 2014 that his grievance in relation to all three concerns had been upheld in part. On 18 August 2014, the claimant submitted an appeal against the outcome notified to him in relation to grievance number 2. The essence of his appeal was that he considered there to be a lack of objectivity and transparency, and he was concerned about the conclusion that his grievance was only being upheld "***in part".*** He saw no reason for there to be only a partial upholding of his grievance.

(31) The appeal meeting took place on 7 November 2014, and it was chaired by Stephen West. The claimant attended with his trade union representative, Duncan Borland from the GMB. He was informed of the outcome of the appeal by letter from Mr West dated 20 November 2014, which was emailed to him on 28 November 2014. The letter confirmed that each of the three issues being considered were now being upheld in full.

(32) The claimant had been informed at the start of July 2014, by John Duffy, that two of the points which were raised as part of grievance number 2 would not be considered, as they related to the ongoing Employment Tribunal case. However, in a letter which the claimant received on 1 October 2014 from Paul McGowan, he was informed that there was ***"no reason why these matters should not be progressed and resolutions explored"***. This letter was attached to an email which the claimant received from Jean Mulvenna (HR Assistant) of 1 October 2014. This letter followed a grievance clarification meeting on 22 September 2014, in the context of grievance number 3 which by then had been submitted.

(33) Having received that letter, the claimant had presumed that a further grievance meeting would take place in order for the two remaining issues to be addressed. He was still absent from work, so this is a matter which he spoke with John Duffy about on the telephone. He explained to Mr Duffy that he had received the letter from Mr McGowan. However, Mr Duffy's reaction on the phone was very dismissive, and he indicated to the claimant that he did not intend to address the two remaining issues. Thereafter, no further steps were taken by John Duffy in this regard, and as a result these two remaining issues were not considered further as part of grievance number 2.

Occupational Health Assessment and Attendance Review

(34) The claimant attended a further occupational health assessment on 3 October 2014. A report was produced, which recommended a number of adjustments, including a fixed/designated workstation was to be ergonomically assessed; easy access to the building; reduced hours; flexible working hours/working from home; modifying his schedule of work.

(35) The report stated that ***"an ergonomic work environment is a critical step in the accommodation process"*.** The report stated that issues

to be considered included the keyboard, mouse, computer access tools and monitor height, and reference was made to adjustable workstations where available. Reference was also made to voice recognition software such as Dragon Naturally Speaking. The report stated that an appropriate work risk assessment, including ergonomic recommendations, would be useful to provide answers to questions being asked by the respondent. The report also confirmed that the claimant had raised his concerns regarding the meeting notes from April and May 2014 being inaccurate. The report also confirmed that the claimant was assessed as having *"**a mild to moderate of anxiety and moderate depressive symptoms**".*

(36) Thereafter, the claimant attended an attendance review meeting, with John Duffy, on 13 November 2014. A number of adjustments were discussed, with reference to the occupational health report, which included the possibility of home working; flexible working; a phased return to work; not working on the fourth floor and instead moving to the ground floor; a workstation ergonomic assessment; a work risk assessment; a KVM (keyboard video mouse) switch to enable him to work from home with his own screen, keyboard and mouse; voice activated software; and a Tailored Adjustment Agreement.

(37) At the same time as discussing various adjustments which could support return to work, and even though the claimant was clear that he wished to return to work and this was supported by occupational health, he was also informed that if a return to work date could not be confirmed within four weeks, then the respondent may have no option but to consider dismissal on the grounds of capability.

(38) The claimant found this to be quite intimidating, and he could not understand why the possibility of dismissal on the grounds of capability was being raised. In response to this, he expressed the view that he believed this to be quite harsh, and he expressed his concern that if he returned to work and he was then absent again, he would end up

progressing through the stages of their policy despite being covered by the Equality Act. John Duffy said that managers can use their discretion not to issue an improvement notice. However, the claimant was issued with an improvement notice in January 2015, and this resulted in him submitting his grievance number 5.

(39) At the end of this attendance review meeting, there was discussion on the stress risk assessment, i.e. the document which the claimant had completed on 19 December 2013, but which had not been discussed with Stephen West until 23 April and 20 May 2014. Various actions were discussed by way of additional support, and the claimant confirmed that he wished those to be implemented. These actions included regular meetings with his line manager; clear objectives being set; discussions with his line manager regarding workload and targets; team meetings to include all team members with nobody being excluded; support been put in place for him to escalate or raise concerns; and workplace mediation with Colin McDougall.

(40) On 10 December 2014, the claimant was provided with a letter from John Duffy with the minutes of the attendance review meeting of 13 November 2014. He returned to work on 15 December 2014, and he provided a fit note which confirmed that he may be fit for work on the basis that there would be a phased return to work, workplace adaptations and advice from occupational health. The claimant did not carry out work at his workstation that day, because that was also the day of his stage 2 appeal hearing with Angela Terry, in relation to grievance number 3.

(41) On 15 December 2014, the claimant also attended a further attendance review meeting with John Duffy. It was agreed that the claimant would return to work on a phased return basis. One of the agreements was that he would work from home, and in this regard John Duffy stated he had sourced a KVM switch to enable the claimant to use his own screen, keyboard and mouse at home. However, even

though he told the claimant that he had sourced a KVM switch, the claimant was not actually provided with it. He did not receive the KVM switch until June 2015, by which time he had been suspended.

(42) Although the claimant had been provided with his own fixed workstation, it was clear to him that no ergonomic assessment had been carried out, and this is notwithstanding the discussion on 13 November 2014. He immediately saw that he was faced with the same difficulties as before. In particular, he still did not have the necessary filing or storage facility, which meant he still had to bend down on his knees to access his paperwork which caused him considerable pain (as it had done over a year previously). In addition, the issue with regard to the fluctuation in temperature had not been resolved.

(43) During the meeting on 15 December 2014, John Duffy stated that if the claimant required any advice or guidance then he was to contact Colin McDougall and Stephen West, if John Duffy himself was not available. There was no mention, however, of workplace mediation with Colin McDougall, something which had been discussed at the meeting on 13 November 2014 and which it had been agreed was an action point.

(44) During this meeting, the claimant also explained that the way in which he works did not fit in with the fourth-floor environment, and that he found the fourth floor to be stressful. John Duffy stated that he hoped an office move would resolve the issue. This had not been addressed, despite this already having been discussed at the meeting on 13 November 2014.

Access to Work Assessment

(45) On 6 January 2015, Access to Work attended the respondents' office. A Doug Ross, from Momentum Skills, completed a needs assessment report in respect of the claimant at work. He spoke with John Duffy, the claimant's line manager, during the course of this needs

assessment. As a result of this, a recommendation was made for waist high storage in a suitable cabinet / unit to minimise the amount of bending or kneeling required. Access to Work were recommending something which the claimant had been saying for quite some time to his employer was necessary. It seemed to him that it was unnecessary for so much time to have passed before the respondent took seriously the concerns which he had raised regarding storage and the difficulty which he had kneeling down. This is particularly the case, given that the DSE questionnaire he had submitted in February 2014 specifically had a section (and a diagram) in relation to kneeling down. The Access to Work recommendation is not the same as an ergonomic assessment or DSE risk assessment.

(46) The claimant remained at work following his return on 15 December 2014. By letter dated 5 January 2015, entitled "***Attendance Review meeting – Long term Absence Informal Stage*",** he was asked to attend a further attendance review meeting with John Duffy, because his absence had reached the trigger of "***12 days (or equivalent) within a rolling 12-month period.***" He had been absent from work, for disability / MS related reasons, as per his GP's medically certified sickness certificates, from 23 April 2014 to 15 December 2014. This meeting took place on 14 January 2015, though the report and recommendations from Access to Work, dated 11 January 2015, had not yet been made available.

(47) Notwithstanding him having returned to work one month earlier, and notwithstanding his absence from work being on account of his disability, the claimant was given an "***informal improvement note***" due to his absence. He was informed that this warning would stay on his record for one year, and also that he had no right of appeal. This resulted in grievance number 5 which Stephen West stopped and did not allow the claimant to progress as a grievance.

(48) The claimant informed John Duffy during this meeting that being at work was making him very unwell, both physically and mentally. They discussed the fact that a KVM switch had still not been sourced. The claimant again raised the issue around storage and him having to kneel down. Not only had the necessary adjustments not been made to his workstation (in particular, in relation to storage), but grievance number 3 was still ongoing, and the previous month had been particularly stressful in this respect, not least due to the lack of clarity and inconsistent information being given to him by HR and legal.

(49) Jean Mulvenna also attended this meeting, as the HR advisor. After he was given the warning by John Duffy, she asked the claimant whether he would be interested in the possibility of ill-health early retirement. He confirmed that he would be interested in that as a possible option, as he was very mindful of the deterioration in his health. He explained to Jean Mulvenna and John Duffy that he did not know what was involved in terms of the procedure for ill-health early retirement, when a referral to occupational health would be necessary and also the financial side and what sums would be involved. Jean Mulvenna confirmed to him that she would provide him with more information regarding ill-health early retirement, including tiers and figures.

(50) The report and recommendations from Access to Work were made available to the claimant on around 16 January 2015. Access to Work wrote to John Duffy, on 16 January 2015, confirming support could be provided to the claimant, in a total cost of £1,155.54, to which Access to Work would contribute £124.44, requiring the Council to pay £1,031.10.

(51) The claimant recalled sitting down with John Duffy, and also Cindy Crawford, with a hard copy of the report by Doug Ross from Momentum Skills, and discussing it. They agreed that John Duffy would retain the hardcopy, and the claimant therefore asked Cindy Crawford if she would scan the report and email it to him, so that he could have a soft

copy, which she did on 27 January 2015, the day when the meeting with Cindy Crawford and John Duffy took place. The report itself provides a summary of the difficulties which the claimant was having, with particular reference to the move to the fourth floor.

(52) The report contained nine recommendations, which were as follows:

a) waist high storage to avoid kneeling;

b) Dragon voice recognition software;

c) training sessions for Dragon;

d) a compact keyboard;

e) an ergonomic vertical mouse;

f) an electrically height adjustable desk;

g) a designated car parking space;

h) relocating to the ground floor; and

i) working from home.

(53) By email dated 30 January 2015, John Duffy provided the claimant with the minutes of the attendance review meeting. By letter dated 2 February 2015, the claimant was provided with a letter from John Duffy which confirmed that he had been issued with an Informal Attendance Improvement Note which would remain on his personal record for 12 months, until 14 December 2015. This letter also informed the claimant that if he reached another trigger point, then he would move to the first formal stage of the Attendance Management Policy.

(54) In the course of January to April 2015, the claimant was at work but without all of the reasonable adjustments having been made. In particular, he did not have waist high storage and he therefore still had to kneel down, which resulted in him suffering from considerable pain. There were ongoing issues with the temperature. He also had not been provided with a KVM switch or Dragon voice recognition. He had also not been provided with the necessary mouse and keyboard. He also found it very strange when, in February 2015, John Duffy asked him to ask Access to Work what would happen to this equipment after he had left. He found this question quite concerning, given that this was all meant to be about him staying at work, rather than leaving.

(55) The claimant sent an email to Access to Work, and asked the question which John Duffy had said he should ask. He never received a satisfactory explanation from John Duffy as to why he made that comment. Even though he was not absent from work at this time on sick leave (he had taken annual leave around this time), the claimant's GP provided him with a fit note dated 27 March 2015. This stated that he may be fit for work taking account of amended duties, altered hours and workplace adaptations, and it also advised that the respondent arrange an occupational health assessment on his return to work (from annual leave).

(56) The claimant passed this fit note to John Duffy, and he pointed out the boxes which the GP had crossed, i.e. "***altered hours***", "***amended duties***" and ***"workplace adaptations***". When Mr Duffy questioned why the claimant had provided this fit note, he explained that it was because the necessary adjustments had not yet been made and that he was suffering from high levels of fatigue. The claimant alleged that Mr Duffy then said (as he had done before) that "***they***" (i.e. the respondents) would "***get you on capability***". The claimant believed that Mr Duffy said this in relation to the fit note and his requests generally, and not only in relation to the issue of altered hours. This alleged remark was denied by Mr Duffy.

(57) On 12 April 2015, the claimant raised Employment Tribunal proceedings. These are the proceedings to which this claim relates, i.e. ***Tribunal claim no.3***. These proceedings included claims for victimisation, and the claimant referred to Stephen West and Angela Wilson. He referred to Stephen West because he had informed the claimant that grievance number 5 was being stopped and not allowed to continue. He referred to Angela Wilson because his stage 3 grievance, in relation to grievance number 3, had been substantially redacted and she had also initiated disciplinary proceedings against the claimant.

(58) The claimant was moved to an office on the first floor on 28 April 2015. It was a large office which had previously been occupied by a senior member of the respondents' staff. Despite the move of floor, the claimant still required him to continue using services (e.g., printer) on the fourth floor, which caused him ongoing difficulty. By that date, the situation with reference to the nine recommendations made by Access to Work was as follows:

a) Although they provided him with a filing cabinet so that he did not need to kneel down, it was not functional as the claimant was not provided with hanging files which could be put inside the cabinet.

b) The claimant had been provided with Dragon voice recognition software. John Duffy emailed the claimant on 28 April 2015 explaining that he could call through to ICT for them to install the software. The claimant contacted them as requested. ICT tried to install the software on his computer on the first floor on at least two occasions. However, the installation was unsuccessful. He was then given admin rights by ICT, and they agreed that the claimant would try to install the software himself. While he did try to install the software, this was also

unsuccessful. The claimant explained this to John Duffy. However, this issue was never resolved.

c) The claimant had not been provided with training on Dragon. This training was never provided. He understood that he probably would have received training had he not been suspended from work. However, he was suspended, and at no point was he trained on the use of Dragon.

d) The claimant had been provided with a compact keyboard. That issue was addressed.

e) The claimant was only ever provided with one ergonomic vertical mouse. At no point did he see a second one and he was never made aware of there being a second one. Unfortunately, the one which was provided to him was not suitable as a result of his right hand being numb due to his multiple sclerosis. The claimant explained this to John Duffy after he had tried to use the mouse. While Mr Duffy said he would arrange to obtain another mouse, a suitable mouse was never provided.

f) The claimant had been provided with an electrically height adjustable desk. That issue was addressed.

g) A designated car parking space had not been provided. However, the claimant had indicated that he was not particularly keen on having his own designated space. What he had asked for was for the respondent to ensure that an adequate number of car parking spaces were available. John Duffy was aware of this. Unfortunately, however, that issue remained unresolved.

h) The claimant had been relocated to the first floor. This was not the ground floor, as recommended by Access to Work, however the claimant was content with the first floor. Although

he had been moved to the first floor, the claimant still had to attend the fourth floor in order to use the printer, and this is an issue which the claimant raised with John Duffy on 10 June 2015.

i) Although the claimant was being permitted to work from home, he had still not been provided with a KVM switch, to enable him to have an appropriate workstation at home.

(59) In addition, the claimant's workstation (on the first floor) had not been ergonomically assessed or risk assessed. His colleague, Cindy Crawford, reminded him that as he had moved offices a DSE assessment should be carried out. Therefore, on 28 April 2015, the claimant completed a further DSE questionnaire. He received an automated confirmation, by email on 28 April 2015, that his DSE questionnaire had been submitted.

(60) In this DSE questionnaire, the claimant identified that issues in relation to the working environment and furniture were acceptable. He also identified unresolved issues around software, display screens and the requirement for visual aids and alternative equipment (as a result of difficulties with his eyesight) and other computer equipment (particularly, the mouse and keyboard). However, like the DSE questionnaire which he submitted on 26 February 2014, nothing was done about the questionnaire he submitted on 28 April 2015.

(61) After his move to the first floor, the claimant realised that the fixed line telephone which he had on his desk was not functional, as it did not link into the respondent's phone system. He was advised of this in around May or June 2015 by ICT. He logged calls with ICT about this on a number of occasions. As a result of this, the claimant had to use his mobile phone, and this caused him physical difficulty due to the numbness on his hand as a result of his MS. He raised this with John

Duffy. However, this was never addressed. He had to use his mobile phone, for work purposes, on a daily basis.

(62) Also, no discussion had taken place with regard to altered or reduced hours, and the claimant was still suffering from high levels of fatigue (for which he was taking medication), and he did not have access to the printer on the first floor. He had to use the printer on the fourth floor, which impacted on his levels of fatigue and also weakness in his legs. He was permitted to work from home, and had the ability to use the respondent's flexi-time system, though these were arrangements which applied to the team generally. No specific discussion had taken place with the claimant around reducing his overall hours of work each week.

(63) The claimant had a meeting with Stephen West and Paul McGowan on 11 May 2015. One of the issues discussed during that meeting was his working environment and how that environment impacted on his ability to control the effects of his MS. He explained that although he was happy that he had now been moved to the first floor, there were still significant issues, not least the fact that he could not use the waist high storage filing cabinet which had been provided. He explained that he had to go to the fourth floor in order to use the printer and this was causing him difficulties, but that he understood John Duffy would be resolving this.

(64) Further, the claimant explained that his office phone was not working, and that he was having to use his mobile phone which again he understood John Duffy would be resolving. He also explained that there were installation issues with regard to the Dragon software and that he had not received any training on this. He explained that he was continuing to suffer very significant levels of fatigue and had difficulties with regard to continence for which he was on medication.

(65) During this meeting, there was also discussion around the claimant being referred to occupational health with a view to ill-health early

retirement. He subsequently discovered that the following day, 12 May 2015, Paul McGowan referred him to occupational health and asked if he met the criteria to be considered for ill-health early retirement and whether this should proceed to an independent assessment. He stated in the email that ***"Should this be the case I would ask that this matter be progressed as a matter of urgency".***

(66) The claimant subsequently discovered, in September 2017, after he received a response to a subject access request from Strathclyde Pension Fund, that ill-health early retirement figures had been provided to the respondents with a provisional retirement date of 31 March 2015. Even though he had put in a subject access request to the respondents, which he believed would have covered this document, that document was never provided to him by the respondents.

(67) In December 2016, as a result of a subject access request to the respondents, the claimant was provided with an email which Paul McGowan had sent Jean Mulvenna on 3 February 2015 stating that he had ***"absolutely no issue re OH figures"***. However, notwithstanding the final page of the retirement calculation stating that the benefit quotations and option forms should be passed to the pension fund member, the claimant was never provided with the retirement calculation information. Given what was discussed at the attendance review meeting on 14 January 2015, the claimant had expected to have been provided with the retirement calculation figures.

(68) By email dated 29 May 2015, John Duffy referred the claimant to occupational health. He attended occupational health on 3 June 2015, and they reported to the respondents the same day. The claimant was very worried when he attended this appointment, as he recalled that John Duffy had already indicated to him that the respondents were going to dismiss him on grounds of capability. This was denied by Mr Duffy. Meanwhile, he had not been made aware of the position with regard to ill-health early retirement.

(69) The claimant explained to the OH doctor that not all adjustments had been made. Reference is made in the report to some, but not all, adjustments having been made. The OH doctor reported that:

"Therefore, as things stand, in my opinion it would be somewhat premature to consider Ill Health Retirement at this juncture. However, this is a complex case, and as you are aware, a formal opinion on eligibility for Ill Health Retirement can only be provided by an Independent Medical Adviser to the Local Government Pension Scheme (Scotland). As I have previously had involvement with Mr Gourlay's case, I am ineligible to provide such an opinion. Therefore if, after further dialogue with your employee, a formal opinion on his eligibility for Ill Health Retirement is required at this time, please let me know. In those circumstances, after obtaining relevant background medical reports from Mr Gourlay's treating clinicians (he has provided consent for this today), arrangements can be made for his case to be assessed by an independent doctor, as required by the rules of the LGPS."

(70) The following week, the claimant was on annual leave. He attended work on 10 June 2015 in order to attend two meetings. He had to go to the fourth floor to use the printer, and this is something which he had to do frequently. He met John Duffy who asked how he was. The claimant explained that he was very fatigued, and that he was still having to go to the fourth floor to use the printer. Mr Duffy told him that there was nothing that could be done with regard to the printer. The claimant was disappointed by this, because he had asked John Duffy on numerous occasions (for example, on 12 May 2015, the day after his meeting with Stephen West and Paul McGowan) if arrangements could be made for him to use the printer on the first floor.

(71) The claimant's understanding was that this would have involved installing the first-floor printer on his PC. However, it was clear from

what John Duffy said on 10 June 2015, that this would not be happening. Travelling to the fourth floor, even by using the lift, resulted in higher levels of fatigue and weakness in the claimant's legs due to his MS, because the overall distance was significantly longer than if he had been able to use the first floor printer which was next door to his office. Also, every day, the claimant was experiencing the effects of MS to varying degrees.

(72) The claimant believed that if a DSE assessment or risk assessment had taken place, this would have been picked up. John Duffy and he discussed what would happen next. He stated that the next option would be to look at ill-health early retirement. The next day, 11 June 2015, Jean Mulvenna sent an email to the occupational health service requesting "***an urgent review***" of the claimant's case in order for a formal opinion to be given on ill-health early retirement. John Duffy was copied into that email (though the claimant was not made aware of that particular referral).

(73) On 9 June 2015, the claimant submitted documents to the Employment Tribunal, and on 12 June 2015 Paul McGowan put in a complaint about the claimant, and the claimant was suspended from work on 17 June 2015. Two days later, on 19 June 2015, Jean Mulvenna sent an email to Paul McGowan asking if he was happy for her to get confirmation from the claimant that he still wished to explore the possibility of ill-health retirement. She explained in the email that the occupational health doctor had called her (on 18 June 2015) and wished to do a handover to an independent practitioner.

(74) Paul McGowan replied and stated that he would be discussing this with Vicki Rogers at lunchtime that day. Then, in the afternoon, Paul McGowan sent a further email to Jean Mulvenna, copying in Vicki Rogers and also Stephen West, and stated that following his reading of the occupational health report he wished to advise the occupational

health doctor ***"to hold off further with IHR until we advise"*** and that they would review the position if circumstances changed.

(75) This, however, clearly took no account of the discussion which the claimant had with John Duffy on 10 June 2015 or the discussion which Jean Mulvenna had had with the occupational health doctor on 18 June 2015. The email from Paul McGowan also stated that the next attendance review meeting was to be postponed. That related to a letter which the claimant had received dated 15 June 2015, and which invited him to attend a formal stage 1 meeting.

(76) The claimant did not see that email exchange between Jean Mulvenna and Paul McGowan until around December 2016, following a subject access request. He was therefore not involved in any dialogue, as envisaged by the occupational health doctor. Decisions with regard to ill-health retirement took place in his absence and without his knowledge, despite the claimant being involved prior to that.

(77) In July 2015, the claimant was provided with a bundle of documents for the Employment Tribunal proceedings (claims nos 1 & 2) which he had raised against the respondents in January 2014. These documents, from the respondents, included the report provided by Tracy Keenan as part of the investigation she carried out into the claimant's OH complaint. However, the claimant noted that the report contained the minutes of his meeting with Tracy Keenan, though without all of his proposed changes having been incorporated. In addition, and more significantly, this version of the report (produced in July 2015) also contained the minutes of the meeting which Tracy Keenan had with the occupational health nurse, Linda Stephen.

(78) This was the first time the claimant had seen these minutes. He was extremely concerned when he saw these minutes, as this only served to enhance his view that an unfair and inaccurate account of his meeting with the occupational health nurse had been provided. He took issue with

a significant number of points within these notes. However, he never had an opportunity to address them.

(79) The claimant raised this at the disciplinary hearing, which took place in September 2015 (as he had received the full document in July 2015), and he also raised this in the course of his appeal against dismissal made to the panel of councillors. He believed that the production of the full report in July 2015 (around five months after the meeting which Tracy Keenan attended in February 2015) only served to show that his concerns around Tracy Keenan were justified. However, the claimant did not believe that Stephen West (who dismissed him) or the appeal panel took particular note of what he was saying in this regard.

Grievances Nos. 3, 4 and 5

(80) On 25 July 2014, the claimant submitted his "**grievance number 3**", following on from his email correspondence with Michelle McAloon on 8 and 9 July 2014. The issue which he raised in this grievance number 3 related back to grievance number 1, and specifically the fact that he had not received any response to the email which he sent to Craig Jardine on 12 November 2013, raising concerns regarding the minutes of the grievance meeting (for grievance number 1) and he also put in a freedom of information request. Therefore, as part of grievance number 3, the claimant asked a number of questions in relation to why no response had been provided to him, bearing in mind over eight months had passed since his email of 12 November 2013.

(81) On 22 September 2014, the claimant attended what had been referred to as a "***grievance clarification meeting***". This was a meeting to discuss the issues raised in grievance number 2 and grievance number 3, and to agree the way forward. It had been suggested there was a degree of overlap between the two grievances. The claimant considered the grievances to be separate and distinct, and he did not believe that a meeting was necessary. His preference was for the respondents simply

to get on with dealing with his grievances. However, he did attend the meeting on 22 September 2014, and this resulted in the continuation of the grievances as separate grievances.

(82) The grievance hearing for grievance number 3 took place on 23 October 2014, and it was heard by Paul McGowan. By letter dated 5 November 2014, the claimant received the outcome which was that his grievance had been upheld in part. He was also provided with the minutes of the meeting which took place on 23 October 2014. By email dated 10 November 2014, the claimant sent to Paul McGowan a revised version of the minutes, which included tracked changes. These changes were intended by the claimant to ensure that the minutes were an accurate reflection of what had been discussed.

(83) One of the changes which the claimant made was in the section referring to email correspondence which he had with Colin McDougall in August 2013. He had been informed by Colin McDougall on 23 August 2013 that bringing a representative with him to a meeting was a *"**courtesy rather than an entitlement**"*. The claimant referred to this during the stage 1 meeting with Paul McGowan on 23 October 2014. However, the minutes which he had received did not include the fact that he had referred to this comment by Colin McDougall, and so he included reference to that as a tracked change.

(84) By email dated 2 December 2014, Jean Mulvenna provided the claimant with an amended copy of the minutes. He reviewed the amended copy, and noted that not all of his changes had been accepted. In particular, the passage referred to above, about what Colin McDougall had said, had not been included. The wording of the amended version did not make sense to the claimant, as it suggested that Colin McDougall had informed him that he felt bullied, but that was not the case, as it was the claimant who felt bullied. It was clear to the claimant that the minute no longer made sense or provided an accurate account. Therefore, on the same day, 2 December 2014, he sent an email back to Jean Mulvenna

and pointed this out. She replied on 8 December 2014 stating that his comments would be attached to the final minute. However, that proved not to be the case.

(85) The claimant submitted an appeal against that outcome on 17 November 2014, in which he raised a number of concerns regarding (amongst other things) various queries remaining unanswered. In his appeal, he set out 15 different issues which he believed needed to be addressed. When the claimant was informed that the appeal would be heard by Angela Terry, he was concerned about this because she was at the same level in the hierarchy as Paul McGowan. Therefore, the claimant did not believe it was appropriate for Angela Terry to hear the appeal which he had submitted against the decision of Paul McGowan. The claimant believed that, as a matter of fairness and particularly given the size of the organisation, the appeal should have been heard by somebody higher up in the hierarchy, such as Vicki Rogers or an equivalent person, such as Stephen West who heard his stage 2 appeal for grievance number 2.

(86) In the course of email correspondence with the claimant, Vicki Rogers refused to agree that she (or someone in her equivalent position in the hierarchy) should hear the claimant's appeal in relation to grievance number 3. When it was clear to the claimant that this was her final position, he agreed that Angela Terry could hear the appeal. However, he remained very concerned about the way this had been handled, and as a result he submitted "***grievance number 4***". specifically in relation to the approach which had been taken by Vicki Rogers. He submitted grievance number 4 by email dated 3 December 2014 to Vicki Rogers.

(87) However, Vicki Rogers informed the claimant that his grievance in relation to this (grievance number 4) would not be considered as a separate grievance. In an email from Vicki Rogers of 4 December 2014, which she copied to Angela Terry, Ms Rogers stated that: *"**raising a further grievance about an existing grievance is not appropriate**";* and that *"**any procedural issue regarding the competency of the***

officer hearing the grievance should be raised as part of the existing grievance process".

(88) Vicki Rogers went on to say that she had given authority for Angela Terry to hear the second stage of grievance number 3 and she concluded with: ***"Accordingly your new grievance is not accepted and instead will be treated as a procedural matter in connection with the current grievance."*** The claimant did not consider this to be an appropriate response. His stage 2 appeal (further to grievance number 3) related to an entirely different matter, and specifically concerns he had raised in relation to grievance number 1 from 2013. He did not consider that it would be appropriate to introduce as part of grievance number 3 a consideration of the way in which grievance number 3 was being handled.

(89) Instead, the claimant felt it would have been more appropriate for his stage 2 appeal in relation to grievance number 3 to be put on hold, pending resolution of grievance number 4. He felt that this would have allowed him to explain his position at a grievance hearing, and for the respondents to set out its position and, at least potentially, persuade him or assure him that the process which was being carried out was fair and proper. Unfortunately, the claimant felt that, by closing down grievance number 4, and refusing to hear it, no opportunity was provided for his concerns to be properly aired and for a formal, objective, response to be provided.

(90) It seemed very clear to the claimant that Vicki Rogers had not sought advice from the respondents' Head of Legal, Democratic and Regulatory Services prior to deciding that his grievance number 4 essentially was not competent. Section 4.3 of the Grievance Policy and Procedure confirms that where a manager disputes the competence of a stage 1 grievance, advice must be sought, and that the advice must be sought prior to the manager making any decision on the competence of the grievance.

(91) By email dated 8 December 2014, the claimant questioned why Vicki Rogers had stated that he was questioning the competence of Angela Terry, as this is not something which he had done in his email of 4 December 2014. He had simply raised the point that Angela Terry was at the same level as Paul McGowan. He was not questioning her competence. As Angela Terry had been copied into the email he had received from Vicki Rogers, the claimant found this whole approach by Vicki Rogers to be intimidating, and he expressed his concern in this regard in his email of 8 December 2014. He stated that he considered her approach to be intimidating and bullying. He also made the point that he regarded Angela Terry to be a highly proficient HR manager.

