EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a partially remote hearing. The form of remote hearing was hybrid; some participants in person in the hearing centre and some participants attending by C.V.P.. A fully face-to-face hearing was not held because it was not practicable and no-one requested the same."

Claimant: Mr A S Joseph

Respondent: (1) dnata Limited
(2) Mr G Granger
(3) Ms D Mant
(4) Mr S Smith
(5) Ms B Engineer
(6) Ms J Kaur
(7) Mr P Herbert
(8) Mr M Ansell

Heard at: Watford **On:** 14 & 15 June 2021 (by CVP), 16 to 18, 21 to 23 June 2021 (hybrid hearing), 24 June 2021 (by C.V.P.), 2, 3 and 16 September 2021 (in chambers; by C.V.P.)

Before: Employment Judge George, Mr C Surrey (by C.V.P.), and Mrs J Hancock (by C.V.P.)

Appearances
For the claimant: Mr J Gun Cuninghame, counsel (the claimant in person on 24 June 2021) and (by written submissions), Mr K Harris of counsel.
For the respondent: Mr S Sanders, counsel

RESERVED JUDGMENT

1. It was not a term of the claimant's contract in relation to sick pay that, once company sick pay had been exhausted, the claimant would have to work a 12 month period free of absence before sick pay was reinstated.

2. The respondent breached the claimant's contract of employment/made unauthorised deductions from wages by failing to pay him sick pay.

3. The claimant was disabled by reason of the mental impairment of stress, anxiety and depression from 23 December 2019.

4. The respondents knew or ought to have known that the claimant was disabled by reason of the above mental impairment from 23 December 2019.

5. The claim of indirect disability discrimination is dismissed on withdrawal.

6. The claims of direct disability discrimination are not well founded and are dismissed.

7. The claims of disability discrimination contrary to s.15 of the Equality Act 2010 are not well founded and are dismissed.

8. The claims of disability related harassment are not well founded and are dismissed.

9. The claims of victimisation are not well founded and are dismissed.

10. The claims of breach of the duty to make reasonable adjustments are not well founded and are dismissed.

11. All claims against the second to eighth respondents are dismissed.

12. The claimant was not unfairly dismissed.

REASONS

1. This hearing took place at Watford Employment Tribunal, partly by C.V.P. and partly as a hybrid hearing as set out in the heading to this reserved judgment. It had been listed to consider liability only. The documentary evidence was comprised of an agreed bundle of documents running to nearly 2000 pages. The parties also prepared a supplementary bundle of documents, the pages in which were numbered to be incorporated within the main agreed bundle. Page numbers in those bundles are referred to in these reasons as page 1 to 1974 or as the case may be. We were also provided with two separate documents: the respondent's Dignity at Work Policy version 160329 and the respondent's Staff Handbook 2016 version 170712 which were admitted into evidence but which were not given page numbers and are referred to, where necessary, by name. The representatives had prepared skeleton arguments prior to the first day of the hearing. The parties cooperated on agreeing some corrections to the transcripts of recordings of conversations between the claimant and BE which

we took into account and, in those circumstances, it was agreed that there was no need to play the recordings themselves.

2. We also heard oral evidence from the claimant and we heard from the following witnesses called by the respondent: Steven Smith – a terminal business manager; Michael Ansell – presently the operations director to whom SS reports; Gary Granger – formerly HR Director and now chief people officer; Alex Doisneau – now managing director and, at the relevant ime the chief operating officer to whom GG reported and reports; Gary Morgan – Chief Executive Officer until his retirement with effect on 31 October 2020; Debbie Mant – HR business partner; Sarah Richards – a terminal business manager; Andrew Saunders – then operations director at Heathrow Airport to whom SS reported and now operations director at Gatwick Airport; Benafsha Engineer – a duty manager (by C.V.P.); Peter Herbert – formerly employed as a duty manager until his redundancy (by C.V.P.); and Jas Kaur – a duty manager. All of the witnesses adopted in evidence written statements upon which they were cross-examined. In addition, the claimant adopted in evidence the statements he had previously made on the impact upon his ability to carry out day to day activities of the physical impairment of his heart condition (page 107) and the mental impairment (page 249). For ease of reference, the witnesses (including the individual named respondents) and other individuals in the case list who were not called to give evidence are referred to by their initials. No disrespect is intended thereby.

3. We had the benefit of an agreed chronology and cast list. Save where indicated above, all witnesses gave evidence face-to-face in the hearing centre with the non-legal members of the panel attending by C.V.P. and the judge in person. The representatives attended in person when the hearing was hybrid and by C.V.P. when the hearing was fully remote.

4. The circumstances in which the intended oral submissions on 24 June 2021 had to be abandoned and the judgment reserved are set out in the record of hearing sent to the parties on 27 June 2021 and are not repeated here. The Tribunal was relieved to hear from the claimant on 9 July 2021 that Mr Gun Cuninghame had resumed conduct of the litigation. The written submissions and submissions in response were exchanged and delivered to the Tribunal in line with the case management orders sent to the parties on 27 June 2021. In the event, the claimant's written submissions