(92) Given the way the claimant was feeling about this situation, and the way it was being handled by Vicki Rogers, he felt that he had no option than simply to accept that Angela Terry would hear his stage 2 appeal in relation to grievance number 3. Therefore, in the same email of 8 December 2014, he confirmed his agreement that Angela Terry could hear the appeal.

(93) The claimant also explained in that email that he was unable to attend the meeting scheduled for 8 December 2014 as he had been instructed by his consultant nurse to arrange an appointment with his GP as soon as possible, because, at that time, he was having great difficulty swallowing, and he had already undergone an urgent endoscopy on 4 December 2014. He therefore asked for another date to be arranged for a stage 2 hearing with Angela Terry. Vicki Rogers replied and referred to her earlier responses whilst also stating that she respected the claimant's right to have a different view and that he was free to raise his concern as part of the stage 2 hearing. She stated that it was helpful that the claimant agreed Angela Terry could hear the stage 2 hearing, and that Angela Terry would be in touch.

(94) As a result of all of this, grievance number 4 simply did not progress at all, and no further procedure took place in relation to that grievance. In

September 2016, as a result of a subject access request which the claimant had submitted in October 2015, he was provided with a copy of an email sent by Vicki Rogers to Angela Terry on 25 November 2014. This email confirms that Vicki Rogers would ordinarily have heard his stage 2 appeal. The claimant believed that this email supports the concerns which he was raising in this regard at that time. However, Vicki Rogers at no point even acknowledged to the claimant that, ordinarily, she would indeed have been the person to hear his stage 2 appeal, which is the very point that the claimant had been making.

(95) In these circumstances, the claimant did not believe, therefore, that Vicki Rogers was being upfront with him at the time, and she essentially closed down his grievance number 4 in this regard. Had this grievance been allowed to proceed, it seemed to the claimant very likely that it would have been established that Vicki Rogers (or someone else at her same level) would normally have been expected to hear the stage 2 appeal.

(96) By letter dated 8 December 2014 from Angela Terry, the claimant was informed that the stage 2 hearing in relation to grievance number 3 would take place on 15 December 2014. In the same letter, Angela Terry stated that the claimant had failed to attend on two previous scheduled dates, 4 and 8 December 2014, and that if he did not attend the meeting set down for 15 December 2014, then she would consider that his grievance appeal had been withdrawn. The claimant was surprised and concerned by this approach, particularly given that the reason he was unable to attend the second scheduled meeting, on 8 December 2014, was due to an urgent referral by his GP. Angela Terry appeared to have had no regard to that, despite being informed by Gavin Walsh (respondents' in house solicitor) on the morning of 8 December 2014 that the claimant had just received a letter from a specialist with an appointment that he may have to attend that day, and Mr Walsh had explained this in an email to Angela Terry.

(97) The reason the claimant was unable to attend on 4 December 2014 was because (before the stage 2 hearing had been arranged) he had arranged a MOT for his car and he had no alternative means of transport, and he had informed them of this as well. In any event, on 3 December 2014, the claimant had submitted grievance number 4, and this resulted in an exchange of correspondence with Vicki Rogers up to 8 December 2014. Therefore, it seemed to the claimant that the respondents could not have expected, and did not expect, the hearing to take place on 4 December 2014. As such, the claimant did not therefore believe that the comments made by Angela Terry in her letter of 8 December 2014 were fair, and he raised this as a concern during the stage 2 appeal hearing.

(98) The stage 2 appeal hearing, in relation to grievance number 3, took place on 15 December 2014. The claimant was present with his GMB union representative, Duncan Borland. The meeting was chaired by Angela Terry. During this meeting, Angela Terry referred to 14 of the 15 issues which he had raised in his appeal. The claimant did not realise, at the time, that she did not address the third issue which he had raised, about compliance by the respondents of policy and procedure.

(99) One of the concerns discussed during the appeal meeting was the length of time which it had taken for this grievance number 3, to be dealt with. The claimant raised the grievance on 25 July 2014, and the stage 1 grievance hearing did not take place until 23 October 2014, with the outcome provided in early November 2014. Therefore, over three months had passed before the matter had been dealt with at the first stage. The claimant did not consider this to be acceptable, or indeed in accordance with policy. Angela Terry referred to the policy on timescales and confirmed that a grievance meeting should have taken place within five days, unless there were exceptional circumstances. She asked whether the claimant had received any explanation with regard to exceptional circumstances, and he confirmed that he had not.

(100) They also discussed the issue around self-populating date fields, with reference to the letter which the claimant had received from Paul McGowan, on 5 November 2014, in relation to the outcome of the stage 1 hearing. Complaint number 11 of his stage 2 appeal raised this issue, explaining that the date on the letter changes whenever the letter is opened, which the claimant explained was unhelpful. He expressed his concern during the stage 2 hearing that it was unprofessional to have electronic dates in such letters, and this is because the date on the letter changes depending on the date on which the letter is printed or opened on screen. This was one of the claimant's concerns on 25 February 2015 when preparing for the stage 3 appeal hearing.

(101) The claimant also explained during this appeal hearing that he had raised a grievance with Vicki Rogers in relation to the fact that Angela Terry was hearing this appeal. Angela Terry explained, as had Vicki Rogers, that this was not being treated as a grievance and that instead the claimant could raise it as a matter of process in the course of the appeal hearing. The claimant therefore repeated his concerns about Angela Terry hearing the appeal, given that she was at the same level as Paul McGowan. Angela Terry disagreed, stating that it was appropriate for her to hear the appeal.

(102) Further, the claimant was concerned about comments made by Angela Terry in her letter of 8 December 2014 in relation to meetings having been postponed. The claimant therefore expressed his concerns regarding this in the course of the stage 2 appeal hearing. He explained exactly what had happened, and why the two meetings had to be postponed, with particular reference to the urgent hospital and GP appointments he had to attend. Angela Terry's position was that she had a responsibility to arrange a meeting as soon as possible and it was important for the claimant to make himself available to attend.

(103) However, the claimant found his a somewhat odd comment given that three months had passed before the stage 1 meeting, and he also

explained to Angela Terry that he believed his health took precedence. Nevertheless, Angela Terry maintained that the claimant should have given earlier notification of his unavailability. Given what she had said in the letter of 8 December 2014, and given the position which she was then taking in the course of the appeal hearing, the claimant explained that he wished to take out a grievance in relation to what he believed to be bullying and intimidation by Angela Terry. At the end of the appeal meeting on 15 December 2014, Jean Mulvenna (who was also present as an HR advisor) informed the claimant that he would need to raise a separate grievance in relation to his concerns regarding Angela Terry, and that she would confirm this in writing. However, she did not in the end confirm this in writing.

(104) Therefore, in relation to grievance number 3, the claimant had raised a concern with Vicki Rogers regarding Angela Terry hearing the stage 2 appeal. He had raised this as a formal grievance (grievance number 4), however was informed that this could not proceed as a grievance and instead it would need to be raised by him as a procedural issue at the appeal hearing itself. He also raised concerns regarding the way Angela Terry had conducted herself, particularly in relation to comments made around meetings being postponed. He was informed by Jean Mulvenna that this issue had to be raised as a separate grievance. To the claimant, he felt that he was being provided with contradictory and inconsistent information.

(105) On the one hand, one concern which the claimant had (i.e. Angela Terry hearing the appeal) was not allowed to be progressed as a grievance, whereas the other concern which he had (i.e. comments made by Angela Terry) was to be raised by him as a separate grievance. When he raised a question about this in an email to Jean Mulvenna on 18 December 2014, she forwarded his question to Vicki Rogers, who replied to him, on 19 December 2014, stating as follows:

"For clarity, I can confirm that raising a further grievance about an existing grievance is not appropriate. Jean has confirmed that she may have indicated a separate grievance should be lodged and this is unnecessary. Any procedural issue regarding the competency of the officer hearing the grievance should be raised as part of the existing grievance process. It is my understanding that you did this and Angela responded accordingly."

(106) Therefore, the claimant felt that it was being made clear to him that he was not being permitted to raise any separate grievance in relation to his concerns around the handling of grievance number 3, and specifically the fact that Angela Terry heard the appeal and also the concerns he had regarding comments made by Angela Terry. He was being informed that these issues had to be raised as part of the existing grievance. Having been given this information, the claimant submitted a stage 3 appeal, and in the course of that, he did as he was requested, i.e. he raised his concerns regarding Angela Terry.

(107) However, following communications from the respondents' Head of Legal, Democratic and Regulatory Services (also known as the Monitoring Officer), Peter Hessett, the claimant was not permitted to progress his grievance in relation to Angela Terry. In response to a subject access request which he submitted in 2016, the claimant discovered that, on 19 December 2014, Vicky Rogers sent an email to Stephen West and Paul McGowan stating that there was a ***"growing potential for disciplinary process being invoked"*.** The claimant was not aware at the time that disciplinary action was already on their mind. All he was doing was raising concerns around the way his grievance was being handled.

(108) By email dated 24 December 2014, Angela Terry provided the claimant with the outcome of the stage 2 appeal hearing. She explained why the claimant's email in November 2013 to Craig Jardine had been deleted. She also addressed the issue which the claimant had raised with regard

to the delay that had been involved in his grievance being heard, and she apologised for unnecessary delay. She acknowledged the issue the claimant had raised with regard to self-populating date fields and stated that she would endeavour to ensure this did not happen again. She said there had been no suggestion that the claimant had been unreasonable. For reasons which were never explained to the claimant, no responses provided to what he had raised as complaint 3 in his stage 2 appeal.

(109) With regard to the claimant's concern around Angela Terry hearing the stage 2 appeal, she stated that this complied with the Council's scheme of delegation. In relation to the concern which the claimant had raised about Angela Terry herself, and the way she had conducted the appeal, including in relation to correspondence and his concerns around bullying, she noted that the claimant had been advised to raise this as a separate matter with Vicki Rogers. However, on 19 December 2014, Vicki Rogers confirmed to the claimant that it would not be appropriate for him to raise a separate grievance. Again, the claimant felt that he was being given inconsistent information.

(110) On 12 January 2015, the claimant submitted a stage 3 appeal against the stage 2 outcome provided to him by Angela Terry. He raised seven concerns in the stage 3 appeal. These can be summarised as follows:

(1) **Inconsistency**: his concern here was in relation to the deletion of his email (12 November 2013) from Craig Jardine's inbox. He did not consider that clear information had been provided about this, and he had a number of outstanding questions. This is the issue which resulted in this grievance (i.e. grievance number 3) being raised in the first place.

(2) **Vicki Rogers presenting an autocratic, bullying and intimidating style of management**: The claimant referred to emails from the start of December 2014. These are the emails

which informed him that Angela Terry would continue to hear the stage 2 appeal (notwithstanding the concerns he had raised) and also that his specific grievance in relation to that matter, grievance number 4, would not be accepted and instead would be treated as ***"a procedural matter in connection with the current grievance"*** (email of 4 December 2014 from Vicki Rogers). The claimant viewed this as an autocratic management style, and explained that this was not conducive to a healthy workplace. He referred to publicly available information regarding Vicki Rogers, in which she had described herself, amongst other things, as balanced and a perfectionist. He was concerned, however, that she had acted unprofessionally in connection with the way she had handled his concerns.

(3) **Vicki Rogers making unfounded statements and implications about the claimant, implying that he had an issue with regard to Angela Terry's competence in hearing stage 2 of this grievance**: this is also a reference to the email from Vicki Rogers on 4 December 2014, in which she stated that ***"any procedural issue regarding the competency of the officer hearing the grievance should be raised as part of the existing grievance process".*** Given that the claimant had not raised a concern regarding the competence of Angela Terry (his issue was about whether it was appropriate for her to hear stage 2, given her level of authority in the hierarchy), he considered this to be unprofessional on the part of Vicki Rogers. Therefore, the claimant considered that she had made unfounded statements about him, which others could be aware of, and he did not consider this to be appropriate for someone in the role of Head of People and Transformation. Given all of this, the claimant expressed his concern that Vicki Rogers had employed

a diversion tactic and he explained his perception that this was an abuse of authority.

(4) **Not being heard by Angela Terry with transparent impartiality when raising his concerns at stage 2**: this was a reference to the fact that the claimant's concern around Angela Terry hearing the stage 2 appeal had been raised by him in the form of grievance number 4, but he had been told by Vicki Rogers that this could not be raised as a separate grievance and would have to be addressed as part of the stage 2 hearing. The claimant did, therefore, raise it as part of the stage 2 hearing, but he was not satisfied that it had been dealt with satisfactorily. Therefore, he raised it as part of his stage 3 appeal.

(5) **Written communication from Angela Terry being perceived by the claimant as being intimidating and bullying**: this relates to the comments made by Angela Terry about the stage 2 hearing having to be reconvened due to the claimant not being available. He raised his concerns about this, and the way she expressed herself, in the course of the stage 2 hearing. He was originally informed by Jean Mulvenna that this may need to be raised as a separate grievance. However, he was subsequently informed, by Vicki Rogers, that he was not to raise a separate grievance about an existing grievance. Therefore, it seemed to the claimant that his only option was to incorporate this as part of his stage 3 appeal. As noted in his stage 3 appeal, the claimant was particularly concerned about Angela Terry having informed him, on 8 December 2014, that if he failed to attend the rescheduled meeting then she would treat his stage 2 appeal as having been withdrawn. The claimant found this to be particularly heavy-handed and unfair in all the circumstances, and he considered this to be intimidating and also a form of bullying.

(6) **Vicki Rogers failing to understand that the claimant had raised a separate, and very serious, issue regarding Angela Terry (in addition to his concern around her hearing the stage 2 appeal), i.e. his concern around bullying and intimidation by Angela Terry**: this also relates to the fact that Vicki Rogers had informed the claimant, on a number of occasions up to and including 19 December 2014, that he was not entitled to raise a grievance about an existing grievance. Having been informed of that, and having received the email of 19 December 2014 which stated that Vicki Rogers considered the matter had been "***dealt with***", the claimant felt that he had no option but to raise his concerns around Angela Terry as part of this stage 3 appeal, which is noted above under point number (5). However, the claimant also believed that Vicki Rogers had not properly understood the difference between (a) his concerns around Angela Terry hearing the stage 2 appeal and (b) his concerns around bullying and harassment on the part of Angela Terry. As noted above, Vicki Rogers had said in an email to Jean Mulvenna on 19 December 2014: "***Jean has confirmed that she may have indicated a separate grievance should be lodged and this is unnecessary***". However, the claimant believed that Vicki Rogers thought that Jean Mulvenna had been referring to his concerns around Angela Terry hearing the stage 2 appeal, rather than his concerns around bullying and harassment on the part of Angela Terry.

(7) **The claimant's concern that the HR Department within the respondent was not adhering to the CIPD Code of Professional Conduct**: the claimant raised concerns around the conduct of Vicki Rogers and Angela Terry, and he referred to sections of the CIPD Code of Professional Conduct which he did not consider had been complied with.

(111) On 20 January 2015, the claimant received a letter from Paul McGowan (who had heard stage 1 of grievance number 3). This letter asked the claimant to attend a meeting with him to discuss the issue set out in the first of his seven complaints which he had raised in his stage 3 appeal. He was also informed that, in relation to the remaining six complaints, the grievance procedure did not allow such issues to be considered at this stage of the process, and that those issues where outwith the remit of the Appeals Committee. The claimant was told that these six issues would not therefore be considered. In addition, he was informed that Vicki Rogers would be making arrangements to meet with him in order to discuss these matters.

(112) This letter from Mr McGowan took the claimant very much by surprise. He did not understand why Paul McGowan was asking to meet with him in relation to his stage 3 appeal, when he is the person who had heard stage 1. The claimant was also extremely concerned about being told that the remaining parts of his stage 3 appeal would not be considered at all, particularly given that he had previously been advised, by Vicky Rogers, that he could not raise a separate grievance about an existing grievance and that such matters would be dealt with as part of the existing grievance.

(113) This is relevant to each of the six issues which the claimant had been told would not be considered, and he believed it is particularly notable with regard to that part of his stage 3 appeal which related to the fact that Angela Terry had heard stage 2. The claimant had been advised by Vicki Rogers that that issue was a procedural issue to be dealt with in the course of the stage 2 hearing. He could not understand, therefore, why he would not then be allowed to continue to raise that same issue as part of the stage 3. Furthermore, he was being asked to meet with Vicki Rogers herself, the very person against whom he was raising serious concerns as part of his stage 3 appeal. It seemed to the claimant that none of this was an appropriate way to go about handling his stage 3 grievance appeal.

(114) On 27 January 2015, the claimant attended the requested meeting with Paul McGowan. During this meeting, Mr McGowan provided the claimant with certain documents pertaining to the investigation which he had carried out (at stage 1) in relation to the deletion of the claimant's email to Craig Jardine of 12 November 2013. He also informed the claimant that his stage 3 appeal (i.e. the seven points referred to above) was being redacted.

(115) In an email on 27 January 2015, Paul McGowan asked the claimant to confirm whether he wished to proceed with his stage 3 appeal, in so far as it related to the first of his seven complaints. He also confirmed that complaints 2 to 7 would not be taken to the Appeals Committee.

(116) The claimant replied by email dated 29 January 2015, and he copied in the Monitoring Officer, Peter Hessett. The claimant set out what he had been advised previously by Vicki Rogers, and the fact that he was being given inconsistent information. On the one hand, Vicki Rogers had informed him that it was not appropriate to raise a further grievance about an existing grievance and that instead such matters would be treated as a procedural matter in connection with the current grievance, whereas on the other hand he was now being informed that the additional matters being raised by him would not be progressed as part of his appeal.

(117) The claimant therefore asked for clarification from Peter Hessett. He also explained in this email that he was going to raise a further grievance, in light of the fact that he had received a formal warning due to sickness absence, which was due to multiple sclerosis and other matters. This is the claimant's "***grievance number 5".***

(118) By email dated 2 February 2015, Paul McGowan confirmed that he had noted Peter Hessett's response to the claimant, and he also confirmed that the claimant's forthcoming grievance should be directed to Stephen West.

(119) The claimant received the response from Peter Hessett by email on 2 February 2015. He stated that issues which the claimant had raised in his stage 3 appeal were ***"irrelevant to the appeal"*** and also ***"an attempt to raise a grievance about an aspect of the handling of a grievance".*** Mr Hessett stated that he was unclear about the inconsistency which the claimant had endeavoured to highlight. He agreed with Vicki Rogers that raising a further grievance about an existing one is not appropriate, and stated that if there was an issue regarding the competency of an officer to hear a grievance then that should be raised with the officer.

(120) However, the claimant was not raising a concern regarding the competency of Angela Terry hearing the stage 2 appeal. His concern was in relation to whether it was appropriate for her to hear the grievance, given that she was on the same level of authority as Paul McGowan, who heard stage 1. Further, whilst the claimant was being told by Peter Hessett that it was not appropriate to raise a further grievance about an existing one, he was not telling the claimant what he could do in order to raise his concerns.

(121) Mr Hessett did not address the fact that the claimant had been advised by Vicki Rogers that any such concerns would be dealt with as a procedural matter in connection with the current grievance. Therefore, the claimant was still left in a state of uncertainty and confusion, and it was not at all clear to him how he could raise the concerns which he had set out as complaints numbered 2 to 7 in his stage 3 appeal.

(122) By letter dated 5 February 2015 from Angela Wilson, Executive Director of Corporate Services, the claimant's stage 3 grievance appeal was acknowledged. He was informed in this letter that advice had been provided by Peter Hessett and that his stage 3 appeal document was to be the subject of deletion and/or redaction. He was informed that the stage 3 hearing would only consider the first of his seven complaints set out above, meaning that the remaining six complaints would not be

considered. The letter stated: *"**Only those matters pertaining to complaint 1 within your grievance will be accepted**"*.

(123) The claimant believed that the true reason why his stage 3 appeal was very substantially redacted is because he had raised Employment Tribunal proceedings against both the respondents and named individuals.

(124) On 25 February 2015, the claimant attended a meeting with Angela Terry and a committee administrator, Nuala Quinn-Ross, in order to agree the bundle of documents for the purposes of the stage 3 grievance hearing (in relation to grievance number 3). He attended with his GMB union representative, Jackie Cavan. When he was presented with a redacted version of his stage 3 appeal, the claimant was very concerned, because the vast majority of his (over 80%) had been redacted. The only part of his appeal which remained unredacted was the issue he had raised as the first of the seven complaints in his stage 3 appeal.

(125) A couple of minutes after attendees at this meeting had all sat down, Tracy Keenan entered the room. She is the person who dealt with the claimant's OH complaint. On 5 March 2014 she had sent the claimant her outcome report. He was concerned with aspects of the report, and in particular with a statement to the effect that the occupational health nurse (Linda Stephen) had stated that he had used derogatory language in relation to the receptionist. After the claimant sent an email to Tracy Keenan on 5 March 2014 clarifying the position, and raising his concern that untruths had been told by the occupational health nurse, he considered this to be a very serious matter, and assumed that Tracy Keenan would take steps to address his concerns.

(126) However, Ms Keenan had replied on 5 March 2014 and made it clear to the claimant that she would not be taking any further steps and that the investigation had been closed. Therefore, it was just under a year earlier that the claimant had raised concerns regarding the way Tracy

Keenan had dealt with matters, and he was very unhappy with the way that matter had concluded.

(127) At the meeting on 25 February 2015, when the claimant asked Tracy Keenan what she was doing there, she replied that she was helping out Angela Terry (previously it was Jean Mulvenna who had helped). The claimant explained that he did not wish her to be there, and he explained this was because he believed she had previously been what he described as demonstrably inaccurate and also biased. He explained that he believed she had been inaccurate and biased given the way she had handled the OH complaint he had raised and that, as such, he did not believe she was the appropriate HR person to support Angela Terry in his stage 3 grievance appeal.

(128) Tracy Keenan responded by saying that she would continue to provide support, and she repeated this. She also said that if the claimant was unhappy about this, then he could set out his concerns in a letter to Angela Wilson, Director of Corporate Services. The meeting continued, with Tracy Keenan present. The claimant then started to look through the bundle of documents which had been provided by Angela Terry, for the purposes of the stage 3 appeal hearing. He noticed very quickly, when flicking through some of the pages, that the dates on certain letters were incorrect, on account of self-populating date fields.

(129) The claimant explained to those present that this was an issue which he had raised previously, towards the end of 2014 as part of stages 1 and 2 of grievance number 3. Angela Terry herself had apologised for the issue around self-populating date fields. The claimant explained that it appeared the issue had not been resolved because dates on letters were still incorrect. He could immediately tell from the reaction of Angela Terry and Tracy Keenan, and in particular their body language, that they were unhappy about him having raised this issue in relation to the dates on letters being incorrect.

(130) The claimant was conscious of the fact that he had been asked by occupational health to attend a Cognitive Behavioural Therapy (CBT) appointment at 1:00pm that day, and it was already around 12:30pm. He explained this at the meeting, and he said that he thought the simplest thing would be to handwrite on the correct dates and for the handwritten dates to be initialled. In addition, he explained that by handwriting the correct dates this would essentially preserve the evidence that there was an issue with regard to self-populating date fields, and he could refer to this during the stage 3 appeal hearing. However, Tracy Keenan did not agree with this approach. She said that she wished to go and print off new versions of the letters with the correct dates. She therefore left the room in order to do this, and the claimant's union representative (Jackie Cavan, GMB) then followed her.

(131) By email dated 10 November 2014, the claimant had sent to Paul McGowan a revised version of the minutes of the stage 1 hearing, which included tracked changes. One of the changes which he had made was in the section referring to email correspondence which he had with Colin McDougall in August 2013. By email dated 2 December 2014, Jean Mulvenna provided the claimant with an amended copy of the minutes. He noted that not all of his changes had been accepted. In particular, a passage about what Colin McDougall had said had not been included, and the wording of the amended version did not make sense. Then, on 8 December 2014, Jean Mulvenna explained that the claimant's comments would be attached to the final minute.

(132) Therefore, for the purposes of the 25 February 2015 meeting, the claimant took his complete tracked change version of the minutes with him, which included the full and correct passage regarding the correspondence with Colin McDougall. He asked Angela Terry if she could hand over to him documents which she was holding so that he could check whether their version of the minutes included his complete

tracked changes (as Jean Mulvenna had said they would). He therefore asked her if she could hand documents over to him, and she did so.

(133) He then noted that his amended version of the minutes, with all of his tracked changes, had not been included, and neither had his email correspondence with Jean Mulvenna with his comments. The claimant pointed this out to Angela Terry. However, he was informed that they would not include his tracked change version of the minutes, and as a result this document was not agreed as part of the stage 3 bundle. He had to produce the document separately at the stage 3 hearing. He could not understand why he was now being told something different from what he had been told by Jean Mulvenna in December 2014.

(134) Tracy Keenan had informed the claimant during this meeting on 25 February 2015 that if he had concerns regarding her involvement in the stage 3 appeal, then he was to write to Angela Wilson. The claimant did so, by letter dated 28 February 2015 which he sent by email to Angela Wilson (and he copied in others, including Tracy Keenan). In his letter to Angela Wilson, the claimant referred to what he described as an ***"unprofessional and incompetent investigation"*** in relation to his complaint about occupational health from 27 September 2013 (i.e. the complaint which had been investigated by Tracy Keenan). He raised concerns regarding Tracy Keenan's failure to competently investigate matters and the resulting inaccurate findings.

(135) The claimant provided Angela Wilson with details regarding what had happened during the course of Tracy Keenan's investigation. He also explained to Angela Wilson what happened on 25 February 2015 in the course of the meeting when they were discussing the stage 3 appeal bundle. He stated in the letter that he believed that Tracy Keenan was biased.

(136) Tracy Keenan replied to this by sending Angela Wilson an email on 1 March 2015. The claimant was not aware of this at the time, and he was subsequently provided with a copy of this email, through a subject

access request. Tracy Keenan stated in her email to Angela Wilson that it was her suggestion that the claimant direct his objection to her involvement to Angela Wilson directly. Tracy Keenan also explained in that email that she had already submitted a formal complaint about the claimant, following on from the meeting of 25 February 2015. The claimant subsequently discovered that Tracy Keenan had submitted her complaint to Paul McGowan on 26 February 2015, after emailing him on 25 February 2015 to seek his advice.

(137) Therefore, as at 28 February 2015, Angela Wilson was aware of two complaints: one complaint was from Tracy Keenan about the claimant in relation to his alleged conduct at the meeting on 25 February 2015, and the other was a complaint from the claimant about Tracy Keenan and concerns the claimant had regarding her conduct both prior to and at the meeting on 25 February 2015.

(138) By email dated 3 March 2015, Angela Wilson acknowledged receipt of the claimant's letter of 28 February 2015 to her and confirmed that she would respond after taking professional advice and in line with policy. Then, by letter dated 6 March 2015, Angela Wilson informed the claimant that she had requested that Stephen West, Head of Service, examine the issues the claimant had raised under the respondents' Code of Conduct for employees. A copy of the Code of Conduct was produced to the Tribunal. In terms thereof, and section 5.3 ("***Conduct towards colleagues"***) it is provided that: "***Employees should respect each other, different beliefs and opinions, and behave in an appropriate manner at work."*** She referred to the claimant as having made *"**numerous unfounded and disparaging comments you have made and circulated to others regarding your colleagues within this Council"**.* She stated that she was "***particularly concerned"*** with his statements in relation to Vicki Rogers "***which could be viewed as a personal attack towards her.***" Finally, she also stated that any concerns around discrimination are taken seriously and should be raised with the line manager or Head of Service.

(139) However, the claimant had already done that, on 28 February 2015, in his grievance number 5. The claimant believed the true reason why Angela Wilson initiated a disciplinary investigation is because he had raised Employment Tribunal proceedings against the respondents and named individuals, including Angela Wilson, Stephen West, and others, or because he had raised grievance number 5 which included concerns around discrimination (or it may have been for both reasons).

(140) The letter of 6 March 2015 from Angela Wilson meant that the concerns which the claimant had raised in his letter to her of 28 February 2015 were not actually investigated. Therefore, even though Angela Wilson was aware of two complaints (one from Tracy Keenan about the claimant, and one from him about Tracy Keenan), only one of those complaints was going to be investigated by the respondents, i.e. the complaint about the claimant by Tracy Keenan, but not his complaint about her. Instead, his complaint about Tracy Keenan was treated as, in itself, a disciplinary matter with him potentially being disciplined.

(141) Following on from the claimant's return to work in December 2014, which resulted in him receiving a warning at an attendance review meeting on 14 January 2015, he was very concerned about this, given that his absence was related to his disability. He was also aware that there was no facility for him to appeal against the warning. Therefore, on 28 February 2015, the claimant submitted a grievance regarding this, being his "***grievance number 5".***

(142) In this grievance, the claimant gave detailed information regarding his medical condition and the background to his absence, and he asked questions around the advice provided by HR, and which resulted in the warning. In addition, his stage 3 grievance appeal in relation to grievance number 3 had been redacted by over 80%. Only one of his seven complaints set out in his stage 3 appeal was being considered. He had been informed by Peter Hessett that the remaining six complaints would not be heard, but he had not been given any

information as to how he could go about raising these concerns. He did not consider it would be fair for him to effectively be silenced in relation to those concerns, as he considered them to be serious and worthy of investigation.

(143) Therefore, the only thing the claimant could think of doing was to raise them as a separate grievance. Given that he was already submitting a grievance on 28 February 2015 regarding the absence warning, he decided to include those six complaints which had been redacted from his stage 3 grievance appeal as part of this new grievance, i.e. grievance number 5. In other words, grievance number 5 covered two issues: firstly, the warning as a result of his absence and, secondly, the six complaints which had been redacted from his stage 3 appeal in relation to grievance number 3.

(144) This resulted in a meeting with Stephen West on 12 March 2015. The claimant was informed that his grievance of 28 February 2015 would not be progressed at that time and instead that an investigation would be carried out in relation to the language and comments which he had included in his grievance. Therefore, just like his letter to Angela Wilson of 28 February 2015, the claimant felt that his grievance number 5 was being used as a basis for a disciplinary investigation, and it was not being investigated.

(145) Paul McGowan also attended this meeting on 12 March 2015. He provided the claimant with a copy of section 5.3 of the respondents' Code of Conduct for employees. He explained that this is what would form the basis of the investigation referred to by Stephen West. The claimant noted that section 5.3 made reference to the policy on Dignity at Work. He made the point that whilst they were now making an allegation against him that he had breached the policy on Dignity at Work, he in fact believed that he had been a victim and that it was various individuals from within the HR Department who had treated him

in a way which was against the policy on Dignity at Work. He explained, therefore, that he intended to submit a formal complaint in this regard.

(146) Stephen West also informed the claimant at the meeting on 12 March 2015 that he would be seeking advice from the Monitoring Officer (Peter Hessett) as to whether the claimant's grievance number 5 could competently be pursued through the grievance procedure. That grievance was thereafter stopped, and no investigation took place into grievance number 5 before the claimant was dismissed in September 2015.

(147) During the disciplinary hearing itself, which was chaired by Stephen West, he said that he had been advised by Peter Hessett that the claimant's grievance could be stopped and that it was the decision of the Monitoring Officer (i.e. Peter Hessett) as to whether a grievance would ultimately be treated as a grievance. Stephen West repeated this in the course of the appeal hearing (on 18 February 2016), after the claimant had been dismissed. However, Peter Hessett was also in attendance at the appeal hearing, and when Stephen West stated that Peter Hessett had advised him that the grievance could be stopped, Peter Hessett spoke up and stated that he had not done so.

(148) This caused the claimant great concern, as it was apparent to him that grievance number 5 had been stopped without advice being sought or provided by the necessary officer of the respondents, despite Stephen West informing the claimant on 12 March 2015 that he would seek such advice. The claimant believed that the true reason why grievance number 5 was stopped is because he had raised Employment Tribunal proceedings against the respondents, and had named individuals including Stephen West, or because he had raised grievance number 5 itself which included concerns around discrimination (or for both reasons).

(149) In August 2015, prior to his disciplinary hearing before Mr West, the claimant was provided with a copy of a letter which Vicki Rogers had

sent to Stephen West on 6 March 2015. The claimant believed the letter is significant because it is dated the same day that Angela Wilson wrote to him confirming that he was being investigated. The letter from Vicki Rogers makes very general assertions regarding the claimant having continued to make allegations of unprofessional and incompetent behaviour. She states in her letter: ***"At the current count, four of the team (excluding myself) have been subjected to this behaviour"*.**

(150) The issue which the claimant had with this letter is that it provides no context or background whatsoever as to the reasons for or the nature of his concerns. In particular, no mention is made of the reasons why he was concerned about Angela Terry hearing this stage 2 appeal; no mention is made of his concerns around the initial investigation which had been carried out by Paul McGowan; no mention is made of his concerns around his stage 3 appeal being over 80% redacted; no mention is made of why he submitted grievance number 5 in the light of a warning for disability-related absence; no mention is made of his concerns around the investigation by Tracy Keenan into his earlier occupational health complaints; and no mention is made of the reasons why he was concerned about the approach which was taken at the meeting of 25 February 2015. In these circumstances, the claimant believed that the letter from Vicki Rogers failed to provide a reasonable or balanced assessment, and instead was being used as a basis for a formal disciplinary investigation against him.

(151) On 12 March 2015, after his meeting with Stephen West, the claimant sent Mr West an email, confirming his understanding of what had been discussed, and in particular that he had been informed he would be investigated under the Code of Conduct for employees. Stephen West responded by email dated 18 March 2015. He confirmed that an investigation would be carried out. In addition, in relation to grievance number 5 (which the claimant had raised on 28 February 2015), Mr West confirmed that he would not be progressing that grievance as he

would be *"**making arrangement to investigate the language and comments included in your submission.**"*

(152) Mr West also informed the claimant that he had received two complaints relating to his conduct and behaviour, and subsequently the claimant was informed that the two complaints were from Vicki Rogers and Tracy Keenan. On 13 March 2015, the claimant sent an email to HR asking for documents to be included for the purposes of the stage 3 appeal hearing on 19 March 2015. These documents included grievance number 5, which had been stopped but which included the information that had been redacted from his stage 3 appeal (which the appeal committee would be considering on 19 March 2015). The claimant explained in his email that he wanted the appeal panel to be aware that his grievance had been stopped, and that he was concerned this action amounted to victimisation.

(153) Prior to the disciplinary hearing, the claimant raised concerns about the impartiality of Stephen West, and the claimant believed that at a very early stage, i.e. just at the point when Stephen West was instigating an investigation against the claimant, his impartiality was already tainted because he had acted outwith authority when stopping the claimant's grievance, and he had done so with knowledge of Paul McGowan (in relation to whom the claimant subsequently raised concerns, which were then used against him).

(154) In his email of 18 March 2015, Stephen West also noted that the claimant had said he wished to make a complaint under the Dignity at Work Policy, as he believed he had been subjected to discrimination, harassment, victimisation and bullying. He said in the email: *"**Again I would ask that you provide further information in relation to this matter detailing how you feel you have been discriminated, harassed, victimised or bullied and the individuals involved**."*

(155) On 19 March 2015, the claimant attended the appeal hearing for his stage 3 appeal, in relation to grievance number 3. He attended with his

GMB union representative, Jackie Cavan. The management case was presented by Angela Terry (who heard stage 2) and Tracy Keenan was present. The appeal panel comprised four local authority councillors, and one of them, the chair, was Councillor Rainey. Peter Hessett and Vicki Rogers were also in attendance, advising the panel from a legal and HR perspective.

(156) The appeal panel focused only on the issue around the claimant's email to Craig Jardine of 12 November 2013. This was the issue which triggered grievance number 3 in the first place. Even though the claimant had raised a number of additional concerns, including in relation to Angela Terry and Vicki Rogers (as part of his stage 3 appeal), this was not considered because that part of his appeal had been redacted. He brought this to the attention of the panel during the appeal hearing, as he felt it was important for them to be aware that he had wider concerns regarding HR, and he also considered this to be relevant given that Vicki Rogers was advising the panel.

(157) It seemed to the claimant that Vicki Rogers was in a conflict of interest situation, as he had endeavoured to raise a grievance against her in relation to her handling of his grievance number 3. He had done so through grievance number 4, which Vicki Rogers told him would not be considered. He had also raised concerns about her in his stage 3 appeal (which was redacted). Therefore, the claimant did not think it was appropriate for Vicki Rogers to be in attendance at the stage 3 appeal hearing. In addition, on that day, he was not aware that on 6 March 2015 Vicki Rogers had written to Stephen West raising a complaint about the claimant. The claimant believed that that in itself created a conflict of interest, and Vicki Rogers should have taken it upon herself not to attend and advise on his stage 3 appeal.

(158) At the conclusion of the stage 3 appeal hearing, the claimant was informed by Councillor Rainey that his appeal had been upheld in part. He confirmed the view of the panel that the investigation into his

grievance, in relation to the email that the claimant had sent to Craig Jardine on 12 November 2013, had been unprofessional. He explained that the appeal panel considered there should have been more thorough follow-up and questioning of Craig Jardine. This outcome was confirmed to the claimant in writing by Peter Hessett by letter dated 19 March 2015, who confirmed that the panel had upheld the grievance in part and that the investigation could have been more thorough. Mr Hessett provided an apology on behalf of the respondents.

(159) The claimant believes it is significant that Councillor Rainey stated at the end of the appeal hearing that the investigation had been unprofessional. This is because the investigation had been carried out by HR. The claimant felt this is significant in the context of him having raised other concerns around the professionalism of HR (i.e. Angela Terry, Vicki Rogers and Tracy Keenan). He believes that the fact HR had been found to have acted unprofessionally in one respect at the very least should give some weight or credence behind other concerns he had raised about their professionalism. However, instead of his other concerns being taken seriously and investigated, the claimant felt that they were instead used against him as the basis for a disciplinary investigation.

(160) Meanwhile, grievance number 5 (raised by the claimant on 28 February 2015) was not being progressed. The claimant asked Stephen West in an email of 23 March 2015 who made the decision to put that grievance on hold. By email dated 2 April 2015, Stephen West confirmed that he had made that decision. Mr West had been named as a respondent in Employment Tribunal proceedings which the claimant had raised against the respondents, and named individuals. In that email, Stephen West also confirmed for the first time that he had received complaints from Tracy Keenan and Vicki Rogers, and he stated that the complaint by Vicki Rogers was *"**on behalf of herself and her team**"*. At that point the claimant was not provided with any other information regarding the complaints against him.

(161) During the meeting with Stephen West and Paul McGowan on 12 March 2015, the claimant explained that he would be submitting a complaint under the Dignity at Work policy, and this was subsequently referred to in the email correspondence with Stephen West who specifically asked him to clarify his complaint. Therefore, by email dated 26 March 2015, the claimant submitted his Dignity at Work complaint, by sending it to Angela Wilson and also the Chief Executive, Joyce White. He requested that the matter be investigated by "***third party persons / organisation***."

Dignity at Work complaint

(162) The respondents operated a Dignity at Work Policy, a copy of which was produced to the Tribunal. The claimant's 6-page Dignity at Work complaint, a copy of which was provided to the Tribunal, provided a summary of the events relating to his employment which had taken place since the autumn of 2013. He detailed his complaint as disability, general bullying, victimisation and harassment. He was endeavouring to explain how he felt that various concerns which he had raised had not been properly considered or investigated, and yet he was himself now being investigated under the Code of Conduct. It also covered the recent events, including the 14 January 2015 warning for being absent, the redaction of his stage 3 appeal, his letter to Angela Wilson of 28 February 2015, the stopping of grievance number 5 and the starting of disciplinary proceedings. The claimant proposed that a "***cover-up***" had been taking place, and that a third-party independent investigation was necessary to be seen as impartial and transparent. He explained in his Dignity at Work complaint that the effect which all of this was having on him was stress, multiple sclerosis relapses, general ill health, and anxiety.

(163) By email dated 30 March 2015, Angela Wilson said she would consider the claimant's Dignity at Work complaint in conjunction with the

required professional advice and that the matter would be progressed ***"in line with the appropriate policies and time scales"*.**

(164) At this time, the claimant was already engaged in his Employment Tribunal proceedings against the respondents, being his claims 1 and 2. Parties were at a stage where hearing dates before the Glasgow ET were being fixed. After he submitted his Dignity at Work complaint, the claimant received a phone call from Gavin Walsh, the respondents' in-house solicitor who was dealing with the Employment Tribunal proceedings on behalf of the respondents.

(165) Mr Walsh explained to the claimant on the phone that additional costs would be involved as a result of him having submitted a Dignity at Work complaint, as he said this would result in hearing dates being postponed. He suggested that it may make sense for the claimant to withdraw his Dignity at Work complaint which covered a range of issues including the more recent events. The claimant asked Mr Walsh to confirm this in writing, and he then received an email from Gavin Walsh on 1 April 2015. Although Mr Walsh does not make specific reference in his email to the claimant's Dignity at Work complaint, he said in the email that ***"it is not ordinarily the case that such claims could proceed to a final hearing at Tribunal while internal procedures were outstanding"*.**

(166) Following receipt of this email, and in the light of his conversation on the phone with Mr Walsh, the claimant decided to retract his Dignity at Work complaint. He did so by email dated 2 April 2015 to Angela Wilson, where he explained in the email that he considered his complaint to be "***retracted***" until such times as the Employment Tribunal proceedings, then scheduled to be heard at the ET Glasgow July and August 2015, were concluded.

(167) In response to the claimant's email, he received a letter from Angela Wilson dated 22 April 2015. She acknowledged that his Dignity at Work

complaint had been "***temporarily withdrawn***". However, she went on to say the following:

"It is disappointing to read that despite being advised that it is not for you to criticise or judge the professionalism or competence of those for whom you have no supervisory responsibility, you continue to do so. While I note your comments and accusations concerning my failure to deal with or to delegate to an appropriately competent person to deal with your concerns, there is no basis for this other than your failure to accept the professional views of others. As such, it is my intention to forward this submission for consideration by the investigating officer, Annabel Travers."

(168) The claimant was extremely upset and disappointed by this reply from her. This was completely contrary to her email of 30 March 2015 in which she had stated that his Dignity at Work complaint would be progressed in line with the appropriate policies and time scales. To the claimant, this was just another example of a complaint he was raising being turned against him and instead being used as a basis to investigate him. He had raised very serious complaints under the respondents' Dignity at Work policy, which he had temporarily withdrawn, and yet it seemed clear to him that Angela Wilson already passed judgment on the concerns which he was raising in that complaint, again despite her email of 30 March 2015. The claimant had expected his concerns to be looked at seriously and independently, rather than just being swept aside and instead used as a basis to investigate him.

(169) In her letter of 22 April 2015, Angela Wilson concluded by stating that details of the allegations against the claimant had been provided to him in writing as per policy. However, that was not the case. All the claimant had been told, at that stage, by Stephen West was that complaints had

been made by Vicki Rogers and Tracy Keenan. No other details had been provided to him.

(170) In these circumstances, the claimant responded by letter dated 24 April 2015, and he pointed out what he considered to be a number of factual inaccuracies in Angela Wilson's letter of 22 April 2015. He also made the point that he believed the investigation which was now being carried out against him was for the purpose of sacking him. Specifically, he stated: "***This investigation now has, in my opinion, one objective i.e. of sacking me."*** He concluded his letter stating that: ***"I consider your approach in this matter to be a further illustration of harassment and victimisation. A further ET1 (Case number 4106122/2015) has been submitted 12 April 2015."***

(171) At that time, the claimant felt it was clear that the respondents had no intention of investigating or taking seriously his concerns. In this letter to Angela Wilson, he also provided her with a copy of the email that he had received from Colin McDougall on 11 October 2013, in response to his letter to him of 10 October 2013. This was the letter which raised health and safety concerns and in particular around DSE assessments, and which attached the DSE policy.

(172) The claimant sent this to Angela Wilson because, as at 24 April 2015, still no DSE assessment had been carried out for him in respect of the fourth floor, despite him having completed and submitted a DSE questionnaire over a year earlier on 26 February 2014. The claimant felt it appropriate to make Angela Wilson aware of this because she was responsible for health and safety implementation for Corporate Services, which is the department the claimant was in. The claimant thereafter submitted a further DSE questionnaire on 28 April 2015, but no action was taken on that.

(173) Angela Wilson replied to the claimant's correspondence by letter dated 29 May 2015. Notably, she stated the following: ***"it is not accepted that my letter of 22nd April 2015 or the approach to this matter in***

general have involved any harassment or victimisation of you". The claimant believed this is just another example of decisions and judgments being made about the concerns he had raised, but without any actual investigation taking place.

Disciplinary Investigation, Suspension and Grievances Nos. 6 and 7

(174) By letter dated 8 May 2015 from Annabel Travers, which he only received by email on 11 May 2015, the claimant was asked to attend an investigation meeting on 12 May 2015. This is the first time that he was informed of any specific allegations against him. The allegations were that:

(a) The claimant made unfounded and disparaging comments, and demonstrated an inappropriate manner towards colleagues in his letter to Angela Wilson of 28 February 2015;

(b) what the claimant said could be viewed as a personal attack towards Vicki Rogers;

(c) on 25 February 2015 the claimant made unfounded allegations and a personal attack towards Tracy Keenan;

(d) in his Dignity at Work complaint the claimant made various accusations, allegations and comments about colleagues; and

(e) the claimant had made various accusations, allegations and personal and professional attacks about members of the HR team (but with no other specific information as to what this meant or when this was meant to have happened).

(175) The claimant only received that letter on 11 May 2015. He was informed that he had to provide all of the relevant documents in time for the

meeting on 12 May 2015. He felt that this was an extremely tight timeframe, and there was no possibility he would have been able to collate all of the relevant documents in time for that meeting. This caused him very extreme stress and anxiety and affected him physically. Accordingly, the claimant sent an email on 11 May 2015 to Annabel Travers, expressing his concerns, and he explained that he would be raising a grievance in relation to her handling of the process. This was because by not providing him with enough notice, he felt that his ill-health had been exacerbated.

(176) The claimant also requested assistance from occupational health, and he expressed his concerns regarding Angela Wilson having stated in October 2013 that equality impact assessments were not required for the fourth floor. The reason he mentioned this point about Angela Wilson is because he was being investigated as a result of having raised concerns around the professionalism of members of HR, and he wanted to make the point that the Executive Director herself had specifically stated to him that she was an HR professional and that she considered equality impact assessments were not required for the fourth floor.

(177) It was clear to the claimant, and he felt it should have been clear to the respondents, that equality impact assessments were required for the fourth floor, and therefore he was giving this as an important example of what he considered to be a lack of professionalism from the most senior person within the HR Department.

(178) On the same day, 11 May 2015, the claimant submitted his "***grievance number 6",*** being his formal grievance in relation to the handling of the investigation. As well as referring specifically to the very tight timescale set down by Annabel Travers, the claimant also referred to other matters, and in particular his grievance of 28 February 2015 (grievance number 5) having been stopped, and the fact that he had not yet

received any response from Angela Wilson to his letter of 24 April 2015. He also queried whether Vicki Rogers was aware of what was happening, bearing in mind she was the Head of Service. He sent this grievance by email to Stephen West on 11 May 2015.

(179) Separately from this, the claimant was very concerned about the allegations set out in the letter of 8 May 2015 saying (amongst other things) that he had made unfounded allegations. He could not understand how or why conclusions could already have been made that he had made unfounded allegations, when the various concerns which he had raised had not actually been investigated. In this regard, his stage 3 appeal in relation to grievance number 3 had been redacted by over 80%; grievance number 4 was not allowed to proceed; grievance number 5 had been stopped; he had temporarily withdrawn his Dignity at Work complaint. Yet, notwithstanding his grievances either not having been allowed to proceed or stopped or having been temporarily withdrawn, and therefore no investigation having been carried out, it seemed to the claimant that a conclusion had been made that his allegations were unfounded.

(180) Given this, the claimant had very serious concerns regarding the disciplinary process which was now taking place, as it seemed to him that conclusions had already been made, and he did not consider this was in accordance with policy and procedure. As a result, he submitted his "***grievance number 7***", on 12 May 2015, which he sent to Stephen West by email.

(181) By email dated 19 May 2015, Stephen West informed the claimant that the concerns which he had raised in his grievances of 11 and 12 May 2015, i.e. grievance numbers 6 and 7, would not be progressed further through the grievance procedures. He stated that this followed advice he had received from Peter Hessett, the Monitoring Officer.

(182) On 19 May 2015, the claimant received an email from Annabel Travers, where she stated as follows:

> ***"You will also have an opportunity to provide relevant information as part of this process. It will be for Stephen West to determine how this matter proceeds thereafter. For the avoidance of all doubt, I have not been appointed to investigate any complaints which you may have made and as such, I will not seek or consider such matters in the course of the Investigation I have been tasked with undertaking."***

(183) The claimant was off work due to fatigue for a week from 22 May 2015, though he swapped it for annual leave. By email dated 22 May 2015, he contacted John Duffy to provide him with an update in relation to a number of issues, including the fact that he had sore eyes as this was a matter which he would be dealing with. He informed him that his GP had requested that he complete a form regarding depression (which later resulted in him being diagnosed with depression). Occupational health had also previously referred to the claimant as suffering from depression (3 October 2014). He also informed him about the disciplinary investigation that had been instructed and that Stephen West had asked to meet with him in order to discuss certain issues, though the claimant did not know exactly what.

(184) The claimant copied Stephen West into that email, and he replied on 24 May 2015. Mr West explained that he would be seeking advice from Paul McGowan. The claimant had concerns about this, because Paul McGowan was part of the HR Department and by this time the claimant had lost confidence in the ability of the HR department to handle matters in a fair and transparent manner. Amongst other things, the claimant felt that grievances which he had submitted were not being progressed and instead they were being used against him for the purposes of discipline. He also felt that all of this was being done on

the instruction of HR. Therefore, the claimant did not consider it would be appropriate for Paul McGowan to be further involved in matters, and he expressed his concerns to Stephen West in an email of 24 May 2015.

(185) The claimant raised a number of issues in relation to Paul McGowan, including the fact that in November 2013 he had advised the Unison Equalities Officer (Margaret Wood) that he and Angela Terry had not been advised of any specific concerns regarding the fourth floor. This was at a time when the claimant had raised his concerns, on a number of occasions, with Colin McDougall in the course of August to November 2013. Further, the claimant referred to the fact that Paul McGowan himself had instructed the claimant (in October 2013) to stop dealing with health and safety issues in relation to the fourth floor (despite him being a Corporate Health & Safety Officer).

(186) In these circumstances, the claimant therefore questioned in his email of 24 May 2015 how Stephen West could be satisfied, given all the circumstances, that advice received from Paul McGowan would be professionally competent. The claimant was concerned that there was a very high prospect that no action would be taken in relation to his concerns, and therefore he chose to copy the email to members of the GMB union and Unison and also his line manager, John Duffy.

(187) The claimant attended the disciplinary investigation meeting with Annabel Travers on 26 May 2015. He was accompanied by his trade union representative, Brian Johnstone from the GMB. He was not provided with copies of any documents or complaints from any individuals. He was asked to comment on the allegations which were set out in the letter dated 8 May 2015 (received on 11 May 2015).

(188) He explained that he had concerns regarding the professionalism and competence of people within HR. He did not refer to any specific individual in this regard, though Annabel Travers subsequently noted

in the minutes that the claimant had specifically called Vicki Rogers unprofessional and incompetent. However, the claimant had not done so and this was demonstrated by a recording of that meeting made by the claimant.

(189) Even though the claimant provided a copy of that recording to Nigel Ettles and Gavin Walsh (solicitors to the respondents) on 11 September 2015 (after the first day of the disciplinary hearing) and then read out a transcript of the recording on 21 September 2015 (the second day of the disciplinary hearing), Annabel Travers and Lyn Hughes maintained that the claimant had called Vicki Rogers unprofessional and incompetent.

(190) The claimant brought certain documents to the meeting in a separate folder with him to the investigation meeting, which he asked Annabel Travers to take from him. He believed he was entitled to do this, as her letter to him of 8 May 2015 stated that he could provide her with written information. This was his attempt to explain his concerns regarding the procedures which had taken place. The documents which he asked Annabel Travers to take set out his concerns around the fact that the issues which he had raised were not being investigated, and he raised concerns around what he believed to be discriminatory treatment.

(191) He referred to his concerns around a close working relationship between Angela Wilson and Vicki Rogers, and the potential lack of objectivity (including in relation to the disciplinary investigation). He provided information regarding the investigation carried out by Tracy Keenan into his complaint about occupational health. However, Annabel Travers refused to take the folder from him, and he had to leave the meeting with the folder still in his possession.

(192) As Annabel Travers refused to accept the folder of documents from him, and, therefore, as far as the claimant was concerned, she would not be investigating matters properly, the claimant explained to her that unfortunately this meant that these issues would most likely have to be

considered at the Employment Tribunal with proceedings already having been raised. The claimant believed that Annabel Travers did not investigate matters thoroughly, contrary to section 5.2 of the respondents' Disciplinary Policy and Procedure. Further, while the fact the claimant had attempted to hand over documents is not included in the minutes of the investigation meeting with Annabel Travers, the claimant explained to Mr West during the disciplinary hearing that he had attempted to hand over documents to Annabel Travers.

(193) Stephen West forwarded the claimant's email of 24 May 2015 to Paul McGowan. This is not something which the claimant had asked to happen. Then, instead of his concerns being investigated or addressed, the claimant was informed that the comments which he had made in his email of 24 May 2015 would form part of the disciplinary investigation. He also became aware that Paul McGowan used this as a basis to submit a complaint against him, and he did so on 12 June 2015.

(194) Therefore, as had happened with the other concerns that the claimant had raised (grievance numbers 5, 6 and 7), instead of the respondents addressing the concerns and investigating them, the claimant felt that they were used against him as a basis for a disciplinary investigation. Further, there was no separate investigation meeting in relation to his email of 24 May 2015, or in relation to grievance numbers 6 and 7 which also ended up forming part of the allegations against him.

(195) On 9 June 2015, the claimant submitted a letter to the Glasgow Employment Tribunal, in relation to the ongoing Employment Tribunal proceedings for discrimination. He was responding to correspondence from the Tribunal about the respondents' application to postpone a Case Management Preliminary Hearing fixed for 18 June 2015 in relation to case 4106122/2015, and he stated that he was of a mind that that new case should be combined with his existing Tribunal claims 4100134/2014 and 4102906/2014. Those first two cases were

progressing towards a full Hearing at the Glasgow ET in July / August 2015.

(196) The claimant advised the Tribunal that he was being investigated, on the instructions of Angela Wilson, for an alleged breach of the WDC Code of Conduct for Employees, and stated that he perceived areas for concern, and he proposed to the Glasgow ET that: "***Angela Wilson has not objectively managed the claimant's concerns or, alternatively, not had a competent person in a position of authority objectively manage the claimant's concerns."*** Further, he added, that Ms Wilson was having him investigated with potential for dismissal, and he proposed that "there ***is evidence of potential cronyism et al."***

(197) The claimant's letter of 9 June 2015, a copy of which was produced to this Tribunal, included in its Appendix 03, entitled "***Back together again***" and "***Me and the Boss***", photographs of Vicki Rogers and Angela Wilson in November 2013 which the claimant had seen on the publicly available Twitter account of Vicki Rogers. He believed that they were relevant to the Employment Tribunal proceedings and the claims which he had raised for disability discrimination. He was endeavouring to show that there was a lack of objectivity on the part of Angela Wilson and Vicki Rogers when dealing with his concerns, as it was clear they had worked closely together in the past. He was therefore concerned that they were now supporting each other in response to his concerns, rather than looking at his concerns objectively.

(198) The claimant was on annual leave from Monday 8 June to Friday 12 June 2015. He ended up working on Wednesday 10 June and he provided training on Sunday 14 June. As a result, he was also absent from work, as time off in lieu, on Monday and Tuesday of the following week, i.e. 15 and 16 June 2015. When he returned to work on Wednesday, 17 June 2015, the claimant was suspended by Stephen West. He said that this was due to the very serious matter of the letter

which the claimant had submitted to the Employment Tribunal. John Duffy had actually contacted the claimant earlier in the day to say that he was aware something serious had happened, though he did not know what it was, and that the claimant was going to be suspended.

(199) Earlier that day the claimant had been diagnosed by his GP as suffering from a depressive disorder. A copy of the medical record showing this diagnosis was provided to the respondents. The claimant informed Stephen West (and HR who were present) of this and stated that he did not think life was worth living as a result of what was happening. A minute of this discussion was taken by the respondents, but despite his requests this minute was not produced for the purposes of the disciplinary or appeal hearings. The claimant only received it, after the conclusion of his appeal against dismissal, having made a subject access request. This is one of a number of examples of documents not being provided to the claimant when requested (for example, it took two and a half years, until 23 December 2016, for the claimant to be provided with copies of the minutes of the appeal against dismissal hearing, despite his solicitors making repeated requests).

Suspension

(200) At the meeting, Stephen West handed the claimant a letter confirming his suspension, which is dated 17 June 2015. Mr West referred to the ongoing investigation into the claimant's conduct, and advised that further issues had been brought to his attention which caused him "***serious concern***". He stated that: "***These relate to references to Vicki Rogers and Angela Wilson made within your recent correspondence with the Employment Tribunal and in particular allegations you have made from information you have obtained from Twitter Accounts. In addition I have received a complaint from Paul McGowan, HR & Workforce Development Manager relating to comments made about him by you in correspondence***

to individuals inside and outside the Council". The claimant was advised that this "***period of paid removal from duty is a temporary measure which will not be recorded on your personal record. I would advise that your suspension is not an assumption of guilt and is not considered a disciplinary sanction. There is no right of appeal against suspension."***

(201) In the letter of suspension, Mr West stated that:

**"*After careful consideration of the facts available at this time I have decided to suspend you on full pay, from your position of Health & Safety Officer with effect from Wednesday 17th June 2015 until further notice. The decision to suspend you from duty has been taken as a precautionary measure due to the seriousness of your conduct in relation to your colleagues. I believe your continued conduct may indicate that your relationships with your colleagues and Managers have irretrievably broken down resulting in a serious breach of trust and confidence. If founded such matters could be considered gross misconduct.*

I would advise that I will consider the information detailed above, and the content of your grievances dated 11th & 12th May, alongside the report from the current investigation, which I expect to receive within the next few days. At that time, I will advise whether these matters will proceed to a disciplinary hearing or whether further investigations will be required."

(202) The claimant firmly believes that the reason for his suspension is the fact that he submitted information to the Employment Tribunal. Although the letter of suspension also refers to a complaint about the claimant made by Paul McGowan, it was clear to the claimant that Stephen West was primarily concerned about the claimant having submitted information to

the Employment Tribunal, and references to Twitter accounts regarding Vicki Rogers and Angela Wilson.

Disciplinary Hearing

(203) By email dated 21 August 2015 from Julie McBride of HR, the claimant was provided with a copy of the confidential 27-page investigation report compiled by Annabel Travers between the start of her investigation on 26 March 2015, and its completion on 26 June 2015. This included a number of appendices in the form of various witness statements, namely Tracy Keenan (interviewed 2 April 2015, signed notes 21 April 2015); Angela Terry (interviewed 24 April 2015, signed notes 24 June 2015); Jacqueline Cavan GMB (interviewed 24 April 2015, signed notes 25 June 2015); Vicki Rogers (interviewed 24 April 2015, notes and addendum of 24 June 2015 signed on 3 July 2015); and the claimant interviewed on 26 May 2015.

(204) While Lyn Hughes, HR, sent the claimant the notes of his investigatory meeting, on 17 June 2015, to sign off, the claimant, after email conversation with Ms Hughes and Ms Travers, declined to do so, saying that the notes missed some very significant content, and were "***most seriously lacking in accurate, precise and reliable detail."***

(205) Nuala Quinn-Ross, an attendee at the meeting on 25 February 2015, was not interviewed by Annabel Travers, as Ms Quinn-Ross was absent from work during the interview period. Ms Travers, as investigating officer, determined that sufficient evidence was made available without interviewing Jean Mulvenna and Paul McGowan, and without interviewing Angela Wilson.

(206) Ms Travers' report set out its scope and coverage, and her findings in respect of each of the 4 allegations made against the claimant. Her investigation did not include investigation of the background to the claimant's comments and statements regarding his Council

colleagues, and she stated that the hearing officer (Mr West) "***should establish whether the comments and statements made by Brian Gourlay regarding his Council colleagues can be substantiated."***

(207) In the same email, the claimant received a letter from Stephen West (dated 19 August 2015) asking him to attend a disciplinary hearing on 10 September 2015. The letter from Stephen West included the 4 allegations which had previously been put to the claimant during the investigation by Ms Travers. However, the letter also included 3 additional allegations which had not been discussed with the claimant during the investigation, specifically (1) in relation to grievance numbers 6 and 7 submitted on 11 & 12 May 2015, (2) his complaint of 24 May 2015 regarding Paul McGowan, and (3) the allegation that he had ***"trawled through***" Vicki Roger's personal Twitter account and included two of her personal photographs in an Employment Tribunal submission, alleging ***"cronyism"***, and such behaviour and comments could be viewed as a personal attack towards her.

(208) The claimant was advised that the disciplinary hearing would be an opportunity to seek explanations from him to respond to the allegations which had been raised against him, including the 3 additional complaints brought to his attention since the commencement of the initial investigation. He was further advised that as the hearing had been called as a result of allegations that may be regarded as gross misconduct, there was potential for disciplinary action up to and including dismissal to be taken, and therefore he was encouraged to attend the hearing.

(209) He was advised that he had the right to be represented or accompanied at the disciplinary hearing by a work colleague or trade union representative, and he was sent a copy of the investigation report, and witness statements, etc, that would be referred to at the hearing, and advised he could submit written evidence in support of his case, and call witnesses to the hearing, but that he would

personally be responsible for arranging attendance of his witnesses, who must seek approval of their line managers to attend the hearing,

(210) In light of this letter from Mr West, the claimant sent a letter to Stephen West dated 1 September 2015, raising a number of concerns, one of them being his concerns that Stephen West was not in a position to carry out the role of disciplinary hearing officer. The claimant explained in his letter to Mr West that he had submitted a claim against him for victimisation as a result of his grievance of 28 February 2015 (grievance number 5) having been stopped by him. He also raised the concern that Mr West had stopped grievance numbers 6 and 7 (11 and 12 May 2015), and that he had suspended him on 17 June 2015.

(211) The claimant expressed his concerns regarding Mr West's ability to be impartial, stating that: "I ***professionally believe you are, more likely than not, unable to fulfil the ethical and moral criterion for impartiality. Accordingly, as I have advised you previously, you should not be the disciplinary hearing officer to deal with my disciplinary hearing. Indeed this whole matter should have been investigated by an independent 3rd party."***

(212) In his letter of 1 September 2015, the claimant advised Mr West of the 11 witnesses he required, namely Joyce White, Angela Wilson, Stephen West, Colin McDougall, Annabelle Travers, Vicki Rogers, Paul McGowan, Angela Terry, Tracy Keenan, Jean Mulvenna, and Jackie Cavan. The claimant further stated that he would contact them by email, which he duly did that same day, inviting them to attend on 10 September "***in the interests of truth and justice."*** The claimant's proposed witnesses declined to attend on the claimant's behalf, or did not reply to him. Mr West replied stating he would be attending as the disciplining officer, and Ms Travers stating she would be in attendance to present her investigation. No witnesses were called on

the claimant's behalf at the disciplinary hearing. Mr West only called Ms Travers, the investigating officer.

(213) The claimant also made a "***polite request***" to Mr West that the disciplinary hearing be "***video recorded for transparency***", explaining that: "***Due to the continual inadequacies of the records / minutes of meetings and the subjective views of my mannerisms and 'gesticulations'",*** and: **"*There have been some very significant gaps and omissions in the disciplinary investigation meeting with Annabelle Travers on 26 May 2015."***

(214) The claimant did not, however, receive a response to this letter and Stephen West continued with the disciplinary hearing on 10 September 2015, and it continued to a second day on 21 September 2015. The claimant believed that Mr West's lack of impartiality was evidenced by the fact that he gave the impression that the disciplinary hearing was also an opportunity for the claimant's grievances to be aired, when, as far as the claimant was concerned, that was quite patently not the case and not what happened.

(215) The claimant attended the disciplinary hearing on 10 September 2015 with his trade union representative, Mick Conroy from the GMB. Stephen West chaired the disciplinary hearing, and Nigel Ettles (principal solicitor) was also present as was Lyn Hughes, HR adviser.

(216) At the start of the disciplinary hearing, Mr West acknowledged that the original allegations against the claimant were investigated by Ms Travers, and they were the subject of her investigation report. Further, he noted that a further 3 allegations were made during the course of the investigation and that these would also be considered at this disciplinary hearing.

(217) Mr Conroy questioned why the claimant's outstanding grievances had never been heard, and stated that for natural justice, grievances should take precedence over disciplinary matters as per the ACAS

Code of Practice, as if the decision of the disciplinary hearing was to dismiss the claimant, then the grievances would fall. After an adjournment, Mr West stated that he was advised by HR and the Monitoring Officer to suspend the grievances in order to investigate the disciplinary allegations as investigation could substantiate the allegations raised by the claimant in his grievance of 28 February 2015, and the Monitoring Officer had deemed the grievances of 11 and 12 May 2015 as not competent.

(218) Annabel Travers, the investigating officer, attended the disciplinary hearing, on day 1 of 2, and she presented her investigation report and findings. She was asked questions by Mr West, and by the claimant and Mr Conroy. It was agreed to reconvene the disciplinary hearing on a later date, namely 21 September 2015.

(219) Ms Hughes took the respondents' notes of the disciplinary hearing. There are two sets of notes from the disciplinary hearing, which took place over the two days, one for each day on 10 and 21 September 2015. These notes of hearing were produced to the Tribunal.

(220) The notes of day 1 (10 September 2015), taken by Ms Hughes, run to 18 pages, and were lined off for the claimant to sign and date that he confirmed they were a concise summary of the principal points discussed on 10 September 2015. On page 18 of 18, the notes refer to reconvening the meeting on ***"21st May"***, which is clearly an error, given day 2 is agreed as having been held on 21 September 2015. These notes were not signed off by the claimant as agreed. They were not provided to him before the reconvened disciplinary hearing on 21 September 2015.

(221) At the reconvened disciplinary hearing, on 21 September 2015, the claimant attended, again with his trade union representative, Mick Conroy from the GMB. Stephen West chaired the reconvened disciplinary hearing, and again Nigel Ettles (principal solicitor) was also present as was Lyn Hughes, HR adviser, who again took the

respondents' notes of day 2. It was noted that the claimant had asked for additional information from the respondents, and that this had been emailed to him.

(222) The claimant thereafter presented his case, making submissions in respect of each of the allegations brought against him, and Mr Conroy also made points on the claimant's behalf. The meeting was adjourned from time to time, and reconvened during the course of that day. Mr Conroy summed upon the claimant's behalf, and noting that he believed there were a core of managers within the Council who wanted Mr Gourlay dismissed, he asked Mr West not to dismiss the claimant. Mr West stated that there was a lot of information to go through, and so he would adjourn to consider the information presented to him, before making a decision, and that he would write out to the claimant in the next couple of days.

(223) The notes of day 2 (21 September 2015), taken by Ms Hughes, run to 30 pages, and were lined off for the claimant to sign and date that he confirmed they were a concise summary of the principal points discussed on 21 September 2015. They were not agreed by the claimant. They were provided to him, after he had been issued with Mr West's letter of 24 September 2015 dismissing him from the respondents' employment without notice, and after the claimant made an email request of Mr West, on 25 September 2015, for the minutes of the disciplinary hearings of 10 and 21 September 2015.

Summary Dismissal

(224) By letter dated 24 September 2015, sent by email from Stephen West at 00:41 hours on 25 September 2015, the claimant was informed that he was being dismissed, without notice, as from that date, from his position of Health & Safety Officer within Corporate Services at the respondents. In particular, the claimant was advised that Mr West had considered all the evidence presented at the disciplinary hearing, and

his findings, based on the balance of probabilities, were set forth in respect of each of the 7 allegations individually.

(225) In drawing his 5-page letter of dismissal to a close, Mr West stated that:

"I have outlined my rationale in respect of each of the allegations and would conclude that cumulatively they are demonstrative of gross misconduct based upon serious insubordination, serious breaches of trust and confidence, and serious breaches of the Council's Code of Conduct for Employees. This has resulted in an irretrievable breakdown of trust and confidence in the employment relationship. As a result of this I feel that I have no option but to dismiss you from your position of Health and Safety Officer within Corporate Services at West Dunbartonshire Council."

(226) In terms of the respondents' Disciplinary Policy and Procedure, at paragraphs 12.16 and 12.17, it is provided that summary dismissal is "***normally the penalty for acts of gross misconduct***", and will be without notice or payment in lieu of notice. Acts of gross misconduct are defined as those "***which result in a serious breach of the terms of employment and warrant summary dismissal."*** An illustrative list of examples of such misconduct is given, including serious insubordination, and a serious breach of trust and confidence, however, it is also provided that "***the list is neither exclusive or exhaustive and therefore does not preclude the possibility of dismissal for other offences of similar gravity not specified."***

(227) Mr West advised the claimant, in that letter of dismissal, that any outstanding payment of wages / salary and accrued annual leave would be processed and paid to him and that his P45 would be forwarded to him in due course, and due to the disciplinary sanction imposed, the claimant was further advised that he would not receive any payment in lieu of notice. Mr West also advised the claimant of his right to appeal the decision, and that he must complete and return an appeal form,

within 10 working days of his receipt of the dismissal letter, to Angela Wilson. Mr Conroy, his TU representative from the GMB, was copied into the dismissal letter, and email attaching it.

(228) Subsequent email correspondence ensued between that date (25 September 2015) and 9 October 2015, when Lyn Hughes sent the claimant a copy of her notes of the disciplinary hearings held on 10 and 21 September 2015. As the claimant explained, in his email of 10 October 2015 to her, copied to Mr Conroy, Mr West and Mr Ettles, the claimant stated that he was "***professionally unable to sign the document stating that your notes are a concise summary of the principal points discussed",*** as *"**there are too many factual inaccuracies**", and "**my recollections of the meetings differ greatly from your typed statement. This fact… greatly supports my need for a reasonable adjustment."***

(229) In concluding, the claimant further stated that his preference would have been a proper recording, and that*: "**Cognisance must be taken that factual inaccuracies have been told; that cover-up is taking place and that this whole matter is a sham and an abuse of authority orchestrated by persons in authority at WDC."*** He queried why a simple recording was not taken, as previously requested by him, when that would have been a very inexpensive reasonable adjustment.

Appeal against Dismissal, and Appeals Committee

(230) The claimant appealed to the respondents against his dismissal without notice by completing the respondents' <u>*pro-forma*</u> Notification of Appeal form, which he submitted on 8 October 2015, by email to Angela Wilson. A copy of his notification of appeal to the respondents was produced to the Tribunal. The key points arising from this appeal form were that he intimated that he wished to appeal against (a) the decision to discipline him, and (b) the level of disciplinary action taken against

him. Over 30 pages, the claimant stated his grounds of appeal using that form, and answering its set questions. He denied each of the 7 allegations against him, and set forth his position, at some length, and in some detail, cross referring to other matters, and other documents cited by him. At page 29 of 30, the claimant stated that he considered the form of disciplinary action taken against him "***totally excessive and unjustified***."

(231) In particular, the claimant referred to his Dignity at Work complaint, submitted on 26 March 2015, and stated that he considered it "***retracted***" until such times as parallel proceedings in his ET claims 4100134/14 and 4102906/14 were concluded, then scheduled to be heard at the Glasgow ET in July and August 2015. He also referred to his third ET1 lodged against the respondents on 12 April 2015, and stated that he considered he was suffering from ongoing discrimination, harassment and victimisation by HR.

(232) By email of 27 October 2015 to John Duffy, the claimant asked when his grievance number 5 (28 February 2015), was being dealt with. He received a response from Stephen West, on 30 October 2015, stating that ***"in light of the change in your employment status, grievances held while investigations into your conduct were being progressed will now not be progressed".*** Therefore, the claimant's concerns around being issued with a warning which related to his disability and his concerns around the professionalism of HR, including Vicki Rogers, were not investigated by the respondents under their grievance procedure.

(233) The claimant's internal appeal hearing took place over six days, between day 1 (18 February 2016) and day 6 (25 August 2016). The appeal hearing was heard by elected councillors from the respondents' Appeals Committee, namely: **Jim Brown, John Millar, Tommy Rainey and Hazel Sorrell** (though Councillor Millar was not involved

after the first day). The appeals panel was, throughout, chaired by **Councillor Rainey**. The appeal was heard, on each of its 6 days, within committee room 3 in the respondents' offices then at Garshake Road, Dumbarton.

(234) Peter Hessett (the respondents' Monitoring Officer) also attended, along with the Committee Officer, Ms Nuala Quinn-Ross. There was no HR adviser to the Committee ; Mr Hessett attended as both legal adviser and principal clerk to the Committee. Stephen West attended, as management representative, with Lyn Hughes as his HR adviser. The claimant attended with his trade union representative, Mr Ude Adigwe, from the GMB. Due to serious illness, Annabel Travers, the investigating officer, was not available to take part in the appeal hearing.

(235) A copy of the formal minute of the Appeals Committee was provided to the Tribunal, being the legal record of proceedings under local government legislation. It records the sederunt of those present, no declarations of interest noted from the councillors, exclusion of Press and public, given the nature of the appeal business being transacted, and noting the procedure to be followed at the appeal, and then recording the background paper submitted relating to the appeal, and the presentation of the case for management and appellant, and subsequent procedure, adjournments, and reconvening over the further 5 days of the appeal, recording, on page 4 of the minute, the Committee's decision that the grounds of appeal were not substantiated and the appeal was not upheld.

(236) There were also produced to the Tribunal the respondents' notes of the appeal hearing taken by Ms Nuala Quinn-Ross, committee officer. These notes do not form part of the public record of the meeting, which is the formal minute of meeting approved by the Council. Even although the claimant's solicitor at Mc Grade + Co requested the minutes of the

appeal hearing, by email dated 18 November 2016, they were not provided until 26 October 2018, almost two years after the request (and over two and half years after the first day of the appeal hearing).

(237) On the fourth day of the appeal (20 July 2016), the claimant endeavoured to hand over to the appeal panel a 7-page, typewritten document which he had prepared, and which summarised information that he wished to present to the panel as part of his appeal, including his proposed resolution. This document was produced to the Tribunal at bundle 3, pages 775A to 775G.

(238) Councillor Rainey, on the advice of Peter Hessett, the Monitoring Officer, initially did not accept the document, but Councillor Rainey then instructed that the claimant could read the main points. Whilst reading it out aloud, and after some time, Councillor Rainey then changed his mind, and the claimant's document was allowed, copied and distributed to all present, and this is included in the respondents' notes of that day's appeal.

(239) The claimant's proposed resolution was stated as follows: -

> ***"I would like us to move forward from what has happened in the past. I wish to be able to draw a line under this, and just get on with the job which I enjoy and work very hard at. If my dismissal is overturned I would be happy to engage in a process, perhaps formal independent mediation, to enable me to withdraw all of the grievances which have been raised. I do believe this would be the fairest and most productive way forward. Please do not underestimate the effect which all of this has had on me and my health and well-being. I wish to move on from this, and I hope that you will agree with my suggested way forward."***

(240) Both Stephen West and the claimant presented closing submissions to the appeals panel on day 6 (25 August 2016). They both read out from a written summary that was distributed to the councillors, and available to them at deliberation. In addition, Mr Adigwe, the claimant's trade union representative made his own closing submission summing up the case. All of these documents were produced to the Tribunal.

(241) Mr West, in his summing up, stated that he had dismissed the claimant from his post on 24 September 2015 as he, as the disciplinary officer, "***following investigation into 7 separate allegations, believed that Brian was in breach of the Dignity at Work policy and Code of Conduct for Employees. In my view the accumulation of his behaviour demonstrated an irretrievable breakdown of trust and confidence in the employment relationship and was therefore Gross Misconduct."***

(242) Further, Mr West added: "***What I have heard from Brian through this appeal process has not altered my belief that dismissal on the grounds of Gross Misconduct was the correct decision. In addition, as has been evidenced throughout the proceedings of this Committee, it is clear that there remains an irretrievable breakdown in trust and confidence in the employment relationship and Brian's employment with West Dunbartonshire Council could not possibly continue."***

(243) When Mr Adigwe submitted his document to the Appeals panel, and read it out, he highlighted how:

"***In all my experience as a trade union , as a shop steward, Branch Secretary and full time union official ; in every circumstance where a grievance and disciplinary have involved the same individual, the grievance is always heard first. Why? Because that is in accord fair play and natural justice.***

In such cases it is accepted that an aggrieved individual will be allowed to make their case at a grievance hearing first as this procedure holds no potential for sanction against the aggrieved. To insist that a disciplinary hearing precedes a grievance is to leave the aggrieved individual at the mercy of a process where one possible sanction is dismissal.

This is precisely where we find ourselves today. Mr Gourlay has been dismissed before the understandable concerns he was obliged to present as grievances have been given a fair hearing. I would ask panel members, is this fair? Is that just?

Also, when we reflect that Mr Gourlay has been dismissed for his written opinions, it is significant that Annabel Travers, Disciplinary Hearing Officer in March 2015 recommends that a further investigation should be considered to properly understand the context of Mr Gourlay's statements regarding his Council colleagues [130].

Mr West determined that this reasonable suggestion was not necessary.

Remarkably in September 2015, he then heads a Disciplinary Hearing in which Mr Gourlay was dismissed for precisely those very comments that Mr West deemed not worthy of further investigation.

I would suggest that Mr Gourlay has been failed by West Dunbartonshire Council. He is a professional Health and Safety Officer of long standing who finds himself on the dole because management were discomforted by his insistence on doing his job properly.

Of course, Mr Gourlay did use terms which may reasonably be viewed as challenging. But given the intransigence and obstructive reactions of West Dunbartonshire Council HR Department, along with the lamentable lack of proper attention to his concerns by his immediate Managers, it is not surprising that Mr Gourlay became frustrated and disillusioned.

It's not surprising that he concluded that the professional standards he demanded of himself were noticeably absent from the colleagues he was reliant upon to take those concerns seriously, and to act upon them appropriately.

Mr Gourlay may be worthy of sanction over this matter, but I would submit that the sanction of dismissal is grossly unfair and disproportionate. There have been failings on both sides for sure. But Mr Gourlay is paying for his perceived failings with the loss of his job and livelihood.

He is 54 years old, he suffers from Multiple Sclerosis, a lifelong, potentially degenerative condition, and he has been dismissed on a charge of gross misconduct. He is virtually unemployable whilst those that ignored his pleadings, failed to follow procedure and obstructed due process are free to carry on as before.

Is this what the Elected Members would consider to be a satisfactory outcome to this sad chain of events?
It is unfair that Mr Gourlay finds himself out of a job because he had the temerity to speak out against the many corporate failures he witnessed and was subjected to. I would ask the Panel to recognise this unfairness and overturn the decision to dismiss."

(244) In accordance with the respondents' Disciplinary Policy and Procedure, appendix 3, a copy of which was produced to the Tribunal, the Appeals Committee has a set procedure for appeals against disciplinary action. The management representative presents the management case and calls such witnesses as may be required. The appellant or his representative has the opportunity to ask questions of the management representative and any witnesses called by management and the members of the Committee have the same opportunity to ask such questions. The appellant or his representative present their case and call such witnesses as may be required. The management representative, and members of the Committee, have the opportunity to ask questions of the appellant, his representative and any witnesses called by the appellant. Thereafter, after parties have summed up, and withdrawn, the committee, in the presence of its legal adviser and, if required, HR advisor, will then deliberate in private, only recalling, if necessary, both parties and representatives, to clarify points of uncertainty, before recalling parties and announcing its decision, which will be confirmed in writing to both parties. The Committee will uphold or reject the appeal, or order the varying of the disciplinary action which is the subject of the appeal, but it cannot increase the severity of the disciplinary action which is the subject of the appeal.

(245) On the evidence available to the Tribunal, the Appeals Committee, having heard management and appellant submissions, and summing up, over 6 separate days over a 6-month period, then deliberated in private, for up to 1 hour, 10 minutes, outwith the presence of Mr West, the claimant and Mr Adigwe, none of whom were recalled for purposes of clarification.

(246) When the private deliberation was concluded (as per the respondents' notes, being from 3.15pm (when Councillor Rainey asked both parties to leave the meeting to allow members to deliberate the case in private), and 4.25pm (when both parties were invited to re-join the

meeting), Councillor Rainey then advised both parties that the Committee had deliberated and concluded that the grounds of appeal were not substantiated and not upheld, and the meeting closed at 4.26pm.

(247) While Councillor Rainey informed the claimant that his appeal had been unsuccessful, he did not go into any detail, or provide any reasons for its decision. Although this decision was confirmed in writing by letter dated 26 August 2015, from Mr Hessett to the claimant, still no details were provided as to the reasons why the Appeals Committee rejected the claimant's appeal. The respondents' Disciplinary Policy and Procedure, at Appendix 3, stated the form of the Committee's decision. If the grounds of appeal were substantiated, the appeal would be upheld, and if not substantiated, the appeal would not be upheld. If the grounds were substantiated in part, the appeal would be upheld to the extent specified by the committee.

(248) Mr Hessett's 13-line letter of 26 August 2016, after a preamble, narrating the six dates of the appeal hearing, and Mr West's letter of 24 September 2015 dismissing the claimant for gross misconduct, merely confirmed that: "... ***the Appeals Committee decided that the grounds of appeal had not been substantiated and did not uphold the Appeal. Under the Council's Disciplinary Policy and Procedure, the decision of the Appeals Committee is final."***

(249) To date of the close of the Final Hearing before this Tribunal, the respondents had not provided any reasoned decision to the claimant for the Appeal Committee's decision to uphold Mr West's summary dismissal of the claimant, or to explain why they decided that the claimant's grounds of appeal had not been substantiated.

Tribunal's assessment of the Evidence

29. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us,

and to consider the many documents produced to the Tribunal in the various Bundles lodged and used at this Final Hearing, which evidence and our assessment we now set out in the following sub-paragraphs: -

i. Mr Brian Gourlay: Claimant

a. The first witness led before the Tribunal was the claimant. In giving his evidence in chief, he read *verbatim* from his detailed written witness statement, dated 21 February 2020, extending to 139 pages, and 355 paragraphs, comprising a three-page summary statement, with a brief overview of his case, followed by 12 separate chapters dealing with discreet matters, but sometimes with a degree of overlap between the chapters. As an appendix to his witness statement, the claimant provided a list of key people, at page 140, and a tabulated chronology of dates and events at pages 141 to 168.

b. It is, we consider, appropriate at this stage to note and record the summary of his case, which the claimant provided to us in the first 3 pages of his signed witness statement of 21 February 2020, as follows:

Summary

Given the detail and volume of information involved, I am advised that it would be helpful to provide a brief overview:

a) I suffer from multiple sclerosis. The predominant symptoms while I was still employed were fatigue, heat intolerance, balance, incontinence, visual problems, numbness and lack of strength and stamina. Since around 2015/16, this has slowly progressed into secondary progressive MS.

b) As a result, I requested a number of adjustments to the workplace. This became a particular issue of concern when my office was moved to the fourth

floor. Unfortunately, it took an extremely long period of time for my concerns and requests for adjustments to be implemented, during which time I was suffering both physically and mentally. In some cases, the adjustments were not made at all or made at a time when it was too late.

c) This situation resulted in me raising grievances. I was also concerned about the way in which the HR department was handling matters, and I raised those concerns in grievances as well. It seemed to me that it was appropriate for me to utilise the respondent's formal grievance procedures, as I believed that would result in impartial investigations.

d) In December 2014 I wanted to raise a grievance regarding the handling of an existing grievance (which I refer to as grievance number 3) by Vicki Rogers. I was told that I could not do so. I was told that any concerns had to be raised as part of the existing grievance number 3.

e) I also wished to raise concerns about Angela Terry who had been allocated to hear my stage 2 appeal. Again, I was told this could not be done as a separate grievance.

f) I therefore raised both issues in my stage 3 appeal, as I understood this is what I had to do. However, the respondent then informed me that I could not do so, and they redacted these parts of my appeal.

g) Therefore, I raised the same issues in a separate grievance (referred to as grievance number 5). However, the respondent did not allow me to

progress that grievance, and instead of these concerns being investigated, they were used against me as part of the disciplinary proceedings.

h) At the meeting to prepare for the appeal bundle in relation to grievance number 3, I objected to Tracy Keenan being involved. She said I should write to Angela Wilson. I therefore did so. However, instead of those concerns being investigated, they were used against me as part of the disciplinary proceedings.

i) On 18 March 2015, Stephen West advised me that I could make a complaint under the Dignity at Work Policy. I therefore did so. I also retracted that complaint, following a discussion with the respondent's solicitor in relation to Employment Tribunal proceedings which were ongoing at that time. However, my Dignity at Work complaint was used against me as part of the disciplinary proceedings.

j) I raised grievances on 11 and 12 May 2015, very much borne out of frustration with the process adopted by the respondent up to that point, and due to my concerns around the way in which the disciplinary proceedings were being conducted. I also raised concerns about Paul McGowan on 24 May 2015. In each case, my grievances and concerns were not investigated and instead were used against me as part of the disciplinary proceedings.

k) In short: I endeavoured to bring concerns to the attention of the respondent regarding the HR department by using their formal procedures. These were serious issues as far as I was concerned. However, in each case, what I said was treated as a

conduct issue, rather than an issue of concern raised by me which warranted investigation.

l) It seems to me that the respondent simply was unwilling to investigate the conduct of its own HR Department. They seemed to think that it was not permissible for me to raise concerns or make critical comments about anyone for whom I did not have supervisory responsibility. However, I cannot believe that is fair.

m) How can the respondent have reasonable grounds to believe that I had made unfounded comments or allegations if the respondent had not investigated those comments or allegations in order to establish whether or not they were founded or unfounded? Surely, they would need to first of all establish, through a separate investigation, whether the comments and allegations were or were not founded and then, if it is established that they were unfounded, put a formal allegation to me? However, that is not what they did. They just concluded that I had made unfounded comments and then dismissed me.

n) It is also clear to me that the only reason I was suspended was due to information I had provided to the Employment Tribunal as part of my ongoing discrimination claim at that time. This formed part of the reason why I was dismissed and I believe that my suspension and dismissal were acts of victimisation.

c. As it was a very detailed written witness statement, which comment we make as an observation, and not a criticism, and it was necessary for him to stop, when reading it, and refer us, as and when appropriate, to relevant documents in the Joint

Bundle lodged with the Tribunal, his evidence in chief, which started on the second day (Thursday 27 February 2020), due to interlocutory matters being addressed on day one, as regards amendments to the ET1 claim form and finalising the List of Issues, his evidence, in person, at the Glasgow Employment Tribunal, ran over the following days, Friday 28 February 2020, Monday 2 and Tuesday 3 March 2020, from which the date he was cross examined by the respondents' solicitor, Mr Ettles, on 3 and 4 March 2020, and the claimant's evidence concluded, on Thursday, 4 March 2020, after some five days in total.

d. Given the respondents had lodged two supplementary witness statements, on 28 February 2020, from their witnesses, Mr West and Mr Hessett, we allowed the claimant's counsel, Mr John, on the afternoon of Monday, 2 March 2020, to ask the claimant some questions related to those supplementary witness statements, at the close of the claimant reading his own witness statement, as his evidence in chief, and before his cross examination by Mr Ettles, the respondent's solicitor, started on Tuesday, 3 March 2020.

e. Mr Gourlay, as the claimant, was the principal witness led on behalf of the claimant. He came across to the Tribunal as a polite and respectful person, and an intelligent, and articulate individual, and, no doubt down to his employment experience as a professional Health and Safety Officer, he was very thorough in his contemporary note taking, and correspondence with the respondents, much of which filled the volumes in the Bundles lodged with the Tribunal.

f. While very thorough, the claimant also came across to the Tribunal, at times, as very pedantic, and it seemed to us, as the evidence emerged, that his relationships with other colleagues within the Council, if a person did not agree with the claimant,

then he saw them as being in the wrong, and he did not appear to be able to accept that there could be a different view held by others.

g. In that regard, we felt that the claimant came across in evidence as very single minded, and he often spoke of things as he recalled them, or perhaps perceived them, after the passage of time many years ago now. His perception of events was also influenced by things he learned about, after the event, and often from FOI / SAR responses that he had obtained from the respondents, after the termination of his employment with them.

h. While we did not believe the claimant was deliberately lying to the Tribunal, given that much of what he said was supported by contemporary documentation sent by him to the respondents, and their responses to him, we were alert to him, in giving his evidence, that he did so, very much as he saw matters from his own perspective.

i. In cross examination, we were satisfied that the claimant answered questions openly, and that he answered to the best of his recollection, and as such we had no real issues with his credibility or reliability, other than in relation to the allegation that Mr Duffy had told him "***they will get you on capability***", and the allegation made against Mr West as presenting officer at his internal appeal before the panel of councillors.

j. Before dealing with that specific issue of Mr West, however, we wish to address a conflict in evidence between the claimant's position, and that of John Duffy, as regards the claimant's allegation that Mr Duffy had told him "***they will get you on capability***". At paragraph 82 of his witness statement, the claimant had stated that: "*He then said (as he had done before) that "they" (i.e. the respondent) would "get you on capability". I have a very clear recollection of him saying this*." Further, at

paragraph 93, the claimant had stated: *"… John Duffy had already indicated to me that the respondent was going to dismiss me on grounds of capability / attendance."*

k. In his evidence in chief, speaking to these two paragraphs of his witness statement, the claimant stated that Mr Duffy made that statement orally, not in writing, and in his cross-examination, on 3 March 2020, the claimant stated that he was "***100% sure***" that John Duffy used those words. Further, the claimant added, John Duffy was "***keeping a foot in both camps***", and the claimant felt that Mr Duffy had been told about a capability dismissal by somebody, but the claimant accepted that he did not raise it anywhere after the meeting on or about 27 March 2015, when he took in his GP fit note to Mr Duffy, explaining that to have done so "***would have been to dob John in***" to senior managers.

l. In the claimant's conjoined paper apart to his ET1, at paragraph 12, he had specifically stated: "*The Claimant had provided the Respondent with a subsequent fit note on 27 March 2015, upon his return to work following a period of annual leave. This fit note stated that the Claimant might benefit from working amended hours. The claimant attempted to discuss the possibility of amended hours with Mr Duffy, who shut down that discussion by making it clear to the Claimant that in the event the Claimant requested amended (reduced) hours, the Respondent would "get him on capability." By this, the claimant understood Mr Duffy to mean that the Respondent would find a way to manage him out of the employment of the Respondent on grounds of his inability to physically carry out his role. "*

m. When John Duffy came to give his evidence to the Tribunal, his witness statement addressed this allegation, at paragraph 6.9, by stating: "Despite *what he has said, I did not tell Mr Gourlay*

that if he requested amended (reduced) hours, the Council would "get him on capability." I did not suggest that the Council would find a way to manage Mr Gourlay out of the employment of the Council on the grounds of inability to physically carry out his role. My aim was always to achieve a sustained return to work for Mr Gourlay."

n. In giving his sworn evidence to this Tribunal on 12 and 16 June 2020, Mr Duffy stated that he was "***a good supporter of Brian***", and, he maintained his position that he did not tell the claimant that the Council would get rid of him on capability. In resolving this conflict in the evidence, the Tribunal has preferred Mr Duffy's denial. While we accept it may have been a throwaway line by Mr Duffy to the claimant, said in the passing of a wider conversation, it is difficult to understand why, if the claimant says it was definitely said by Mr Duffy, the claimant did not document it, and raise it in his ongoing correspondence with the respondents at or about the relevant time, nor in his internal appeal against dismissal.

o. Returning now to the claimant's allegations made against Mr West as presenting officer at his internal appeal, we note that in the amendment which we allowed to the ET1, the allegation added by the claimant was that Stephen West, as presenting officer at the appeal, during break offs in the hearing, sat with the appeal panel members.

p. The claimant's witness statement spoke to that allegation too, but when it came to his evidence, on 2 March 2020, the claimant's answers to his counsel were that such was his concern, at Mr West sitting with the appeal panel members during their final deliberations, on day 6, that he had remarked to his then GMB representative, Mr Ude Adigwe, "***what the fuck is going on here.***"

q. That was not foreshadowed in the ET1, nor the claimant's own witness statement, and it simply appeared in evidence, completely out of the blue. In his evidence in chief, per his witness statement, at paragraph 270, the claimant had noted that, during the appeal hearing, when there were breaks, Mr West sat with the councillors in the councillor's room, having coffee, and the claimant stated there that he did not think that appropriate.

r. From the evidence we heard, no challenge was made to that at the time of the appeal. Further, at paragraph 352 of his witness statement, the claimant stated that, at the final adjournment on day 6 of the appeal, he noticed that Mr West was again in the same coffee room as the councillors and, less than an hour later, they reconvened, and Councillor Rainey (the panel chair) confirmed that the claimant's appeal had been unsuccessful.

s. The claimant did not, in that witness statement, make any allegation that Mr West sat with the councillors, in the committee room, during their final deliberation adjournment. That, however, was his oral evidence to this Tribunal, after questioning, when his counsel asked him some questions arising from the respondents' supplementary witness statements.

t. In reply to Mr John, his counsel, the claimant stated that when he saw Mr West talking to the councillors, he remarked "***what the fuck is going on here"***, but added that, after his GMB trade union representative, Mr Adigwe told him "***it's a fine balancing line"***, nothing further happened, and neither he nor Mr Adigwe raised it further.

u. In reflecting on this aspect of the case, the Tribunal bore in mind Mr West's evidence to us, as also that of Mr Hessett. We preferred their evidence to us, and we have rejected outright, as

fanciful, the claimant's evidence to us that Mr West somehow sat in during the councillors' private deliberation, in the committee room, and influenced their decision.

v. Finally, we have to note and record that on many matters of detail, within his witness statement, the claimant was not directly challenged by Mr Ettles, the respondents' solicitor, in cross examination. Indeed, many points in the claimant's witness statement, constituting his evidence in chief, were, we felt, not in dispute, as they were often dealt with in contemporary correspondence at or about the relevant time, and, as such, clear from that correspondence. Mr Ettles did not cross-examine the claimant in minute detail, but only on certain areas that he felt important to the respondents' defence to this claim.

ii. Ms Cindy Crawford: formerly Apprentice Health and Safety Officer

a. Ms Crawford, aged 25, was called to give evidence on the claimant's behalf, and she did so, in person, at the Glasgow Employment Tribunal, of the afternoon of Wednesday, 4 March 2020, speaking to the terms of her three page, signed written witness statement, dated 18 February 2020, as produced to the Tribunal. She was, by agreement, interposed at the close of the claimant's cross examination, and before the Tribunal asked him questions, and he was re-examined by Mr John, his counsel.

b. As per her witness statement, and evidence, Ms Crawford was formerly employed by the respondents, from August 2012 until November 2015, as an Apprentice Health and Safety Officer, working alongside Mr Gourlay, and reporting to John Duffy. As such, she was a relatively junior member of staff, and we felt, a very peripheral witness, who added little to our understanding of the case, and the claimant's own direct evidence on matters.

c. She is now an HR administrator for a health sector company, and left the Council in 2015 because there was no position for her at the end of her apprenticeship.

d. In giving her evidence, she spoke of her knowledge of matters relating to DSE questionnaires, a comment she recalled Mr Duffy making about the claimant being "***dramatic***", and about scanning a specific document, and asking Mr Duffy to source a KVC switch for the claimant.

e. Her evidence, which just lasted under 25 minutes, was vague and general, and while we had no reason to disbelief her testimony, it was of little practical assistance to us in determining the background facts and circumstances to this case.

iii. Mrs Angela Wilson: Respondents' Strategic Director, Transformation & Public Service Reform

a. Mrs Wilson, aged 51 years, was the first witness led on behalf of the respondents. At the relevant time, her job title was Executive Director, Corporate Services. In the Council's organisational structure, at the relevant time, she was Stephen West's line manager.

b. In her evidence-in-chief, given in person to the Tribunal, at the Glasgow ET, on Tuesday 5 and Monday 9 March 2020, Mrs Wilson spoke to the terms of her two-page written witness statement, produced to the Tribunal. As the copy produced was not dated and signed, as required by the Tribunal's Case Management Orders, she dated and signed it while at the witness table on 5 March 2020. The witness statement related to matters between February and April 2015, and the origins of the investigation that Annabel Travers was instructed to conduct into the claimant's conduct.

c. Mrs Wilson was the most senior officer of the Council from whom the Tribunal heard and, for that reason, and as the respondents had not led before the Tribunal some other officers who had previously been indicated as potential witnesses for the Council, she was asked, in cross-examination, questions by the claimant's Counsel that had, perhaps, not been anticipated by her.

d. She was the subject of detailed cross-examination by the claimant's Counsel but she stuck to her evidence-in-chief, and she did not deviate from that evidence. She was articulate in the terms of her answers, and Mr John, Counsel for the claimant, spent considerable time questioning her in cross-examination, and she dealt with his questions professionally, and without fluster.

e. In giving her evidence, Mrs Wilson displayed no overt personal *animus* towards the claimant, and, in that regard, as a senior officer within a large public sector organisation, we were alert, from our own wide employment experience and backgrounds, that she will have been expected to deal with challenges, and grievances, from staff, as part of her job, and to deal with matters objectively.

f. Her evidence before the Tribunal was fairly consistent with the documents issued by her from time to time, as contained within the Joint Bundle of Documents lodged with the Tribunal, and we had no issues with the credibility or reliability of this witness.

iv. Mr Stephen West: Respondents' Strategic Lead – Resources

a. Mr West was the respondents' second witness led before the Tribunal. His evidence started, in person, at the Glasgow ET, on the afternoon of Monday, 9 March 2020, and it was continued, part heard, until the following day.

b. At the relevant time, he was the respondents' Head of Finance & Resources. Aged 55 years, he spoke in evidence to the terms of his original, 14-page witness statement dated 25 February 2020, and his 2 page, supplementary witness statement, dated 28 February 2020, the latter addressing the additional parts of the claim allowed by the Tribunal on 26 February 2020.

c. When his evidence was adjourned, during cross-examination on the afternoon of Tuesday, 10 March 2020, it had been intended that he would resume his evidence before the Tribunal on Tuesday, 17 March 2020. In the event, as the Final Hearing was adjourned, part heard, on that date, following Mr O'Hagan's indisposition, Mr West's evidence did not resume before the Tribunal until Friday, 5 June 2020, being the first day of the Continued Final Hearing conducted by CVP.

d. Mr West's further cross-examination was held, on Friday, 5 June 2020, by CVP, and while it was intended to continue that further cross-examination the following Monday, 8 June 2020, in the event, no evidence was led before the Tribunal that day, arising from adjournments, and case management, relating to issues arising from the electronic Bundle lodged by the respondents' solicitor being "***marked***", and requiring "***cleansing"***, before the Tribunal could proceed with a direction from the Tribunal that all witnesses were to delete the original, marked electronic Bundle, and use the new cleansed version.

e. On Tuesday, 9 June 2020, on Mr West's further cross-examination, it proceeded before the Tribunal again on CVP, and his evidence concluded that afternoon. He was the only witness before us who had his evidence heard, part in person, and part by CVP. Giving his evidence, in both ways, he came across to the Tribunal as a fairly competent manager and witness, but he was often defensive, in cross-examination, and

he did not handle detail well, as appeared from his reaction to Mr John's cross-examination on behalf of the claimant.

f. When challenged by counsel for the claimant, the witness sometimes gave answers which were slightly different from what he had said in evidence-in-chief, particularly around the investigation into the complaints about the claimant, the conduct of the disciplinary hearing, the letter of dismissal which he issued to the claimant, and matters around what happened at the internal appeal against dismissal before the councillors.

g. As the dismissing officer, and the presenting officer at the internal appeal, Mr West was an important witness for the Tribunal to hear from. There was no evidence had he had any overt personal *animus*, ill will, or malice towards the claimant, and he came across to the Tribunal as a credible and reliable witness who was simply trying to recall, several years after the event, what had happened, and how he had handled matters at the relevant time in 2015/2016.

v. Mr Peter Hessett: Respondents' Strategic Lead – Regulatory

a. While it was intended to proceed straight to Mr Hessett's evidence, at the close of Mr West's evidence on the afternoon of Tuesday, 9 June 2020, Mr Hessett unfortunately had technical issues trying to connect to the Hearing by CVP, so that his evidence did not start that afternoon, but he managed to successfully join the Hearing by CVP the following morning, Wednesday, 10 June 2020.

b. In giving his evidence to the Tribunal, by CVP, Mr Hessett (aged 49 years) confirmed the terms of his two-page original witness statement, dated 25 February 2020 and his two page, supplementary witness statement, signed on 2 March 2020, the

latter addressing the additional parts of the claim allowed by the Tribunal on 26 February 2020.

c. Both his witness statements were taken as read, rather than read aloud, as had happened with earlier witnesses before the Tribunal, a change in practice made by Order of the Tribunal due to the Continued Final Hearing being by CVP. The full Tribunal had pre-read his, and other remaining witness statements before hearing from Mr Hessett, and subsequent witnesses.

d. At the relevant time, Mr Hessett was Head of Legal, Democratic & Regulatory Services, and then, as now, he was also the Council's Monitoring Officer.

e. His original witness statement spoke to his involvement with the claimant's grievance appeal submitted on 12 June 2015, and his subsequent grievances submitted on 11 and 12 May 2015. His supplementary witness statement dealt with matters relating to the claimant's dismissal appeal before the Council's Appeals Committee, where he was both legal advisor and principal committee clerk.

f. Giving his evidence to the Tribunal, Mr Hessett came across as a truthful, and a confident manager, who was an articulate and reliable historian of his involvement in matters relating to the claimant's case. As such, we regarded him as a credible and reliable witness.

g. In so far as his evidence was corroborative of that previously given by Mr West, denying the claimant's allegations that, as presenting officer to the appeal, Mr West had sat in with the appeal panel members, during their private deliberation, we regarded as convincing Mr Hessett's clear and unequivocal

statement that, during the final deliberation session before the Appeals Committee, Mr West was not in attendance.

h. Mr Hessett balanced that clarity with an acceptance that, during earlier breaks, over the 6 days that the internal appeal ran, elected members of the Council might be present, along with appellant and management representatives, including Mr West, in the adjacent room getting hot drinks, but there would be no discussion about the appeal.

i. Further, the Tribunal has noted, from the formal minute of the Appeals Committee, as produced to us in the Joint Bundle, that the entry for day 6 (25 August 2016) refers to parties summing up their case, thereafter both parties withdrew from the meeting, and, after the Committee had deliberated the matter in private, both parties were re-admitted to the meeting and advised that the Committee had found the grounds of the appeal not substantiated and the appeal was not upheld.

j. While Mr Hessett spoke to the outcome of the claimant's internal appeal having been not upheld by the panel of councillors, as discussed by the Tribunal, at an earlier stage in the Final Hearing, there was a concern that this witness was, as a senior officer of the respondents, an adviser to the appeals panel, and not himself a decision maker.

k. Despite observation by the Tribunal to this effect, and comment likewise from the claimant's counsel, the respondents chose not to lead any of the councillors who sat on the appeal panel as decision makers. The Tribunal felt it would have been of assistance to them, as the fact-finding industrial jury hearing this case, if the respondents had led at least one member of that appeals panel, perhaps its chair. As such, the Tribunal is obliged to note that we did not have the benefit of direct evidence from any of the decision makers on the appeals panel.

l. Nevertheless, in giving his evidence to the Tribunal, we heard from the claimant, and from Mr West and Mr Hessett from the respondents, about the appeal, and their respective recollections about it, and it was not in dispute that the appeals panel had rejected the claimant's internal appeal against dismissal.

m. The burning issue still for the claimant is that, while he knows he was unsuccessful, after a 6-day internal appeal process, he has never received any written, reasoned decision from the respondents, explaining why his appeal was not upheld. Mr Hessett's confirmatory letter is just that, telling him no more than what the Appeals Committee chair, Councillor Rainey, stated in delivering the appeal panel's decision that the grounds of the appeal were not substantiated and the appeal was not upheld.

n. In his oral evidence in chief to the Tribunal, on the late afternoon of 2 March 2020, when answering Mr John's questions about the respondents' supplementary witness statements from Mr West and Mr Hessett, the claimant stated that when he asked if the appeal decision was unanimous, he was not told, and he still does not know, nor does he know the reasons for his appeal being rejected, even though, as he told us, he expected them to explain that to him. In a graphic description of his situation, as he saw it, the claimant stated that: ***"I've been demonised and portrayed as the employee from Hell."***

vi. Mrs Annabel Travers: Respondents' Procurement Manager

a. Mrs Travers was the Council's penultimate witness led before the Tribunal. She gave her evidence, by CVP, starting on the afternoon of Wednesday, 10 June 2020, continuing into the next day, and concluding on the afternoon of Friday, 12 June 2020.

b. On account of her own disability, aphasia, she had been provided with certain software by the respondents to assist her to read and listen from documents being referred to her, and to convert PDF documents into Microsoft Word, which was a better format for her software reader to work from.

c. Further, the Tribunal made reasonable adjustments during the giving of her evidence to allow her the best opportunity to present her evidence, having regard to a letter from her GP dated 13 March 2020, as produced to us by the respondents' solicitor.

d. When Mrs Travers had any difficulty in looking at a particular page in the PDF electronic Bundle, because her device screen was scrolling, we allowed her sufficient time to find the relevant page, digest its content, and then answer counsel's question.

e. In giving her evidence, Mrs Travers , aged 41, confirmed the terms of her 19-page witness statement, submitted to the Tribunal, signed, but undated, on 2 March 2020, detailing the background to her involvement in the claimant's case, the scope and coverage of her findings in respect of allegations 1 to 4, and her leaving it to the Disciplinary Hearing officer (Mr West) to consider whether the comments and statements made by Mr Gourlay regarding his Council colleagues could be substantiated.

f. At no time, while giving her evidence, did Mrs Travers evidence any overt *animus* towards the claimant, and nor was that ever suggested to her by counsel. Mrs Travers came across as a good historian of what had happened at the relevant time. On account of her disability, arising from a stroke which post-dated her involvement as Investigating Officer in Mr Gourlay's case, her difficulty in giving evidence to the Tribunal was a

communication difficulty, not any difficulty in her recollection of events at the relevant time.

g. She came across to the Tribunal as an honest, and credible witness, who, when cross-examined by counsel for the claimant, was not readily prepared to concede and accept his version of events, but she carefully reflected on her evidence in chief, and counsel's point, and then restated her position, standing up well to his challenges, and disagreeing with him where she felt it appropriate to do so.

h. While, at times, she had problems with vocabulary, and finding the right words, she patiently and calmly persevered, and so she made her position clear. Overall, we found her to be a generally credible and reliable witness.

vii. Mr John Duffy: Respondents' Section Head: Risk and Health & Safety

a. The final witness heard by the Tribunal was Mr Duffy, the claimant's line manager at the relevant time. His evidence, by CVP, started on the afternoon of Friday, 12 June 2020, and it was continued to, and concluded on, Tuesday, 16 June 2020, an extra sitting day appointed by the Tribunal to conclude the evidence, he not being available on Monday, 15 June 2020.

b. Aged 66, Mr Duffy confirmed the terms of his 9-page witness statement, signed and dated 27 February 2020, detailing the claimant's 4 periods of absence relevant to these claims, and also addressing issues regarding reasonable adjustments for the claimant.

c. We found this witness to be an enigma. Generally, he came across as a poor witness, who appeared to want to support both the Council, and also Mr Gourlay. We felt he was often trying to please both sides, and give stock answers, so that, overall,

his evidence was often unreliable, and changed, for example where he tried to evidence support for the claimant, as his line manager, yet be seen at the same time as trying to follow the respondents' internal procedures.

d. It seemed to us that, on many occasions, Mr Duffy was forgetful of what in fact had happened, several years ago now, and he gave the answers that he thought were the right answers, and not necessarily based on his factual recollection from the relevant time.

e. While we had no issues with his credibility, where his evidence was supported by other witnesses, as much of his involvement was documented, and so set forth in the contemporary documents lodged with the Tribunal, we did have issues to address with this witness as regards the reliability of his oral testimony on certain matters.

f. As we explained earlier, when assessing the claimant's evidence, we preferred Mr Duffy's denial that he had told the claimant that the respondents were out to "***get him on capability."*** On another matter, we again preferred Mr Duffy's evidence., In his witness statement to the Tribunal, at paragraph 6.7, Mr Duffy stated that after the claimant had moved from the 4th floor to the 1st floor, "*Mr Gourlay did not have to continue to use a printer on the fourth floor. There was a printer on the first floor which he could have used".*

g. This evidence was at odds with the claimant's position which, as per paragraph 94 of his witness statement, was that*: "I had asked John Duffy on numerous occasions... if arrangements could be made for me to use the printer on the first floor. My understanding was that this would have involved installing the first floor printer on my PC. However, it was clear from what*

John Duffy had said on 10 June 2015, that this would not be happening."

h. Mr Duffy's evidence to us, that he had told the claimant just to contact IT to get it installed, is not foreshadowed in his witness statement, and appeared to be an answer given off the cuff at the Hearing, and took no account of the claimant's pled position, at paragraph 10 of the conjoined paper apart to ET1, that despite the move from the 4th floor to the 1st floor on 28 April 2015, the claimant had to continue to use a printer on the 4th floor, there being no printer on the 1st floor. Nonetheless, from the evidence we heard, it is clear that there was a printer on the 1st floor, and it was reasonable for us to accept Mr Duffy's evidence that he had told the claimant to access that printer through contacting the IT department, as it required the individual staff member to do so to get access.

viii. <u>Potential witnesses not called by the Respondents</u>

a. In listing the case for Final Hearing, the respondents had indicated that they would be calling other witnesses but, in the event, they did not call Lynn Hughes, HR Officer; Jean Mulvenna, HR Officer, or Paul McGowan, HR & Workforce Development Manager. Likewise, they did not lead any evidence from other key names who featured in the background to this case, including Colin McDougall, Audit & Risk Manager, Vicki Rodgers, Head of People & Transformation, and Paul McGowan, HR Manager.

b. On day 1 of this Final Hearing, 26 February 2020, the Tribunal noted, and recorded in its written Note & Orders dated 27 February 2020, its surprise, based on the Tribunal's wide experience of unfair dismissal cases, where most employers tend to lead evidence from investigating manager, dismissing manager, and appeal hearer, that there was no witness statement from any councillor on the respondents' Appeals

Panel, to explain its reasons for not upholding the claimant's appeal against dismissal.

c. In reply, the respondents' solicitor, Mr Ettles, stated that he did not intend to lead a councillor, and that Mr Hessett would confirm the Appeal Panel's decision. As our role is not inquisitorial, but to address whatever evidence that parties choose to lead before us, we have, as the industrial jury in this case, dealt with the evidence from witnesses as led before us, and we did not consider it part of our remit to make any Witness Orders, of our own initiative, to ensure that the reasons for the Appeal Panel's decision were explained to us by a councillor who was a decision maker.

d. There was no application made by the claimant, or on his behalf, for the Tribunal to consider issuing a Witness Order for any member of the appeals panel, or indeed for any other officers of the respondents whom the claimant felt should be a relevant and necessary witness for a fair hearing of his case before the Tribunal. Mr Hessett's position in front of us was that he was a professional officer of the Council, as clerk and adviser, and not an appeal decision maker, for that was the independent role and responsibility of the elected councillors sitting on the appeal panel.

Agreed List of Issues

30. Following discussion with both parties' representatives, at the start of the Final Hearing, on day 1 (26 February 2020), the following, finalised version of an agreed List of Issues was agreed by both parties, submitted to the Tribunal, and accordingly it sets forth the matters before this Tribunal for judicial determination, as follows: -

AGREED LIST OF ISSUES

The hearing listed to commence upon 26th February 2020 is limited to merits, hence this list of issues is likewise so limited.

It is accepted by the Respondent that the Claimant was, from the moment of his employment with them, disabled within the meaning of the EqA by virtue of his MS condition.

REASONABLE ADJUSTMENTS

1. *Did a provision, criterion or practice, put the Claimant at a substantial disadvantage at work compared to persons not disabled?*

2. *Did a physical feature/s of the workplace put the Claimant at a substantial disadvantage at work compared to persons not disabled?*

3. *Did the Respondent take reasonable steps to avoid that disadvantage?*

4. *The Claim pleads a series of matters said to give rise to the s.20 duty and which were not met, namely:*

   a) *A GP fit note dated 15 December 2014 indicated that fitness to return to work may be assisted by a phased return to work, workplace adaptations and OH advice;*

   b) *A phased return to work was allowed, but there was no OH referral as recommended, until June 2015 (some 6 months later);*

   c) *A number of reasonable workplace adaptations were also said not to have been implemented, and which would have prevented him from suffering a substantial disadvantage as a disabled person;*

   d) *The Claimant on his own initiative arranged an assessment leading to an Access to Work Report dated 11 January 2015 (shared with the Respondent), and which confirmed a number of auxiliary aids and in particular recommended waist height storage for files, thus obviating the Claimant's need to kneel*

or bend, which his MS made difficult and painful. Such storage was never provided;

e) *Delay of up to 6 months in provision of a Keyboard Video Mouse switch (only supplied on 17.6.15 and after the Claimant's suspension);*

f) *No proper DSE assessment was undertaken (as required by the DSE Regulations) and there was a 4 month delay in providing DSE equipment;*

g) *He was not provided with an adjustable desk until 28.4.15, causing him to use his laptop at different desks and exacerbating pain and discomfort;*

h) *No operational fixed line telephone was provided, leading him to use a mobile phone, thus causing numbness and tingling in his hands and loss of grip;*

i) *He was required to continue to use a printer on the fourth floor even after the move to the first floor.*

j) *Traveling between floors was difficult due to the MS;*

k) *The Dragon Software provided had installation issues and was never operational;*

l) *The ergonomic mouse provided was of a type difficult to use due to the Claimant's hand numbness;*

m) *The waist high storage space was not provided/in a usable form;*

n) *A fit note of 27 March 2015 suggested that the Claimant might benefit from amended working hours, as he was struggling with painful spasms and fatigue in the workplace. When the Claimant tried to discuss this with manager Mr Duffy, the discussion was shut down and such amended hours was*

never implemented. Mr Duffy said that if reduced hours was requested that the Respondent would try to "get him on capability".

DISCRIMINATION ARISING FROM A DISABILITY

5. *Was the Claimant treated unfavourably because of something arising in consequence of his disability? - Namely was the Improvement Note issued to him by Mr Duffy on 14 January 2015 issued in consequence of his disability (Multiple Sclerosis) related illnesses.*

6. *Was the Improvement Note a proportionate means of achieving a legitimate aim?*

VICTIMISATION

7. *Did the Respondent subject the Claimant to the following, amounting to detriments (i.e. a disadvantage or a justified sense of grievance):*

   (a) Substantial redaction of his argument and documents for his stage 3 Grievance (number 3) - dated 25 July 2014;

   (b) The stopping of his Grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015;

   (c) Investigating him under the Code of Conduct from about 6 March 2015;

   (d) Suspending him on 17 June 2015;

   (e) Dismissing him on 24 September 2015;

   (f) Rejection of his Appeal on 25 August 2016;

8. *Did the Respondent subject the Claimant to the aforesaid detriments, wholly, or in part because the Claimant had done the following protected act/s, (or because the Respondent believes that he had done or may do such an act/acts)?*

Alternatively, did the protected acts form a 'significant, or more than trivial influence' on the Respondent's decision making?

The following protected acts correlate with the sub-paragraph numbering above:

(a) Already having raised proceedings in the ET, and / or by challenging an Improvement Note dated 14 January 2015 in the course of his stage 3 grievance, thus having been treated unfavourably because of something arising in consequence of his disability;

(b) ditto;

(c) ditto;

(d) having submitted an email to the Glasgow ET on 9 June 2015 disclosing the publicly available Twitter account of Ms Rogers, and which amounted to the 'giving of evidence or information in connection with EqA proceedings' or 'doing any other thing for the purposes or in connection with the EqA' (s.27(2) EqA);

(e) ditto;

(f) ditto;

9. *Did the Claimant do the said protected acts in good faith?*

10. *Does the Claimant prove sufficient facts so as to shift the burden of proving a non-discriminatory motive onto the Respondent under s.136 EqA?*

11. *Did detriments in para 5 (d) – (f) constitute a course of conduct for the purposes of s.118(6) EqA?* [We have noted the reference to para 5(d) – (f) and read that as an obvious typographical error for para 7(d) –(f).]

DISMISSAL

12. *Did the Claimant's action constitute misconduct, and if so gross misconduct?*

13. *Did the Respondent have an actual belief in the misconduct alleged against the Claimant?*

14. *If so, was that belief based upon reasonable grounds?*

15. *Was such a belief arrived at after a reasonable investigation?*

16. *More particularly in that regard: Should the Respondent have investigated the claimant's accusations against others, in order to determine their foundation and / or the reasonableness of the Claimant holding his expressed views?*

17. *Should the claimant's grievances have been put on hold pending the disciplinary investigation?*

18. *Should the claimant's grievances have been completed prior to a decision on misconduct and on sanction?*

19. *Was and should the Claimant have been dissuaded from pursuing his Dignity at Work complaint?*

20. *Should the contents of the Claimant's grievances / complaints have been used against him in the disciplinary process?*

21. *Was the disciplinary investigation, hearing and appeal hearing procedurally and substantively fair?*

(a) Were all of the allegations against the Claimant investigated, and in line with policy?

(b) Should the Claimant's (withdrawn) Dignity at Work Complaint have been used against him in the disciplinary?

(c) Should the Claimant's grievances (numbers 5, 6 and 7) have been put on hold, redacted or deemed incompetent (and in fact never dealt with)?

(d) Should Stephen West have been disciplinary hearing officer, especially after the Claimant's objections?

(e) Should Stephen West as presenting officer at the appeal, have been breaking off and sitting with the panel?

(f) Not having key witnesses available to give evidence at both disciplinary and appeal and to be questioned;

22. *Was summary dismissal a sanction reasonably open to the Respondent?*

23. *Was and should the Respondent have taken account of:*

(a) His disability – including his psychological state and the exacerbating effect of his physical conditions;

(b) His grievances and frustrations relating to reasonable adjustments, Occupational Health and his treatment by OH and HR?

(c) His clean disciplinary record?

Parties' Closing Submissions

31. We received written closing submissions from both parties' representatives, as also written replies to both submissions. Their respective written closing

submissions were intimated on 23 June 2020. Mr John, counsel for the claimant, submitted a 49-page closing submission, extending to 181 paragraphs. He listed the *dramatis personae*, and after a preamble and background, at paras 1 to 20, he addressed reasonable adjustments (s.20) at paras 21 to 44; s.15 discrimination arising from a disability at paras 45 to 55; unfair dismissal at paras 56 to 163; and victimisation (s.27) at paras 164 to 181.

32. Mr Ettles, solicitor for the respondents, submitted a 15-page closing submission, split into 4 sections on (1) reasonable adjustments (paras 1.1 to 1.19); (2) alleged discrimination arising from a disability (paras 2.1 to 2.5); (3) alleged victimisation (paras 3.1 to 3.6); and (4) dismissal (paras. 4.1 to 4.48).

33. On 29 June 2020, Mr John, counsel for the claimant, submitted his reply to the respondents' closing submissions, running to 73 paragraphs, over 20 pages. On that same date, Mr Ettles, solicitor for the respondents, intimated his 11-page reply to the claimant's closing submissions, together with his 2 page, 4 section, executive summary of the respondents' closing submissions.

34. While both parties' representatives were reminded of their failure, on 23 June 2020, to lodge a succinct executive summary of their closing submission (as per the Tribunal's previous case management orders of 7 February 2020), only Mr Ettles did so, for the respondents, on 29 June 2020, there being no executive summary provided for the claimant.

35. Parties' representatives addressed us, orally, on these closing submissions, and replies, at the Hearing on Submissions which we held with them, by CVP, on Friday, 3 July 2020. We take this opportunity to thank both parties' legal representatives for their written submissions. As they are all held on the Tribunal's casefile, it is not necessary to repeat their full terms *verbatim* here, but, in these Reasons, we do, however, detail from their closing submissions, and replies, where appropriate, the main points which each party made to us.

36. Parties' representatives provided a joint list of authorities on 30 June 2020, with hyperlinks, as previously ordered by the Tribunal, but all bar one of the

hyperlinks were to subscription only services, and so, on 1 July 2020, the Judge annotated their joint list, and parties' representatives and the Tribunal were provided with an annotated list, with hyperlinks added by the Judge to each of their cited cases on *Bailli*, the free, online access to caselaw, so that the full Tribunal could access both parties' cited cases when they were being referred to in their closing submissions.

37. We were referred to the following case law authorities by parties' representatives in their closing submissions:

Claimant's List:

Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA

Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT,

Chief Constable of West Yorkshire Police v Khan *2001 ICR 1065, HL*

***Ring v Dansk almennyttigt Boligselskab DAB; Skouboe Werge v Dansk Arbejdsgiverforening 2012* (C-335/11)**

Parker v Chancery (UK) Ltd ET Case No.1201764/07. (cited in IDS Employment Law Handbooks, Volume 6, Chapter 9, Victimisation, 'Detriment')

Brown v Hidden Hearing Ltd ET Case No.1101177/07 (cited in IDS Employment Law Handbooks, Volume 4, Chapter 19 – Victimisation, 'Detriment')

Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA

Pathan v South London Islamic Centre 2014 UKEAT 0312/13

Woodhouse v West North West Homes Leeds Ltd 2013 IRLR 773 EAT

Respondents' List

Sunshine Hotel Ltd T/A Palm Court Hotel v Mr R Goddard 2019 UKEAT/0154/19

Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 (EAT)

Tayeh v ***Barchester Healthcare Ltd 2013 IRLR 387 (CA)***

Hale v Brighton and Sussex University Hospitals NHS Trust 2017 UKEAT/0342/16

38. In addition, at the Hearing on Submissions, on 3 July 2020, Mr John, counsel for the claimant, referred us to ***IDS Employment Law Handbook, Volume 12 (Unfair Dismissal)***, Chapter 3 (Unfairness), at "***Fairness of internal procedure / Internal appeals",*** at paragraphs 3.101 to 3.104, including the reference there to the House of Lords' judgment in ***West Midlands Cooperative Society Ltd v Tipton*** **1986 ICR 192, HL.**

39. The Judge also asked parties' representatives about the EAT judgment referred to (at IDS, para 3.103) as ***Elmore v Governors of Darland High School and another*** **[2017] UKEAT 0209/16/DM**, by the then EAT President, Mrs Justice Simler.

Reserved Judgment

40. When proceedings concluded, on the afternoon of Friday, 3 July 2020, the Judge advised both parties that Judgment was reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the full Tribunal.

41. With limited opportunity that afternoon, initial private deliberation took place at a Members' Meeting on Monday, 20 July 2020, and a further such Meeting on 14 June 2021 to discuss a draft prepared by the Judge. Draft findings were previously issued by the Judge to the lay members on 11 March 2021, with a view to a Members' Meeting being arranged sometime in March / April 2021, but the Judge's subsequent sickness absence meant that was not then progressed, although the Members did submit written comments to the Judge for his consideration. This unanimous Judgment and Reasons represents the

final product from our private deliberations, and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Relevant Law

42. Both parties' representatives addressed us on the relevant law in their respective written closing submissions. The relevant law was not in dispute between the parties, and the issue before us was how to apply that relevant law to the facts of the case, as we have found them to be in our findings of fact.

43. While both parties cited certain case law authorities to us for our specific consideration, and we have taken those cases into account in our discussion and deliberation, we also note and record here that, in coming to our final decision on this case, we have also taken into account certain other well-known, familiar case law authorities, regularly cited to us in this Tribunal, but not included in parties' lists of authorities for us, and, where we do so, we give the appropriate case names and citations later in these Reasons. Given the delays to date, we did not consider it appropriate to invite further written representations from either party.

44. If anything arises from our reference to these other cases, given we did not invite parties to comment, then matters can be addressed by a reconsideration application, if needs be, in the interests of justice.

45. As a concise statement of the relevant law, we are content to rely upon the statutory provisions to be found in the **Employment Rights Act 1996** as regards the unfair dismissal head of complaint, specifically **Sections 94 to 98**, and, as regards the alleged unlawful disability discrimination heads of complaint, to the **Equality Act 2010**, specifically at **Section 15**, discrimination arising from disability, **Sections 20 and 21**, duty to make adjustments and failure to comply with that duty, **Section 27**, victimisation, **Section 39** employees, **Section 123**, time limits, **Section 136**, burden of proof, and

Section 212, general interpretation. These relevant statutory provisions, so far as material for present purposes, provide as follows: -

Employment Rights Act 1996

Part X

Unfair dismissal

Chapter I

Right not to be unfairly dismissed

The right

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Dismissal

***95 Circumstances in which an employee is dismissed**.*

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),…

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his c contract of employment, …

***96**. [repealed]*

***97 Effective date of termination**.*

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) …

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1),119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) …

Fairness

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) ….

(b) relates to the conduct of the employee,

(c) …

(3) …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Equality Act 2010

15 Discrimination arising from disability

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

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

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

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

Adjustments for disabled persons

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with

persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

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

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

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

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

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

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

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

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

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

(d) any other physical element or quality.

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

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

(13) …

21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants

(1) …

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) …

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

(6) …

(7) …

(8) …

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(2)…

(3) For the purposes of this section—

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

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

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

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

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

136 Burden of proof

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

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;…

212 General interpretation

(1) In this Act—

- *…*
- *"substantial" means more than minor or trivial;*
- *…*

(2) A reference (however expressed) to an act includes a reference to an omission.

(3) A reference (however expressed) to an omission includes (unless there is express provision to the contrary) a reference to—

(a) a deliberate omission to do something;

(b) a refusal to do it;

(c) a failure to do it.

(4)…

46. We have also had regard to the **ACAS Code of Practice on Disciplinary and Grievance Procedures (2015)**, and the **Equality and Human Rights Commission Code of Practice on Employment (2011**), where relevant.

Discussion and Deliberation

47. Earlier in these Reasons, at paragraph 29 above, we recited the terms of the claimant's own summary of his case, as presented to us in the first 3 pages of his signed witness statement of 21 February 2020. Here, as part of our discussion and deliberation, we note and record that in chapter 12 of his witness statement, at page 138, the claimant made the following concluding remarks:

> **353.** ***I appreciate and understand that this statement is very lengthy. This is a reflection of the fact that my life at work, from the summer of 2013 onwards, was extremely challenging. The move to the fourth floor changed everything, and this was first and foremost due to me suffering from multiple sclerosis. My priority was to ensure that I (and others) would be in a safe working environment. I am a trained health and safety professional, and take statutory obligations very seriously. All I was trying to do in 2013 was ensure that my employer met those obligations. However, for reasons which I cannot explain, I was met with resistance. Very early on, I was told to have no further involvement in health and safety issues on the fourth floor, even though this was in essence a pilot environment, and a test to see what would work and what would not work. I wanted to contribute to the learning which was going to be involved. However, I was very quickly excluded from discussions and meetings.***

354. As a result, I felt I had no option than to formalise my concerns. It was this which seemed to make matters significantly worse for me (a point, I believe, made by Vicki Rogers herself when she referred to the period of 18 months in her statement). Then, having raised concerns, I found that I did not receive replies (e.g. my email of 12 November 2013, and my public interest disclosure which Stephen West replied to five months later) and I was involved in procedures which I did not believe were being handled fairly or professionally. When I raised those concerns, matters went from bad to worse. I tried to maintain my own professionalism, though I accept that I was frustrated at what was happening. Nevertheless, I believe that I should have been afforded the benefit of a fair process and an investigation into concerns which I had raised. Instead, I was left in a state of confusion, from around December 2014 onwards, with regard to what I could and could not do, and at times it felt like I was being silenced.

355. Throughout, I was suffering both physically and mentally. I suffered from multiple sclerosis relapses and exacerbated symptoms (such as my eyesight and extreme fatigue) as well as being diagnosed with a depressive disorder. I don't believe that the respondent properly appreciates what I was going through. I had a clean disciplinary record, and yet I was dismissed even though all I had endeavoured to do was address my health and safety concerns, and bring to the attention of the respondent concerns I had in relation to the way policy and procedure was not being applied and implemented.

48. In coming to our final decision on this claim, while noting these statements by the claimant, we have had primary regard to and focus upon the agreed List of Issues, the evidence led before us, both oral and in the many, many

documentary productions, as also to the competing submissions of parties' legal representatives in their closing submissions, written and oral, to this Tribunal.

49. We turn now to look at each of the items in that agreed List of Issues, as separate sections in the following part of these Reasons. It was unhelpful to the Tribunal that, in submitting their written closing submissions, neither party's representative did so expressly using the listed questions, and giving their proposed answers, and instead both parties' representatives lodged written submissions more in a narrative, discursive style, rather than reproducing the set questions along with their respective proposed answers.

50. Given paragraph 3 of the preamble to Mr John's closing submission for the claimant referred to the List of Issues as a "***reference point***", the failure to adopt the methodology anticipated by the Tribunal is all the more bewildering. Be that as it may, we have carefully considered matters using the List of Issues, making comments and observations as and where we feel it appropriate to do so.

REASONABLE ADJUSTMENTS

1. ***Did a provision, criterion or practice, put the Claimant at a substantial disadvantage at work compared to persons not disabled?***

2. ***Did a physical feature/s of the workplace put the Claimant at a substantial disadvantage at work compared to persons not disabled?***

3. ***Did the Respondent take reasonable steps to avoid that disadvantage?***

4. ***The Claim pleads a series of matters said to give rise to the s.20 duty and which were not met, namely:***

a) A GP fit note dated 15 December 2014 indicated that

fitness to return to work may be assisted by a phased return to work, workplace adaptations and OH advice;

b) A phased return to work was allowed, but there was no OH referral as recommended, until June 2015 (some 6 months later);

c) A number of reasonable workplace adaptations were also said not to have been implemented, and which would have prevented him from suffering a substantial disadvantage as a disabled person;

d) The Claimant on his own initiative arranged an assessment leading to an Access to Work Report dated 11 January 2015 (shared with the Respondent), and which confirmed a number of auxiliary aids and in particular recommended waist height storage for files, thus obviating the Claimant's need to kneel or bend, which his MS made difficult and painful. Such storage was never provided;

e) Delay of up to 6 months in provision of a Keyboard Video Mouse switch (only supplied on 17.6.15 and after the Claimant's suspension);

f) No proper DSE assessment was undertaken (as required by the DSE Regulations) and there was a 4 month delay in providing DSE equipment;

g) He was not provided with an adjustable desk until 28.4.15, causing him to use his laptop at different desks and exacerbating pain and discomfort;

h) No operational fixed line telephone was provided, leading him to use a mobile phone, thus causing numbness and tingling in his hands and loss of grip;

i) He was required to continue to use a printer on the fourth floor even after the move to the first floor.

j) Traveling between floors was difficult due to the MS;

k) The Dragon Software provided had installation issues and was never operational;

l) The ergonomic mouse provided was of a type difficult to use due to the Claimant's hand numbness;

m) The waist high storage space was not provided/in a usable form;

n) A fit note of 27 March 2015 suggested that the Claimant might benefit from amended working hours, as he was struggling with painful spasms and fatigue in the workplace. When the Claimant tried to discuss this with manager Mr Duffy, the discussion was shut down and such amended hours was never implemented. Mr Duffy said that if reduced hours was requested that the Respondent would try to "get him on capability".

51. In answering these questions, where the claimant's complaint of failure to make reasonable adjustments is reliant upon him establishing a breach by the respondents of the duty to make reasonable adjustments, the Tribunal has noted, in the parties' agreed drafting of these questions, a failure to clearly identify any PCP being relied upon by the claimant, and confusion, or conflation, as between physical features, and auxiliary aids.

52. As per the **EHRC Code of Practice on Employment (2011),** physical features include stairways, lifts and escalators, and furniture, while auxiliary aids are something which provides support or assistance to a disabled person, and can include provision of a specialist piece of equipment such as an adapted keyboard.

53. Here, in the context of the claimant's case, we are concerned with waist height storage for files, to obviate the claimant's need to kneel or bend, where, while a storage cabinet was provided, the claimant was not provided with hanging files; and that he was required to continue to use a printer on the 4th floor even after he was moved to the 1st floor, when travelling between floors was difficult due to his MS. The other matters specified, re KVM switch, no operational fixed line telephone, Dragon software, and ergonomic mouse, are all under the umbrella of auxiliary aids, rather than physical features.

54. In the conjoined paper apart to the ET1, at paragraph 41, the claimant pled that: ***"The Respondent failed in its duty to make reasonable adjustments under ss20(4) and 20(5) of the EqA, all as pled in paragraphs 4-12 above".*** Those statutory provisions relate to physical features and auxiliary aids respectively, and not to PCPs, which are dealt with in **Section 20(3).**

55. However, in his written closing submissions for the claimant, Mr John, his counsel, identified two PCPs: at paragraph 24 **– hotdesking or work at a small desk, accessing ground level storage and printer on a different floor**; and – at paragraph 25 – **not DSE risk assessing / equality impact assessing an office move.**

56. At paragraph 4.47 of his closing submission, Mr Ettles, the respondents' solicitor, stated that: ***"As regards adjustments, it is submitted that the response of the Respondent was reasonable and the Respondent complied with the duties incumbent on the employer of a disabled employee. It is therefore submitted that all claims should be dismissed."***

Physical features

57. In his closing submissions to the Tribunal, at paragraph 1.16, Mr Ettles, the respondents' solicitor, stated that: "***It is accepted by the Claimant that he was provided with four drawer filing cabinets which should have provided him with waist height storage. The Claimant contends that he***

did not have hangers to use in the drawers. The Tribunal is invited to accept the evidence of John Duffy that hangers were available and that the Claimant was told where to find them."

58. On this matter, based on the evidence we heard at the Final Hearing, we accept Mr Duffy's evidence that he told the claimant that hanging files were available in the basement, for use in the storage cabinet, but Mr Duffy, for whatever reason, did not proactively arrange for them to be delivered to Mr Gourlay's office, a task which we imagine must have involved a relatively straightforward exercise of uplift and delivery.

59. It was not clear to us whether this was a deliberate failure by Mr Duffy, or just reflective of the fact he thought the claimant had been provided with information on where to source the hangers, that was enough, and so the claimant should himself have arranged for their uplift and delivery.

60. The claimant, in his evidence at this Final Hearing, disputed that hanging files were available in the basement, and stated that when he went to the basement, he found no hanging files, he told Mr Duffy, who responded that he would get some, but he did not do so. Either way, we accept the respondents did not provide hanging files to the claimant, and that caused him substantial disadvantage.

61. In deciding this matter, and reviewing the evidence before us, we took into account that the word "***substantial***" in the phrase "***substantial disadvantage***" (as used in **Section 20)** is itself defined, at **Section 212(1) of the Equality Act 2010,** as meaning "***more than minor or trivial***."

62. Based on the claimant's evidence to us at this Final Hearing, we accept that he was put to a substantial disadvantage, in particular by bending and kneeling for ground level storage (as well as in filing cabinets without hangers as he had requested and which were not made available to him) ; working without a fixed workstation ; working without ergonomically assessed or suitable computer, mouse and screen for an extended period; and working

without a usable KVM switch to reduce pain and discomfort in computer use when homeworking.

Provision, Criterion or Practice

63. The Tribunal accepts that there was a PCP which was that the health and safety department, in which the claimant worked, was to be located on the 4th floor and the employees were to hot desk. This PCP was applied from September 2013.

Substantial Disadvantage

64. On the evidence which we have heard and accepted at this Final Hearing, this PCP put the claimant, as a disabled person, at a substantial disadvantage because:

- He did not have his own designated workstation adapted for his disability
- Paperwork was stored in the basement which meant he had further to go to access it which was difficult because of his mobility issues, and the storage cabinets were on the ground which meant he had to kneel or bend which was difficult because of his MS.
- The claimant had to use a mobile phone as there was no fixed telephone line which caused numbness and loss of grip.
- He was working without a usable KVM switch to reduce pain and discomfort in computer use when homeworking.

Reasonable Adjustments

65. The claimant sets out a number of what he says would have been reasonable adjustments in the agreed list of issues. These were listed (a) to (n), as reproduced above. We note that not all of the matters specified at (a) to (n)

are properly adjustments: specifically, we do not regard (a), (b), (c) and (f) as adjustments: sending an employee to OH is not an adjustment, nor is an employer undertaking a DSE assessment.

66. This leaves the following adjustments which the claimant contends would be reasonable adjustments:

- Provision of waist height storage for files
- Provision of a KVM (Keyboard Video Mouse)
- Provision of a dedicated adjustable desk
- Provision of a fixed telephone line.
- Provision of Dragon software

67. The Tribunal does not understand the respondents to take issue with these as reasonable adjustments. The Tribunal agrees that they would be reasonable adjustments. The question is whether, in fact, these adjustments were made and if so, when.

68. At no time during evidence given at this Final Hearing, nor in their closing submissions, have the respondents sought to establish that any adjustment sought would not have eliminated or reduced the disadvantages claimed, or that they were unreasonable by reason of cost, practicability or effectiveness.

69. Suitable adjustments were being identified by the claimant and the respondents' OH at early stages, and they were either not achieved at all before the claimant's suspension, or only after many inadequately explained months of waiting.

70. No, or no satisfactory evidence has been produced by the respondents as to why the delays/failures in adjustment provision occurred. In various instances, John Duffy, the claimant's then line manager, in his oral evidence to this Tribunal, during cross-examination, accepted that delays in assessing and the provision of adjustments for the claimant was unacceptable.

71. The Tribunal recognises that the respondents did make some adjustments for the claimant. They moved him to an office on the first floor in April 2015. He then had his own adjustable desk and a storage cabinet. This alleviated some of the disadvantage. However, not all the adjustments were made, and the claimant was still at a substantial disadvantage. Specifically:

- The claimant still had to go to the 4th floor to access a printer, albeit there was a printer on the first floor, which he could not access. Travel between floors was difficult due to the mobility issues caused by his MS.

- The storage filing cabinet provided to him was on the floor, in his relocated office, but it still required the claimant to bend and kneel to access some of the drawers. He was not provided with hanging drawer files.

- He was not provided with a fixed telephone line. The respondents contended that this had been provided but the Tribunal was not satisfied on the evidence provided to it that it had been.

- Although there were attempts to provide Dragon Software, it was never operational.

- He did not receive a functioning / usable KVM switch to allow him working computer use when homeworking.

72. The Tribunal considers that there was a failure to make any reasonable adjustments in the period from September 2013 to April 2015. From April 2015 until dismissal in September 2015, although some adjustments were made, there was an ongoing failure to make reasonable adjustments as identified above.

73. The claimant also set out (at paragraph 25 of his counsel's written closing submissions) a second PCP which is that the respondents had a practice of not carrying out a DSE risk assessment or an equality impact assessment.

74. The Tribunal accepts that both of these existed and placed the claimant at a substantial disadvantage. However, in relation to reasonable adjustments, the Tribunal considers the same adjustments would have been identified and so the ultimate decision of the Tribunal is not affected.

DISCRIMINATION ARISING FROM A DISABILITY

5. ***Was the Claimant treated unfavourably because of something arising in consequence of his disability? - Namely was the Improvement Note issued to him by Mr Duffy on 14 January 2015 issued in consequence of his disability (Multiple Sclerosis) related illnesses.***

6. ***Was the Improvement Note a proportionate means of achieving a legitimate aim?***

75. The Tribunal has noted, in the parties' agreed drafting of these questions, relating to the claimant's complaint of discrimination arising from a disability, in terms of **Section 15 of the Equality Act 2010**, that it is only the issue of the informal Improvement Note in January 2015 that is relied upon, and not the claimant's summary dismissal from the respondents' employment in September 2015. Similarly, we have noted that the claimant makes no complaint of direct discrimination on grounds of disability, contrary to **Section 13 of the Equality Act 2010**.

76. The Tribunal was satisfied that the issuing of the informal Improvement Note was unfavourable treatment of the claimant because of something arising in consequence of his disability. All of his sickness absences from 23 April 2014 to 15 December 2014 were related to his MS disability and the respondent knew that he had that disability.

77. The Tribunal considered that there was a legitimate aim for the respondents' Attendance Management Policy, specifically reducing levels of absence of employees. It was also satisfied that the issuing of Improvement Notes under

the Policy had the same legitimate aim as it served as a warning to employees of the potential consequences of future absence.

78. The Tribunal then turned to consider whether the issuing of an Improvement Note to the claimant in these circumstances was a proportionate means of achieving this aim in terms of **Section 15(1)(b)**. In making this assessment the Tribunal has to weigh the effect of the treatment on the claimant against the reasonable business needs of the respondents.

79. It is clear that the claimant was extremely upset by the issuing of this Note, and this is made clear by the fact that he lodged a grievance about it, in February 2015, as the informal Improvement Note itself was not open to appeal.

80. The Tribunal members considered the Improvement Note was a low level intervention, and that it was reasonable for the respondents to warn the claimant about the potential consequences of future absence. In their view, this was not impacted by the fact that adjustments were due to be made, and the needs assessment report was awaited.

81. The Employment Judge considered that in all the circumstances, where the claimant had had disability-related absence, where the claimant had asked for a number of adjustments to be made and where they were still to be implemented, there was no need for the respondents to issue the Note at that time, and they should have awaited any developments arising from the Access to Work needs assessment recently undertaken.

82. The claimant was back at work, from 15 December 2014, and issuing the Note at that time was not going to impact on the claimant's level of absence going forward. What was required was for reasonable adjustments to be made, and matters reviewed.

83. In these circumstances, the Judge considers that the respondents discriminated against the claimant in terms of **Section 15.** The members of the Tribunal were otherwise minded, and felt that issuing the Note was following the respondents' Policy, and it was the right thing to do at that time.

84. The Employment Judge was in the minority on this point. He was not convinced of the proportionality of issuing the Improvement Note at that time. Accordingly, the majority decision of the Tribunal was that there was no breach of **Section 15,** and that this complaint should be dismissed.

VICTIMISATION

7. Did the Respondent subject the Claimant to the following, amounting to detriments (i.e. a disadvantage or a justified sense of grievance):

(a) Substantial redaction of his argument and documents for his stage 3 Grievance (number 3) - dated 25 July 2014;

(b) The stopping of his Grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015;

(c) Investigating him under the Code of Conduct from about 6 March 2015;

(d) Suspending him on 17 June 2015;

(e) Dismissing him on 24 September 2015;

(f) Rejection of his Appeal on 25 August 2016;

8. Did the Respondent subject the Claimant to the aforesaid detriments, wholly, or in part because the Claimant had done the following protected act/s, (or because the Respondent believes that he had done or may do such an act/acts)?

Alternatively, did the protected acts form a 'significant, or more than trivial influence' on the Respondent's decision making?

The following protected acts correlate with the sub-paragraph numbering above:

(a) Already having raised proceedings in the ET, and /or by challenging an Improvement Note dated 14 January 2015 in the course of his stage 3 grievance, thus having been treated unfavourably because of something arising in consequence of his disability;

(b) ditto;

(c) ditto;

(d) having submitted an email to the Glasgow ET on 9 June 2015 disclosing the publicly available Twitter account of Ms Rogers, and which amounted to the 'giving of evidence or information in connection with EqA proceedings' or 'doing any other thing for the purposes or in connection with the EqA' (s.27(2) EqA);

(e) ditto;

(f) ditto;

9. Did the Claimant do the said protected acts in good faith?

10. Does the Claimant prove sufficient facts so as to shift the burden of proving a non-discriminatory motive onto the Respondent under s.136 EqA?

11. Did detriments in para 5 (d) – (f) constitute a course of conduct for the purposes of s.118(6) EqA? [We have noted the reference to para 5(d) – (f) and read that as an obvious typographical error for para 7(d) –(f).]

Detriments

85. On the evidence before us, the Tribunal finds each of the alleged detriments did occur on the dates specified and each amounts to a detriment in terms of the Act. Detriment in the context of victimisation is not defined by the **Equality Act 2010**, but the Tribunal has had regard to the explanation and guidance provided in the **EHRC Code of Practice on Employment (2011),** which includes the following statement, at paragraph 9.8:

> ***"Detriment in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."***

Protected Acts

86. The Tribunal then considered whether the claimant had done one or more protected acts in terms of **Section 27(2).**

87. The alleged protected acts were: -

- Raising proceedings in the ET from 2014 onwards
- Challenging an Improvement Note in the course of his stage 3 grievance alleging he had been treated unfavourably because of something arising in consequence of his disability.
- Submitting an email to the Glasgow ET on 9 June 2015 disclosing the Twitter account of Ms Rogers.

88. The Tribunal considers that each of these was a protected act in terms of **Section 27(2).** Raising proceedings is covered by **s27(2)(a),** making allegations of discrimination is covered by **s27(2)(d)** and the submission of the email, the Tribunal was satisfied amounted to ***'giving …. information in connection with Equality Act proceedings'***

89. The Tribunal understood that the respondents suggested that the claimant had acted in bad faith, in particular the Tribunal understood this allegation was in relation to the submission of the email on 9 June 2015. **Section 27(3) of the Equality Act 2010** provides that: "***Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."***

90. The Tribunal is satisfied that the claimant acted in good faith in making his internal grievances, and presenting his Tribunal claims. As regards the 9 June 2015 submission to the ET, we are satisfied that the claimant believed that the material submitted from Ms Rogers' Twitter account demonstrated a personal friendship between her and Angela Wilson, which might explain the stance which Ms Wilson was taking in relation to the claimant's concerns at work, and we are satisfied that he did so, in good faith, believing it would be of assistance to his Tribunal claim then ongoing.

91. At the Final Hearing before us, Mr West accepted that the claimant was entitled to make his point as potentially relevant to his Tribunal claim, and there is nothing before us which allows us to say that the claimant acted in bad faith at any stage.

92. The Tribunal did not consider that any of the alleged protected acts were made in bad faith. The Tribunal accepted therefore that these amount to protected acts in terms of **Section 27**.

Causation

93. The next question for the Tribunal therefore is whether respondents subjected the claimant to the aforesaid detriments, wholly, or in part, because the claimant had done the protected acts. The test is whether the protected acts form a 'significant, or more than trivial influence' on the respondents' decision making? We deal with each in turn.

(a) Substantial redaction of his argument and documents for his stage 3 Grievance (number 3) - dated 25 July 2014;

94. The Tribunal accepts the respondents' position which was that the reason for the redaction was that the claimant was attempting to introduce new matters which had not been considered earlier. It was not because of a protected act. It was not an act of victimisation.

(b) The stopping of his Grievance dated 28 February 2015 (number 5) by Stephen West on or about 12 March 2015;

95. The Tribunal accepts that the grievance was suspended to allow the disciplinary process and investigation into the claimant's alleged conduct in the workplace to progress. It was not because the claimant had done a protected act. It was not an act of victimisation.

(c) Investigating him under the Code of Conduct from about 6 March 2015;

96. The Tribunal was satisfied that the reason for this investigation was because of the claimant's alleged conduct in the workplace. It was not because he had done a protected act. It was not an act of victimisation.

(d) Suspending him on 17 June 2015;

97. The Employment Judge and Mr O'Hagan, in the majority, accepted that there had been a complaint by Mr McGowan about the claimant and that was part of the reason why the claimant was suspended. This is expressly stated in the suspension letter.

98. However, they considered that the sending of the email by the claimant to the Tribunal about the Twitter account was part of reason for the decision to

suspend, and a substantial element in the respondents' decision to suspend the claimant. The majority considered it relevant that the claimant had never been suspended previously despite his wide-ranging series of allegations, and grievances, over a period of time.

99. The other Tribunal member, Mr Burnett in the minority, considered that this suspension was because Mr McGowan, HR Manager, had made a complaint against the claimant. This was seen as something further to be investigated. He considered it was not because the claimant had done a protected act and it was therefore not an act of victimisation. Accordingly, the majority decision of the Tribunal is that this was an act of victimisation, as it was the sending of the Twitter email that was the substantial cause that led to the claimant's suspension.

(e) Dismissing him on 24 September 2015;

100. The Tribunal was satisfied that this was because of the claimant's conduct in the workplace. It was not because he had done a protected act. It was not an act of victimisation.

(f) Rejection of his Appeal on 25 August 2016;

101. The Tribunal was satisfied that this was because of the claimant's conduct in the workplace, and the Appeal Committee's upholding of Mr West's decision to summarily dismiss the claimant. It was not because he had done a protected act. It was not an act of victimisation.

102. In summary, therefore, the Tribunal dismisses the claim of victimisation, except for item (d) relating to suspending the claimant on 17 June 2015, which is upheld as an act of victimisation by the majority of the Tribunal.

103. **Section 136 of the Equality Act 2010** deals with the burden of proof. Further, the **EHRC Code of Practice on Employment (2011)** states, at

paragraph 15.33, that: "***An Employment Tribunal will hear all of the evidence from the claimant and the respondent before deciding whether the burden of proof has shifted to the respondent."***

104. As the Tribunal felt able to make a positive assessment that the reason for the detriment was not because the claimant had done a protected act, there is no need to consider the shifting burden of proof.

105. The respondents argued, in their grounds of resistance to the combined claims, that the claimant's victimisation complaint was time-barred, although this matter was not flagged up by parties' representatives in this List of Issues as a preliminary matter, in terms of **Section 123 of the Equality Act 2010.** At paragraph 3.6 of his written closing submissions for the respondents, Mr Ettles stated: "***The detriments of suspension, dismissal and rejection of the Claimant's Appeal do not constitute a course of conduct for the purposes of Section 118(6) of the Equality Act 2010."***

106. **Section 118** is part of chapter 2 of Part 9 of the legislation relating to enforcement of the Act in the civil courts, and it has no application to the Employment Tribunal. Chapter 3 refers to the Tribunal, and **Section 123(6)** refers – which, as it happens, is in the same terms as **Section 118(6)**

107. Mr Ettles' closing submissions did not invite us to find that the victimisation head of complaint is time-barred. We note that while time bar is a jurisdictional issue, which neither we nor the parties can waive, even if the victimisation complaint is time-barred, it is just and equitable to allow it to proceed, when we have heard evidence on it, and neither party has suggested that they have been unfairly prejudiced by us doing so, when they have both led evidence before us on this aspect of the case.

108. Further, it has not been necessary for us to go on and determine whether the detriments amounted to a course of conduct, as with the exception of the claimant's suspension, we have found, by majority, that none of the other detriments amounted to an act of victimisation. The respondents' Appeals

Committee, in any event, were a separate decision-making body, distinct from Mr West, as the original dismissing manager.

Unfair Dismissal

109. In considering this part of the claim, we have decided to address each of the identified issues (12) to (23) in turn, and thereafter conclude with our majority, and minority, reasons.

110. In terms of **Section 95 of the Employment Rights Act 1996**, it is not in dispute between the parties that the claimant was dismissed by the respondents and, as per **Section 97**, his effective date of termination of employment was 24 September 2015, when he was summarily dismissed, for gross misconduct, by Mr West, on behalf of the respondents.

111. Similarly, there is no dispute that the claimant had sufficient continuity of employment with the respondents to invoke his statutory right to complain that he had been unfairly dismissed by the respondents, contrary to Section **94**. His complaint was brought within time.

112. Further, the Tribunal notes that the respondents submit that the principal reason for the claimant's dismissal was related to his conduct as an employee, and that is a potentially fair reason for dismissal in terms of **Section 94(2)(b).**

113. The claimant, whilst accepting that conduct is a potentially fair reason for dismissal under and in terms of **Section 98**, submits that the respondents failed to act reasonably in treating that potentially fair reason as a sufficient reason for dismissing the claimant under **Section 98(4).**

114. In his written closing submissions for the claimant, his counsel, Mr John, submitted, at paragraph 57, that "***there were a number of significant flaws in the disciplinary procedure, which rendered it procedurally and substantively unfair."***

DISMISSAL

12. Did the Claimant's action constitute misconduct, and if so gross misconduct?

115. The respondents submitted that the principal reason for the claimant's dismissal was related to his conduct as an employee, and they labelled that misconduct as being gross misconduct. We deal with this later when addressing issue (22) below.

116. On the evidence heard by the Tribunal, we are satisfied that this was a conduct related dismissal, and we note that the 7 allegations against the claimant, as found established by Mr West, the disciplining officer, at the disciplinary hearing, were established by him, on the balance of probabilities, as he found the claimant's behaviour unacceptable and in breach of the respondents' Code of Conduct for Employees.

117. Mr West concluded that, cumulatively, they were demonstrative of gross misconduct based upon serious insubordination, serious breaches of trust and confidence, and serios breaches of the Code of Conduct, which had resulted in an irretrievable breakdown of trust and confidence in the employment relationship.

13. Did the Respondent have an actual belief in the misconduct alleged against the Claimant?

14. If so, was that belief based upon reasonable grounds?

15. Was such a belief arrived at after a reasonable investigation?

16. More particularly in that regard: Should the Respondent have investigated the claimant's accusations against others, in order to determine their foundation and / or the reasonableness of the Claimant holding his expressed views?

118. In considering these related matters, the Tribunal has taken note of the parties' respective closing submissions to us. In the respondents' closing submissions from Mr Ettles, he stated as follows:

> ***4.2*** ***Clearly, the Respondent had an actual belief in the misconduct alleged against the Claimant. That belief was based upon reasonable grounds. The Claimant had admitted using the language that was later found to be unacceptable.***
>
> ***4.3*** ***The Respondent's belief was arrived at after a reasonable investigation. There were seven allegations against the Claimant. The first four were fully investigated under the Respondent's Code of Conduct by Annabel Travers. The other three did not require investigation by an Investigation Officer as it was clear from the outset that the Claimant admitted using the language that was later found to be unacceptable. An Investigatory Hearing is not required in every case (see Sunshine Hotel Ltd -v- Goddard UKEAT/0154/19, 15 October 2019, Unreported).***
>
> ***4.4*** ***The Respondent's Disciplinary Policy & Procedure (Bundle 2, Pages 359-382; Core Documents, Pages 1,123-1,146), states at paragraph 5.3 of the Disciplinary Procedure that "The investigatory stage will be the collation of evidence by the employer for use at the Disciplinary Hearing. In some cases this may require the appointment of an Investigation Officer to undertake a full investigation. In such cases the Investigation Officer will be trained to undertake this role. In other cases the investigatory stage will require to be the collation of evidence by***

the Manager for use at the Disciplinary Hearing". The three allegations which were not investigated by the Investigation Officer required only the collation of evidence by Stephen West for use at the Disciplinary Hearing.

4.5 It is submitted that the Respondent did not need to investigate the Claimant's accusations against others, in order to determine their foundation and/or the reasonableness of the Claimant holding his express views. Although the Claimant's accusations were not investigated, the Claimant was given the opportunity to justify the language that he had used about the Respondent's employees. He provided no justification for his use of terms such as "incompetent", "unprofessional" and "biased". His accusations remained unfounded by the conclusion of the Disciplinary Hearing.

119. In his written closing submission for the claimant, his counsel, Mr John, at paragraphs 61 and 62, and then at paragraphs 162 and 163, set out his position, as follows: -

61. However, it is apparent SW did not investigate whether or not the Claimant's Allegations could be substantiated or not. The tribunal is reminded of the following evidence from SW:

a) In XX: "The disciplinary hearing was not investigating whether there was incompetence or unprofessionalism or not. Even if they were founded allegations the language was inappropriate" (also repeated in dismissal letter [2-48 penultimate para];

b) In XX: "I Came to the view that it did not matter what the claimants view was or if he could prove his criticisms, he shouldn't have said it in public";

c) In his WS (para 9.36): "The claimant had that opportunity to present evidence about the allegations relating to competence and professionalism etc of colleagues. All he presented was evidence of errors and decisions with which he disagreed"

d) In submissions to appeal [3B-721](mid) "The issues were not about confirming Brian's various allegations";

e) and then confirming in XX that he "did not investigate his allegations made against individuals";

62. This approach was inherently unfair. C was being investigated and then dismissed against a set of allegations that his criticisms were "unfounded/ unsubstantiated", and yet the Disciplining Officer was explicitly excluding any or any fair consideration of the evidence that went to substantiate them. He was not accepting evidence on it and it would not influence him whatever C proved. He was considering dismissal of an employee of some seniority and 7 years good service. The investigation should have been more complete and thorough.

162. For all of the reasons set out, a finding of gross misconduct was not reasonably open to R and dismissal was not within the range of reasonable responses.

163. A summary of some of the main flaws was put to SW in XX and are repeated for convenience. I.e. that SW:

- ***Given the allegations and proceedings C brought against him, (and his involvement at material times with HR) he should not have been the disciplinary officer;***

- ***In any event, he should have investigated C's grievances and complaints as per Gs and D@W, And certainly before considering disciplinary;***

- ***Given Cs concerns with individuals and process, should have investigated to see if C's criticism were founded or "unfounded" – and given due weight to that evidence, in the way that the allegations were framed against him;***

- ***Should have seen allegation 2 for the unfair doubling up of allegations it was;***

- ***Should have acceded to the request and accommodated to have witnesses at the Disc/appeal hearing;***

- ***should have prior to dismissal acknowledged the ET submission as the potentially relevant point that he now accepts. – and hence it should not have been an allegation feeding into dismissal;***

- ***Should have given C due credit for his physical difficulties and stress and how that was obviously feeding into his frustration;***

- ***Should have given him credit for his previous fair relationship with HR and his clean record of nearly 8 years;***

- ***Should not have been present during discussions in the deliberation period at the appeal;***

And that:

➔ ***These are material flaws in the investigatory and disciplinary process***

➔ ***These flaws influenced the decision to dismiss –***

➔ ***And that dismissal was not in the circumstances an option reasonably open to you, or others***

And because of those flaws he/R did not have an actual reasonable or fair belief in gross misconduct.

120. The issue before the Tribunal was whether or not we were satisfied that the respondents had been able to show that, as per the 3-fold ***Burchell*** test, according to the Employment Appeal Tribunal in ***British Home Stores Ltd v Burchell*** **1980 ICR 303,** that they believed the employee guilty of misconduct, they had in mind reasonable grounds upon which to sustain that belief, and at the stage at which that belief was formed on those grounds, they had carried out as much investigation into the matter as was reasonable in the circumstances.

121. The Employment Judge and Mr O'Hagan, in the majority, were not satisfied that the respondents, through Mr West, as disciplining officer, had a reasonable belief in the claimant's guilt of misconduct, after a reasonable investigation by Mrs Travers, as Mrs Travers' investigation did not include investigation of the background to the claimant's comments about his Council colleagues, where she had recommended that the disciplinary hearing officer should establish whether the comments and statements made. Further, the majority of the Tribunal took into account that Mrs Travers' investigation did not look at allegations 5 to 7. Also, Mr West did not conduct any further investigation himself, and in cross-examination at this Final Hearing, he stated that he did not investigate the claimant's allegations about other individuals as, indeed the dismissal letter itself stated, even if they were founded allegations, the language used by the claimant was inappropriate.

122. The majority of the Tribunal was of the view that the respondents' investigation should have been more complete and thorough. The majority regarded it as unfair that the investigation was not more complete and thorough than it was, as the claimant was dismissed for a set of allegations that his criticisms of others were unfounded, or unsubstantiated, yet Mr West

excluded any fair consideration of these matters by restricting the scope of the investigation conducted prior to the disciplinary hearing.

123. Mr Burnett, in the minority, was otherwise minded. He considered that the respondents had a reasonable belief in the claimant's guilt of misconduct, and that that belief was based upon reasonable grounds. Further, even if the respondents' investigation was not reasonable, Mr Burnett considered that the procedure adopted at the disciplinary hearing, and subsequent appeal hearing, allowed the claimant the opportunity to present his position, regardless of any earlier procedural flaws in the investigation process.

17. Should the claimant's grievances have been put on hold pending the disciplinary investigation?

18. Should the claimant's grievances have been completed prior to a decision on misconduct and on sanction?

124. In considering this matter, the Tribunal has taken note of the respondents' closing submissions from Mr Ettles, at paragraphs 4.7 and 4.8, as follows:

> ***4.7 The Respondent did not need to investigate the Claimant's grievances prior to the Disciplinary Investigation. Reference is made to paragraphs 3.2 and 3.3 above. In Grievances such as the one dated 28 February 2015 (Grievance No. 5) the Claimant was not seeking a specific resolution of an issue. He was seeking an acknowledgement of unprofessionalism on the part of HR. (See Bundle 2, Page 187; Core Documents, Page 465).***
>
> ***4.8 It was not necessary to complete the grievance process prior to a decision on misconduct and on sanction. The Claimant had the opportunity to put forward any explanation for his conduct and any mitigation during the Disciplinary Investigation, the Disciplinary Hearing and the Appeal Hearing.***

125. The claimant's position, as per paragraphs 69 to 71 of Mr John's written closing submission, is as follows:

> ***69. C has a right to have his legitimate complaints fairly dealt with in accordance with fair process and employer policy. He was being dismissed in large part, due to the contents of what was in his 28 Feb 2015 Grievance [2-181/E-459] (as replicated in his letter to AW of same date) [2-171/E-449], his Dignity at Work ("D@W") of 26 March 2015 [2-192/E-470] and his 11 and 12 May 2015 Grievances [2-200,215/E-478,485]. However, his 28.2.15 Grievance was 'parked' by SW, his D@W temporarily withdrawn upon the influence of Gavin Walsh and his May Grievances redacted by 80%.***
>
> ***70. The context and wording of these grievances and complaint will be dealt with individually against the allegations to which they relate below, however as a general point, it was procedurally and substantively unfair for these not to have been investigated and resolved, as they in part predated the disciplinary investigation and the proper investigation and determination of them was key to a fair appreciation of the words used within them.***
>
> ***71. R's Disciplinary and Grievance Policies appear to be silent upon this situation. But there is nothing in either policy which permits a conduct investigation to stop or prevent an employee's right to have a grievance or complaint from being resolved. the D@W Policy [3-669/E-1117] s.52 says that complaints must be dealt with immediately, thoroughly and fairly.***

126. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** contains the following provision:

> ***Overlapping grievance and disciplinary cases***

46. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

127. Mr Burnett, in the minority, was satisfied that it was appropriate to put the claimant's grievances on hold pending the disciplinary investigation, and that it was not necessary to complete the claimant's grievances prior to a decision on misconduct and on sanction. He considered that the disciplinary process should take precedence, as the claimant had been "warned" by Mrs Wilson, the Executive Director, about his form of communication with Council colleagues, yet despite this his behaviour had escalated rather than abated. Mr Burnett felt the claimant, as an intelligent man, and an experienced professional, should have known the standards of behaviour expected of him, and been fully aware of the consequences if he breached the Code of Conduct.

128. The Employment Judge and Mr O'Hagan, in the majority, were not so satisfied. They considered that, rather than deal with grievances and disciplinary matters concurrently, it would have been appropriate for the respondents to complete the claimant's grievances, and thereafter decide on any further steps as regards the disciplinary process. They were conscious that the claimant was using the grievance procedure to seek to resolve his issues with the respondents, HR in particular, and the substance of his grievances were related to disciplinary allegations brought against him, because they were the context for the criticism made of others in HR, and it was those criticisms that were the subject of the disciplinary allegations.

19. Was and should the Claimant have been dissuaded from pursuing his Dignity at Work complaint?

129. In considering this matter, the Tribunal has noted Mr John's written closing submission for the claimant, at paragraph 117, where he states as follows:

> "***C was persuaded to withdraw this complaint after a conversation with R's Gavin Walsh as to how it would affect the ET timetable. However, GW was R's lawyer. Given the nature of the complaints and request for independent investigation, his intervention was at best ill-judged and at worst, suspect. There is no way that GW should have been attempting to influence the course of this complaint one way or the other, whether under the auspices of ET listings or otherwise."***

130. Further, the Tribunal has also taken note of the respondents' closing submissions from Mr Ettles, at paragraph 4.9, stating that: -

> ***"The Claimant was not dissuaded by the Respondent from pursuing his Dignity at Work Complaint. The Claimant has referred to an e-mail sent to him on 1 April 2015 by Gavin Walsh, one of the Respondent's solicitors (Bundle 2, Page 16; Core Documents, Page 683). The Claimant was unrepresented at that time and the e-mail explained to the Claimant the implications of bringing new Employment Tribunal claims when there were related internal procedures underway. In the e-mail it was twice suggested that the Claimant should take his own legal advice on the matter as necessary. Although the Claimant subsequently decided to withdraw his Dignity at Work Complaint, he withdrew it only temporarily."***

131. Having carefully reviewed the evidence available to us, we, the full Tribunal, are not satisfied that the claimant was "***dissuaded"*** from pursuing his Dignity at Work complaint, submitted on 26 March 2015. From the clear and unequivocal terms of his email of 2 April 2015, the claimant "***retracted***" until such times as the Employment Tribunal proceedings, then scheduled to be heard at the ET Glasgow July and August 2015, were concluded. He made a

tactical decision based upon his discussion with Mr Walsh, the respondents' solicitor in the Tribunal proceedings then ongoing.

132. The respondents, through the 22 April 2015 reply from Angela Wilson, regarded the complaint as "***temporarily withdrawn***." She had previously stated, on 30 March 2015, that it would be progressed in line with the appropriate policies and timescales. When, after his summary dismissal, the claimant tried to resurrect his outstanding grievances, he was advised, by Stephen West, on 30 October 2015, that he could not do so, due to the change in his employment status, he having been summarily dismissed. As such, his grievances were not progressed by the respondents, although he continued to make reference to them whilst pursuing his internal appeal against dismissal.

20. Should the contents of the Claimant's grievances / complaints have been used against him in the disciplinary process?

133. In considering this matter, the Tribunal has taken note of the respondents' closing submissions from Mr Ettles, at paragraph 4.10, stating that: -

> ***"There was no reason why the contents of the Claimant's Grievances/Complaints should not have been used against him in the disciplinary process. The way in which the Claimant had described officers of the Respondent was something that needed to be considered by Management and the appropriate way of considering the matter was through the disciplinary process."***

134. Further, it is not disputed that, in bringing disciplinary allegations against the claimant, the respondents did refer to the contents of some of the claimant's grievances and complaints, including his Dignity at Work complaint. We, the full Tribunal, had, as part of the documents before us in the Bundle, a copy of the respondents' Employee Code of Conduct. It provides that a breach of the Code may give rise to disciplinary action.

135. We also had a copy of the respondents' Grievance Policy and Procedure. At paragraph 3.9 of the September 2010 policy, it states that "***grievances will be treated with the highest degree of confidentiality by everyone involved in the process",*** and that records of investigatory meetings "***will be kept confidential to the process and will be used only for the purpose of investigating the grievance and taking any action as a result of the investigation."*** The January 2015 update to the policy, at paragraph 5.5, states that "***grievances will be treated with the highest degree of confidentiality by everyone involved in the process",*** and that records will be kept as confidential.

136. In both versions of the policy, at paragraph 9.1 and 5.1 respectively, provision is made about "***overlapping grievance and disciplinary cases".*** It is there provided that: ***"Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."***

137. In the present case, we take the view that the disciplinary process against the claimant started on 12 May 2015 when the claimant learned, from Annabel Travers' emailed letter to him of 8 May 2015, that she had been appointed by Mr West as disciplinary investigation officer.

138. In all these circumstances, it seems to us that while, with the benefit of hindsight, it may have been better if the claimant's grievances were addressed before the holding of his disciplinary hearing, the matter was one for the exercise of discretion by the respondents' officers, and we fail to see any good reason why an employer should exclude from their consideration in a disciplinary process what an employee has said, or done, under any of the Council's other internal policies or procedures.

21. Was the disciplinary investigation, hearing and appeal hearing procedurally and substantively fair?

139. This question is very broad in its nature, and we have decided to break it down into bite size chunks and look at the position at each of the 3 distinct stages of the disciplinary process: investigatory stage, disciplinary hearing, and appeal hearing. Later, we give our respective majority, and minority, views on whether or not the claimant's dismissal was fair or unfair.

(a) Were all of the allegations against the Claimant investigated, and in line with policy?

140. At paragraph 4.11 of his closing submissions for the respondents, Mr Ettles stated that: -

"***All of the allegations against the Claimant were investigated, to the extent that they needed to be investigated, and in line with Policy."***

141. The claimant disputes that, and Mr John, in his reply to the respondents' position, at paragraph 38, submits that such investigation as there was "***far too narrow and focussed on words used without wishing to grapple with the context or the contents of Grievance / D@W."***

142. The Tribunal notes that the disciplinary allegations against the claimant, being the 7 matters specified in the letter of invite to the disciplinary hearing, were not all investigated by Mrs Travers, as the investigating officer, and we refer to our views above in answer to issues (13) to (17), where the members of the Tribunal, in the majority, being the Employment Judge and Mr O'Hagan, were not satisfied that there was a reasonable investigation, but Mr Burnett, in the minority, was so satisfied.

(b) Should the Claimant's (withdrawn) Dignity at Work Complaint have been used against him in the disciplinary?

143. At paragraph 4.12 of his closing submissions for the respondents, Mr Ettles stated that: -

> ***"There was no reason why the Claimant's (withdrawn) Dignity at Work Complaint should not have been used against him in the disciplinary process. Firstly, the complaint had been withdrawn only temporarily. Secondly, the complaint had been copied by the Claimant to a number of officers in Trade Unions. The content of the complaint had therefore reached officers other than Angela Wilson and Joyce White, to whom it had been sent."***

144. The Tribunal considers that it was appropriate for the respondents to have used the claimant's Dignity at Work complaint when drafting the disciplinary allegations against the claimant. There was no doubt that he had submitted it, and, in all circumstances, while it was temporarily withdrawn, it seems to us that an employer should not exclude from their consideration in a disciplinary process what an employee has said, or done, under any of the Council's other internal policies or procedures, but the employer needs to take proper account of the context in which the employee says, or does, something.

(c) Should the Claimant's grievances (numbers 5, 6 and 7) have been put on hold, redacted or deemed incompetent (and in fact never dealt with)?

145. We consider that it was a matter for the respondents, and those senior officers advising them at the time, to decide how best to deal with each of the claimant's various grievances. It is not for this Tribunal to seek, with the

benefit of hindsight, to decide whether it would have dealt with matters in a different way.

(d) Should Stephen West have been disciplinary hearing officer, especially after the Claimant's objections?

146 In considering this matter, the Tribunal has noted Mr Ettles' written closing submissions for the respondents, stating:

"***4.15 Stephen West was an appropriate person to be the Disciplinary Hearing Officer, despite the Claimant's objections. He had been asked by his Line Manager, Angela Wilson, to undertake an investigation into whether the Claimant had been in breach of the Respondent's Code of Conduct for Employees (Bundle 2, Pages 190-191; Core Documents, Pages 468-469). Mr West then, as the Officer leading the investigation, asked Annabel Travers to compile an Investigation Report. He would consider the outcome of this and, if necessary, arrange a Disciplinary Hearing. Subsequently, as the Officer appointed by Ms Wilson to investigate the Claimant's behaviour, he was the appropriate person to consider the further conduct issues that had arisen in relation to the Claimant.***

4.16 The Claimant had complained about Stephen West but the Claimant had difficulty with a number of senior officers. For instance, given his relationship with Colin McDougall, it would not have been appropriate for Mr McDougall to be the Disciplinary Hearing Officer. The next Line Manager up was Mr West. The Claimant's allegations about Mr West at this stage were not substantial or particularly tangible. He had advised the Investigating Officer that he was not happy with Mr West, had a conspiracy that Mr West had been

delegated the task of sacking the Claimant by Angela Wilson and had views about Mr West's competence (by this stage he clearly had views about the competence of many of his colleagues). Mr West's evidence was that he did not see the Claimant's opinion of him as a bar to being the Disciplinary Hearing Officer because in carrying out the actions which the Claimant was complaining about, Mr West was applying the Respondent's policies and HR advice. There was no personal element in the actions which Mr West had taken. A Manager may make a decision which an employee does not like, but the employee's unhappiness does not give him a right of veto over the involvement of the Manager in subsequent issues, nor does it make it appropriate for an employer to choose another manager. Mr West's evidence was that he was able to approach the matter with an open mind. He categorically denied taking part in a conspiracy that the Claimant alleged existed amongst senior officers in Management. Mr West was confident that he was not biased and had not pre-judged the matter."

147. In his closing submissions for the claimant, Mr John, at paragraphs 79 to 83, raised various matters about Stephen West's impartiality, as follows: -

79. SW had stopped C's whistle-blowing complaint of 8.11.13 [3-165/E33], and the 28 February 2015 grievance, and he was named in ET proceedings. C had firmly objected to SW hearing the Disciplinary in his letter of 1.9.15, [2-905-907/E-543] and had requested that a 3rd party deal with it. C further raised it at the Disc Hearing [2-73/E-604] and at [2-97/E-628] on 21.9.15.

80. This was a reasonable request based upon legitimate reasons and SW should have passed it on. He suggested that C had complaints against many and so few could deal with without a complaint. But the organogram [2-221] shows that Head of Section Peter Barry could have dealt with it, and he was entirely unconnected and independent. Alternatively, an external independent HR consultant could have.

81. SW's reasoning at appeal [3B-721/E-739] was:

"in terms of the hearing process I continued to be impartial on the basis that in my view Brian's victimisation claim has no grounds"

This raises far more concerns than it allays and suggests that he has already prejudged/dismissed aspects of C's case! He was also the one to have suspended, and most likely formed some view as to C and the allegations. He said in XX on 9.6.20 that prior to the Hearing he already "knew some stuff" as to HR's dissatisfaction with C, but was unable to specify. Given that C was by the point of the hearing alleging elements of collusion against him and document suppression, having SW as Hearing Officer was evidently not appropriate or fair.

82. It transpires from his comments at the appeal [3B-826/E-937](bottom) that SW had in fact adopted a hostile stance against C, he claimed that

"Throughout the disciplinary process Brian has acted in a manipulative underhand and dishonest manner"

And referred to him recording meetings. This was an unfair attempt to undermine C. This is despite SW knowing before even the Disciplinary Hearing that C had issues with the accuracy of notes and had openly sought to have the appeal video recorded to avoid further inaccuracy.

83. SW also asserted in his WS (para9.26) that recording was a sign of a "significant level of mistrust in management and colleagues". On the contrary it is evident that there was inaccuracy in R's minute taking and which was prejudicial to C. It is surprising therefore that rather than recognising the misfortune of detrimentally inaccurate minutes, this is used by SW against C to suggest a breakdown of trust in the relationship, so as in part to justify dismissal. That is an unfairly slanted and misleading observation by SW given his knowledge of noting inaccuracies.

148. Further, we have taken account of counsel for the claimant's reply to Mr Ettles' written submissions, where, at paragraph 41, Mr John stated:

"***Re para 4.16, there were other officers who had no previous dealings with C or his complaints who could have heard the disciplinary e.g. Pater*** (sic) ***Barry, Head of Customer and Community Services, was on the same level as SW and independent of issues in the process. SW did not explain why he could not have heard it. Alternatively an independent external HR consultant."***

149. Having considered the evidence led before us, the Tribunal accepts the point made by Mr John that another officer of the Council could have been appointed as disciplinary officer, in particular Peter Barry, another Head of Service, but that did not happen, nor did the respondents decide to appoint an independent, external HR consultant, to act as disciplinary officer. Indeed, given the respondents are a large organisation, with a number of senior

officers who could have been appointed internally, the Tribunal can well understand why the respondents would wish to keep matters internal, and use an existing officer of the Council.

150. While the claimant, though his counsel, has made various points about Mr West's impartiality, the Tribunal considers that ultimately it was a matter for the respondents, and those senior officers advising them at the time, to decide how best to deal with the disciplinary allegations against the claimant, and it is not for this Tribunal to seek, with the benefit of hindsight, to decide whether it would have dealt with matters in a different way. In any event, even if Mr West had been biased, and or pre-judged matters against the claimant at the disciplinary hearing (and we make no such finding), his decision was the subject of the further appeal to the respondents' Appeals Committee, who, as elected members, were independent of the Council officers dealing with matters at earlier stages.

(e) Should Stephen West as presenting officer at the appeal, have been breaking off and sitting with the panel?

151. This point relates to the claimant's allegation that Mr West, as presenting officer at the appeal hearing, sat with the Appeal panel members during their final deliberations on day 6. For the reasons already given, in our assessment of the claimant's evidence, and that of Mr West and Mr Hessett, we preferred the respondents' evidence on this point, and rejected the claimant's evidence on this point. We do not accept that Mr West sat with the Appeal panel during its private deliberation.

(f) Not having key witnesses available to give evidence at both disciplinary and appeal and to be questioned;

152. It was clear to us, from the evidence presented, that the respondents' Disciplinary Policy and Procedure, at paragraph 9.6, provided that, at the disciplinary hearing: "***Each side is responsible for ensuring that its witnesses attend".*** As such, it was for the claimant to ensure any witnesses he required attended. We appreciate that that is a counsel of perfection for

an employee has no legal power of compulsitor to compel a person to attend a disciplinary or appeal hearing on their behalf.

153. While he invited various officers of the Council to attend his disciplinary hearing as witnesses, they did not do so, other than Mr West who was present as disciplinary manager. Mrs Annabel Travers, as the investigating officer, attended the disciplinary hearing as a witness led by Mr West, the disciplinary manager, and she was open to questions by the claimant. The others on the claimant's list were not called by Mr West. He did not consider it necessary to call any other witnesses, only Mrs Travers.

154. On account of illness, Mrs Travers was not available at the time of the appeal hearing, so she was not heard as a witness at that stage. The Appendix 3 dealing with procedure at Appeal Committee Hearings allowed for both sides to call such witnesses as might be required. The claimant called no witnesses, nor did Mr West as the management representative. The Appeals Committee had available to it an extensive Bundle of documents relating to the appeal, including background papers, as well as management and appellant submissions and summings up.

155. In considering this aspect of the case, the Tribunal has had regard to the respondents' own Disciplinary Policy and Procedure, as also the **ACAS Code of Practice on Disciplinary and Grievance Procedures.** On the matter of the appeal provided to the claimant, we have specifically looked at the ACAS Code, which states, so far as material for present purposes:

> ***Provide employees with an opportunity to appeal***
>
> ***26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.***

27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

28. Workers have a statutory right to be accompanied at appeal hearings.

29. Employees should be informed in writing of the results of the appeal hearing as soon as possible.

156. In our view, the respondents provided the claimant with a right of appeal, as per the ACAS Code. While, in our collective experience, a 6-day internal appeal is quite exceptional, the fact that it took place over a 6-month period is not, of itself, evidence of any procedural or substantive unfairness to the claimant. The appeal hearing was constituted to be held on set dates, agreed between the parties, on account of the need to adjourn, and relist for additional dates.

157 The claimant was provided with the opportunity to appeal, and he did so, submitting detailed grounds of appeal, and at the appeal he had representation from the GMB as his trade union. The Appeals Committee, as a decision-making body, was clearly a different person than the disciplinary manager, Mr West, although they heard from him as he was the presenting officer and management representative at the appeal hearing.

158. Both sides got the opportunity to present their case at the appeal and sum up, before the Appeals Committee had private deliberation. The Tribunal was satisfied that that was a fair and impartial process, and not simply a "***rubber stamping***" of Mr West's decision to summarily dismiss the claimant.

159. In his closing submission for the claimant, at paragraph 20, Mr John stated that the claimant alleged "***little time was spent***", at the 6-day appeal hearing, considering the claimant's points. We reject that submission as not well-founded in fact, as the voluminous notes of the appeal hearing produced to

us clearly demonstrate that a significant period of time was spent over those 6 days considering the claimant's points.

160. At this point, we refer also to counsel for the claimant's written closing submission, at paragraphs 154 to 156, dealing with the appeal, where it is submitted as follows:

> ***154. No witness has been called by R to speak to the appeal panel's reasons for dismissal and the appeal record is very thin and sheds no further light. Nor does the appeal dismissal [3B-862] which merely repeats verbatim the reasoning in the dismissal letter as to insubordination and breach of trust and confidence. Rather oddly, neither has any explanation been proffered by R during the hearing as to why none of the panel members were called. The thinness of the Appeal outcome announcement [2-838 bottom] and in the outcome letter and the taking of 1 hour to deliberate after 6 days of hearing, is suggestive of a lack of careful consideration of the issues, a mere rubber stamping.***
>
> ***155. It has not therefore been possible to determine whether any of the unfairness identified up to the dismissal stage was cured or not. Certainly, the same investigation report and submissions from SW were presented, which appear to perpetuate the unfairness below. In fact SW introduced new elements of unfairness in her (sic) presentation of C's meeting recording. In his report to the appeal panel [2-34 para 2.8] he sets out that he did not consider any additional investigations. No further investigations were undertaken nor R witnesses interviewed or heard from, nor any further evidence considered so as to determine the substantiation or not of C's criticisms. It is impossible to tell what was considered and how this was dealt with.***

156. If it is to be said that the appeal must have simply found every aspect of all allegations proved, that simply cannot be inferred, nor on what basis, nor if it was reasonable. The burden of proving the reason for dismissal, and that it was for one of the listed reasons and was arrived at as a genuine belief after a suitably thorough investigation, remains with R. They have not done so."

161. Mr Burnett, in the minority, was satisfied that the respondents did show the reason for dismissal of the claimant, being a conduct related reason, as well as satisfying him that dismissal was within the band of reasonable responses, and the process overall, up to and including the appeal, was fair and reasonable. In light of the majority view, however, the unfair dismissal claim is upheld by the Tribunal.

162. The Employment Judge and Mr O'Hagan, in the majority, consider that the claimant has been unfairly dismissed and, accordingly, they have upheld that head of complaint, and listed the case for a Remedy Hearing. The majority did not consider there to have been a reasonable investigation and, further, they did not consider summary dismissal to have been appropriate or proportionate in all the circumstances, even if the respondents had followed a reasonable procedure which fell within the range of reasonable responses open to a reasonable employer. Specifically, the majority did not consider that summary dismissal was the only option open to the respondents, and by selecting it, the respondents acted outwith the range of reasonable responses open to a reasonable employer. We refer to our further discussion and deliberation in answer to the remaining issues (22) and (23).

22. Was summary dismissal a sanction reasonably open to the Respondent?

163. The Tribunal has not reached unanimity on this matter, the majority of the Employment Judge and Mr O'Hagan being of the view that summary dismissal was not a sanction reasonably open to the respondents, but Mr Burnett, in the minority, dissenting from that view.

164. In his written closing submission for the claimant, his counsel, Mr John, at paragraphs 162 and 163, set out his position, as reproduced fully earlier in these Reasons above, at paragraph 119, which is referred to again for its terms. In summary, it will be recalled that the claimant's counsel submitted that a finding of gross misconduct was not reasonably open to the respondents, and dismissal was not within the range of reasonable responses, as there were material flaws in the investigatory and disciplinary process; these flaws influenced the decision to dismiss; and dismissal was not in the circumstances an option reasonably open to the respondents.

165. On this matter, the Tribunal reminds itself that sanction is a matter for the employer under the band of reasonable responses. It is not for this Tribunal to substitute its own view. We recall how, in the claimant's internal appeal, on day 6 of 6, his then GMB representative, Mr Adigwe, addressed the councillors on the appeals panel stating: "***Mr Gourlay may be worthy of sanction over this matter, but I would submit that the sanction of dismissal is grossly unfair and disproportionate."***

166. In essence, one of the main points of the claimant`s representative's closing submissions to the Tribunal was that he did not believe it was within the band of reasonable responses for the respondents to take disciplinary action against the claimant, which resulted in his summary dismissal, without notice, for gross misconduct, and that it was outwith the band for the respondents to have dismissed him for gross misconduct.

167. On this particular point, the Tribunal recognised that this is primarily a matter for the employer, and the question is whether a decision to so label the conduct in question fell within the band of reasonable responses open to the employer in the circumstances. So too the Tribunal recognised that it must not substitute its view of the situation for that of the employer, and that it is for us to focus on the range of responses open to a reasonable employer given the facts and circumstances of the case available to the employer at the material time.

168. In his closing submissions for the respondents, at paragraph 4.1, Mr Ettles stated that:

> "***It is submitted that the Claimant's actions did constitute gross misconduct. The Claimant's actions involved personal and professional attacks on employees of the Respondent with accusations of unprofessionalism, incompetence and biased behaviour. The Claimant's actions were summarised as involving serious insubordination, serious breaches of trust and confidence and serious breaches of the Respondent's Code of Conduct for Employees. This led to an irretrievable breakdown of trust and confidence in the employment relationship."***

169. In considering this matter, the Tribunal had regard to paragraph 8 of the respondents' consolidated grounds of resistance to the claims, which stated as follows: -

> ***"The consolidated claim for unfair dismissal is generally reflective of the unfair dismissal claim in the Claimant's claim #4 (4100137/2016), subject to the comments below. This claim is unfounded. Not only was the Claimant's dismissal fair as within the band of reasonable responses and procedurally fair (which is the test the Tribunal must apply, not substituting its view for the Respondent's), but his gross misconduct was an extremely serious type of behaviour that inter alia destroyed the relationship of trust and confidence in employment, and his dismissal was to the highest end of the spectrum of gross misconduct, his behaviour so extreme as essentially leaving the Respondent no choice but to dismiss for his very serious, gross misconduct."***

170. In delivering his closing submission for the claimant, his counsel, Mr John, referred the Tribunal to paragraph 16 of the respondents' consolidated grounds of resistance to the claims, which he stated showed the respondents' "***mind set***". It was in the following terms: -

> ***"The consolidated claim continues the Claimant's outrageous and irrational, vexatious attempts to find someone to blame for whatever is angering him, without accepting that in fact it was his behaviour and conduct which escalated to extreme and unacceptable levels (fundamentally inconsistent with any form of conduct appropriate of any employee, and destructive of trust and confidence in the employment relationship) involving attacks on colleagues that were an extreme form of gross misconduct. He did this in various forms of communication, including in grievance documents, but there is no basis for thinking that this type of behaviour can ever be acceptable. Given warnings about this, his behaviour worsened and escalated rather than abating."***

171. Mr John submitted that the claimant's language was "***within the acceptable band of language for a disgruntled employee"***, and while reference was made to the claimant having been "warned" by Mrs Wilson, counsel stated that Mr West had accepted it was a request. Counsel felt the claimant had been given no credit for his predicament, as while he had made strong criticisms of others, he had not been abusive, and so his conduct was not gross misconduct, when looked at in the round, for a reasonable employer would have been looking into the context in which the claimant's remarks were made.

172. Having considered the matter carefully, the majority of the Tribunal, being the Employment Judge and Mr O'Hagan, decided that Mr West concluding that the claimant's conduct was gross misconduct was unreasonable, and fell outwith the range of reasonable responses open to a reasonable employer.

173. In coming to that view, the Tribunal took into consideration the judgment of the Employment Appeal Tribunal, in ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT/0032/09,*** where the EAT under His Honour Judge Hand QC, held that the question of what amounts to gross misconduct is a mixed question of law and fact, and that Tribunals should direct themselves that gross misconduct involves either deliberate wrongdoing or gross negligence and then consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case.

174. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In that particular case, the employer's disciplinary code stated that failure to adhere to a particular policy would amount to gross misconduct. This did not mean that, once the employer concluded the policy had been broken, the breach necessarily amounted to gross misconduct. The Tribunal in that case was entitled to consider the conduct that breached the policy and find that it could not reasonably be characterised as deliberate wrongdoing or gross negligence.

175. Further, in another unreported judgment from the Employment Appeal Tribunal, again by His Honour Judge Hand QC, sitting alone, in ***Eastland Homes Partnership Ltd v Cunningham*** **[2014] UKEAT/027/13**, the Employment Appeal Tribunal, suggested that where an employer characterises particular conduct as gross misconduct, Tribunals must analyse whether that was a reasonable position to adopt in the circumstances. The Tribunal's failure to do so in that particular case led to its finding of unfair dismissal being overturned.

176. The learned EAT Judge, His Honour Judge Hand QC, held that although the well-known authorities on unfair dismissal do not suggest that any finding as to the reasonableness of the characterisation of conduct as gross misconduct is called for, **Section 98(4) of the Employment Rights Act 1996** requires consideration of "***all the circumstances***". In his view, therefore, if the employer's view that the misconduct is serious enough to be characterised

as gross misconduct is objectively (as opposed to subjectively) justifiable, then that should be considered as one of the circumstances against which to judge the reasonableness or unreasonableness of treating the conduct as a sufficient reason for dismissal.

177. Although a dismissal for gross misconduct will often fall within the range of reasonable responses, this is not invariably so, as was made clear by the Employment Appeal Tribunal in ***Brito-Babapulle v Ealing Hospital NHS Trust*** **[2013] IRLR 854,** upheld by the Court of Appeal at **[2014] EWCA Civ 1626**. The test for unfair dismissal requires consideration of whether the employer acted reasonably in the circumstances, under **Section 98(4) of ERA**, so a Tribunal should give consideration to whether any mitigating factors render the dismissal unfair, notwithstanding the gross misconduct, and such factors might include, amongst others, an employee's long service, general work record, work experience, position, and any previous unblemished disciplinary record.

178. In his submissions to the Tribunal, Mr Ettles, the respondents' solicitor, at paragraph 4.47, stated that:

> ***"I invite members to carefully look at all the statements of the Respondent made about colleagues which led to his dismissal. It is submitted that the Respondent's decision to dismiss is one which, in the circumstances, clearly falls well within the band of reasonable responses test that you all will be familiar with. (See Iceland Frozen Foods -v- Jones [1982] IRLR439 and Tayeh -v- Barchester Healthcare Ltd [2013] IRLR387). Given the nature of the Claimant's continued attacks on his colleagues, and the lack of any significant mitigation, it was open to a reasonable employer to dismiss the Claimant summarily. Indeed given the seriousness of the behaviour notwithstanding instructions to stop and the lack of acknowledgement that his behaviour was unacceptable I would question whether any employer would come to a different decision."***

179. Mr Burnett, in the minority, considers that summary dismissal was appropriate in all the circumstances of the present case. The claimant's behaviour at work has escalated to unacceptable levels in the eyes of the respondents' management, and despite Angela Wilson's "*warnings*" to the claimant about his language and correspondence with colleague officers of the Council, the claimant's behaviour had not modified, and rather than abating, it had escalated to what were seen as "*attacks"* on colleague officers.

180. The majority of the Tribunal, being the Employment Judge and Mr O'Hagan, considered that the respondents did not take into account all of the circumstances of the case, as they had pursued the disciplinary process against the claimant without allowing his grievances to be concluded and determined first, and their disciplinary investigation was not complete and thorough. In their view, it was not reasonable for the respondents to consider that the claimant was guilty of gross misconduct, i.e., conduct that could justify his summary dismissal. Even if there was gross misconduct, which the majority do not accept was the case relating to the claimant's conduct complained of by the respondents, the majority consider that the decision to dismiss the claimant, in all the circumstances of this case, and taking account of the size and administrative resources of the respondents, equity and the merits of the case, was unreasonable, and fell outwith the range of reasonable responses open to a reasonable employer.

181. Further, the respondents had not sat down formally with the claimant, in a structured 1:1 interview with an appropriate senior officer of the Council, to see why it was that he was behaving as he was, and what they might be able to do, through the grievance and D@W procedures to address his concerns about how he was being treated by the respondents, and HR in particular, and to bring to his attention appropriate standards of behaviour under the Employee Code of Conduct, and likely consequences if he failed to act within the Code of Conduct.

182. While Mr Burnett, in the minority, regarded Angela Wilson's letters to the claimant as a "*warning*", and the respondents' dismissal letter refers to the

claimant's "*serious insubordination*" in failing to comply with a reasonable management instruction, the majority of the Tribunal does not regard Mrs Wilson's letter as giving a reasonable management order, or instruction, as the claimant is requested to act appropriately. Further, the majority is not satisfied that the respondents took proper account of all relevant matters, in particular those prayed in aid in issue (23), which we deal with next.

23. Was and should the Respondent have taken account of:

(a) His disability – including his psychological state and the exacerbating effect of his physical conditions;

183. The respondents have accepted that the claimant is a disabled person in respect of his MS, but that relates to his physical rather than mental condition. While there was some evidence before us that the claimant was diagnosed with depression, we have not made any specific finding that he had any specific psychological state, as we simply do not have the evidence before us to make any such finding.

184. However, we do note and record that in the Occupational Health report of 3 October 2014 the extent of the claimant's progressive relapsing condition, with weakness effecting limbs and mild-moderate anxiety and moderate depressive state, are recorded, and adjustments of ergonomically assessed workstation/desk is still being recommended, and that it is stated that the "***fourth floor is not the best designated level for a person with disability***".

185. Further, while we are satisfied that the claimant's disability status was known to both Mr West and the Appeals Committee in coming to their respective decisions to summarily dismiss the claimant and uphold that dismissal, what is less clear to us is to what extent Mr West, and the Appeals Committee, took proper account of the claimant's disability as a mitigating factor.

186. The Tribunal is satisfied, on the evidence we heard at the Final Hearing, that Mr Duffy, as the claimant's line manager, was aware that the move to the

fourth floor had created difficulties for the claimant, and that his health had deteriorated after the move, as implementation of reasonable adjustments was delayed.

187. However, the Tribunal is much less clear about Mr West and the Appeal Committee's position, although the claimant's grievances, D@W complaint, and letter of appeal against dismissal, all set out not only his issues and frustrations at work, but how there was a link between his worsening MS, and his treatment at work.

(b) His grievances and frustrations relating to reasonable adjustments, Occupational Health and his treatment by OH and HR?

188. On the evidence before us, it must have been crystal clear to the disciplining manager, Mr West, and the Appeals Committee, that the claimant was aggrieved and frustrated with a number of matters arising from his employment with the respondents, and we are satisfied that these grievances and frustrations were taken into account by both Mr West, and the Appeals Committee, in coming to their respective decisions to summarily dismiss the claimant and uphold that dismissal. As the Appeals Committee decision is not provided with reasons, the Tribunal is unable to assess to what extent, if at all, these matters were taken into account on appeal.

(c) His clean disciplinary record?

189. In considering this aspect of the case, against the evidence led before the Tribunal, we have reminded ourselves of the terms of paragraph 11.1 of the respondents' Disciplinary Policy and Procedure relating to "***Disciplinary Action***", where it is provided as follows : " ***In every case when determining disciplinary action, and / or deciding whether a disciplinary penalty is appropriate and what form it should take, the Manager must bear in mind the need to satisfy the test of reasonableness in all the***

circumstances. So far as is possible, account shall be taken of the employee's current disciplinary record and all other relevant factors."

190. While this specific question asks about a clean disciplinary record being taken into account, the Tribunal has had regard to the fact that, as made clear in the Court of Appeal's judgment, in ***Strouthos v London Underground Ltd* [2004] IRLR 636**, length of service is a factor to be taken into account, but it is not determinative of the issue whether or not there has been a fair dismissal. As Lord Justice Pill made clear, at paragraphs 29 to 31 of the Court of Appeal's judgment in **Strouthos**, in cases of serious misconduct length of service will not save the employee from dismissal. That is trite law, but it all depends on the circumstances.

191. Certainly, there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response is a matter of judgment and, in that judgment, length of service is a factor which can properly be taken into account.

192. On the evidence heard at the Final Hearing, the Tribunal is satisfied that the respondents did take into account the claimant's length of service with them, and it was undisputed that his disciplinary record was clear of default, but, at the end of the day, that was not a factor which the employer felt merited a response to the claimant's gross misconduct, other than what the respondents' Disciplinary Policy had clearly forewarned employees that, if the employer was satisfied that gross misconduct had occurred, summary dismissal may result.

193. The fact that Mr West's dismissal letter of 24 September 2015, and indeed his own witness statement for this Tribunal, did not expressly mention it as a factor taken into account by him at the material time is most curious, but it does not negate his clear evidence to us that he did so, at the time, and that is evidence from him which we believed. As the Appeals Committee decision is not provided with reasons, the Tribunal is unable to assess to what extent,

if at all, the claimant's length of service and clean disciplinary record were taken into account on appeal.

194. The Tribunal recognises that another employer, in similar circumstances, may well have decided to dismiss for misconduct, and pay notice to an employee being dismissed, to reflect previous good service, as that is an option lying within the range of reasonable responses for the respondents here to have adopted, but they summarily dismissed, and accordingly gave no payment in lieu of notice to the claimant, where they considered he was guilty of gross misconduct, and Mr West had stated to the Appeals Committee that the employment relationship could not possibly continue.

195. The Employment Judge and Mr O'Hagan, in the majority, consider that the respondents could and should have imposed a lesser sanction, short of dismissal, given the absence of any proper warning to the claimant about breach of the Code of Conduct being likely to lead to his dismissal, and the respondents could have further explored whether the claimant's case was suitable for ill health retirement. As such, the majority are satisfied that there were alternative disposals open to the respondents, which do not appear to have been considered. That is why the majority of the Tribunal consider that summary dismissal was not appropriate or proportionate in all the circumstances, and that the decision to summarily dismiss was outwith the range of reasonable responses open to a reasonable employer.

196. Notwithstanding the claimant's view that the employment relationship was not broken irretrievably, the respondents' Appeals Committee appear to have had that view, although the lack of reasons for their decision makes that matter less than transparent. As the industrial jury looking at this case independently and objectively, the Tribunal can see why they came to that view, given Mr West's position at the appeal before them. Mutual trust and confidence between employer and employee, which is an essential ingredient to any employment relationship, was gone, and not likely to be restored in a situation where the claimant continued to feel aggrieved, and the felt that there was some sort of conspiracy to get rid of him from the Council's employment. This however was a conduct related dismissal, and the

respondents did not argue otherwise before us, by, for example, suggesting if not conduct, then there was some other substantial reason for dismissing the claimant.

Closing Remarks

197. We note how the **ACAS Code**, at paragraph 29, refers to the "**results of the appeal hearing"** being advised to the appellant as soon as possible – the ACAS Code says nothing about the need to provide reasons for the appeal decision, and this paragraph 29 stands in contrast to paragraph 45 of the Code, relating to grievance appeals, which requires "***the outcome of the appeal should be communicated to the employee in writing without unreasonable delay."*** Again, the Code does not require the employer to provide reasons for the grievance appeal outcome. Further, the respondents' own procedures do not require reasons to be provided for a disciplinary or grievance appeal hearing.

198. In his submissions to the Tribunal, the respondents' solicitor, Mr Ettles, at paragraph 4.48 of his closing submission, stated:

> "***The Claimant appealed against the decision to dismiss him and his Appeal was heard by a Committee of independent Councillors. The Appeal Hearing lasted for six days. The Appeals Committee upheld the original decision to dismiss on the basis of the same misconduct as that relied upon by the dismissing manager. The letter dated 26 August 2016 from Peter Hessett to the Claimant is in Bundle 3B, Page 862; and Core Documents, Page 977. The Appeals Committee did not make any new findings or any findings which were different from those of Stephen West. They simply upheld Mr West's decision. The Appeals Committee did not require to state any more than was stated in the letter of 26 August 2016."***

199. In considering that submission from the respondents, we pause to note and record that the Appeals Committee made no findings. The outcome was a short oral statement by Councillor Rainey, followed up by Mr Hessett's

confirmatory letter, and the formal committee minutes, stating that the grounds of appeal had not been substantiated and so they did not uphold the appeal.

200. Although it was not stated expressly, the respondents suggest that the necessary implication is that the Appeals Committee upheld Mr West's decision to dismiss, for the reasons he had given. The claimant, through his counsel, Mr John, disputes that that is the necessary implication, and specifically submits, at paragraph 156, that:

"If it is to be said that the appeal must have simply found every aspect of all allegations proved, that simply cannot be inferred, nor on what basis, nor if it was reasonable. The burden of proving the reason for dismissal, and that it was for one of the listed reasons and was arrived at as a genuine belief after a suitably thorough investigation, remains with R. They have not done so.

201. As part of the Tribunal's consideration, we have taken into account the then EAT President's judgment by Mrs Justice Simler**, in Elmore v Governors of Darland High School [2017] UKEAT/0209/16,** cited in the IDS Employment Law Handbook excerpt provided by Mr John, counsel for the claimant, at closing submissions. The IDS Brief states, at paragraph 3.103, that: "***The ACAS Guide recommends that an employer should confirm in writing the results of an appeal and the reasons for the decision. However, failure to provide a reasoned appeal decision does not necessarily mean that the appeal was unfair."***

202. In **Elmore,** despite the absence of a reasoned appeal decision or live evidence from a member of the appeal panel, the ET inferred that the appeal panel had upheld the employee's capability dismissal for the same reasons as those relied upon by the dismissal panel itself. In the EAT, Mrs Justice Simler accepted that the ET had drawn a permissible inference that the appeal panel dismissed the appeal on the same grounds and for the same

reasons as those identified by the dismissing panel, and that context was important when looking at the appeal stage.

203. Firstly, there was neither any fresh evidence nor any new or alternative arguments put before the appeal panel that had not been advanced before the original panel. Secondly, the minutes of the appeal hearing were produced and made available to the Claimant and the Tribunal. The discussion reflected in those minutes was inconsistent with any suggestion that the appeal hearing was a mere formality or rubber-stamping exercise. Thirdly, the Employment Judge had found that it was implicit that by upholding the original decision, the appeal panel accepted not only the decision made by the capability hearing panel but also its reasons.

204. In our view, it is to be considered that a 6-day appeal hearing, in the present case, where the claimant had trade union representation, cannot be construed as being a mere formality or rubber-stamping exercise, and the fact that the claimant perceives that that is what it is does not make it a reality.

205. There was no credible evidence before this Tribunal to demonstrate that the Appeals Committee had acted other than independently and impartially, and while their reasoning was not explained, their decision was clear and unequivocal. It is the lack of a reasoned decision that makes it impossible for this Tribunal to come to a view on whether any procedural unfairness in the investigation and / or disciplinary hearing stages of the claimant's case were cured on appeal. No appeal decision maker gave evidence to the Tribunal, and there is no decision with reasons for us to consider.

206. Further, it was well within their remit to have not upheld the claimant's dismissal, if they had felt there were grounds to do so. They did not uphold his appeal, and their view must be given respect, as they are the respondents' appointed internal appeals body.

207 The **ACAS Guide to Discipline and Grievances at Work** is, of course, not the ACAS Code, and it is only the Code that the Tribunal should have regard to. Nonetheless, as a public sector employer, we would expect the respondents as a local authority to take on board both the Code, and the

Guide, and use both documents as a reference point in drafting any new policy or procedure or reviewing any existing policy or procedure.

208. Based on our collective industrial experience, and with a view to improving the openness and transparency of their decision-making process, the Tribunal suggests to the respondents that they may wish to consider revising their disciplinary appeal procedure to impose a clear and unequivocal obligation on the Appeals Committee to give a statement of written reasons for their decision, rather than just briefly state the results / outcome.

209. After all, as a matter of natural justice, and fair play, it is important that any unsuccessful appellant knows why their appeal has not been upheld, and what aspects of their appeal have not been considered as substantiated by the Appeals Committee.

Further Procedure: Remedy Hearing

210 This Final Hearing was held into liability only, with remedy reserved, in the event that any of the pled heads of complaint were upheld by this full Tribunal.

211. The Tribunal directs that, unless parties can, **within 28 days of issue of this Judgment,** mutually agree the *quantum* of compensation payable by the respondents to the claimant, in respect of the successful failure to make reasonable adjustments, victimisation and unfair dismissal heads of complaint, and agree matters extra-judicially between themselves, through ACAS, or application to the Tribunal, under **Rule 64 of the Employment Tribunals Rules of Procedure 2013,** for a Consent Judgment to be made by the Tribunal, the Tribunal will assign a Remedy Hearing before the same Tribunal on a date to be hereinafter assigned, after the issue of date listing stencils to both parties.

212. At that stage, parties' representatives will be invited to advise the Tribunal, and each other, whether they intend to lead any evidence in that regard, if so who, and with estimated duration of the Remedy Hearing, and whether or not they consider it should be conducted in person, or remotely via CVP, giving

reasons for their choice of type of Hearing. Directions will also be given by the Tribunal, in advance of any Remedy Hearing, about preparation of an updated Schedule of Loss for the claimant, and Counter Schedule from the respondents.

213. While the Tribunal received, as part of both parties' closing submissions at this Final Hearing, some limited arguments about the extent to which any compensation for unfair dismissal should be reduced to reflect any contributory conduct by the claimant, and any uplift or downlift for any unreasonable failure by either party to comply with the ACAS Code of Practice, we have decided that both parties' representatives should address us further thereon, in light of this Judgment, by way of supplementary written submissions at any Remedy Hearing, and as such, we say nothing further at this stage.

214. It will suffice, for present purposes, to note and record here that, when Mr John, counsel for the claimant, intimated his written claimant's reply to Mr Ettles' respondents' closing submissions, on 29 June 2020, he stated as follows:

> 71. ***C was not asked at disciplinary about future conduct or about a means of resolving his strong concerns, but at appeal he was and expressed a conciliatory attitude. R had not reasonable basis to view an irretrievable breakdown. The ET submission would be a very questionable "turning point" as it seemed to be in R's view of C, especially as it constitutes victimisation. In the premises, it was simply not reasonable for R to categorise C's conduct as gross misconduct, nor reasonbly*** (sic) ***warranting summary dismissal. It is not possible to divine what the appeal panel's reasoning was, nor to say that it cured earlier flaws. R has for reasons which remain undisclosed, called no decision maker. it is simply not possible to say that***

it was a fair conclusion reached upon reasonable evidence, or how it dealt with C's evidence and submissions.

72. C disputes that there should be a reduction for contributory conduct. In the absence of any investigation into his grievances and/or context of his complaints it is not possible to prejudge that C was unreasonable. A proper analysis of his position would have likely revealed an understandable frustration on what are legitimate concerns. A resolution of his issues, or a proper management of them had the potential to resolve them. Also his aggravated disability and stress and shut down grievances are not a backdrop against which it is easy to tar C as culpable of blameworthy conduct. Further oral submissions will be made on this point if invited.

73. In fact, the failure to follow a fair or policy compliant complete or sufficiently thorough investigation or fair procedure (i.e. inviting requested witnesses) renders it just and equitable to increase any award (up to the 25% limit) for unreasonable failure to follow the ACAS Code.

215. Further, we also note and record here that in his oral submissions to us, on 3 July 2020, Mr Ettles, solicitor for the respondents, stated that he was inviting us to find the claimant's dismissal was not unfair, but if the Tribunal were to find it unfair, as the majority of the Tribunal has done, then he submitted that the Tribunal should find "***a large element of contributory, blameworthy conduct***" on the part of the claimant, and it should be for the Tribunal to assess the level of his contribution, as he did not intend to put a precise figure on it, other than to suggest it should be ***"at the greater end of the spectrum",*** then adding ***"it could be taken as 100% contribution as the claimant brought dismissal on himself."***

216. On an uplift for failure to follow the ACAS Code, Mr Ettles stated that the respondents did not fail to follow that Code, while, in reply, the claimant's counsel, Mr John, submitted that there should be no contributory conduct reduction of compensation for the claimant, there were "***core failures***", and "***fundamental flaws"*** by the respondents, and while the range for the Tribunal was to consider an uplift of up to 25% of the compensatory award for unfair dismissal, he accepted it would not necessarily be at 25%, but submitted as there were not limited failures, it should be more than half-way up the scale.

Employment Judge: Ian McPherson
Date of Judgment: 17 September 2021
Entered in register: 17 September 2021
and copied to parties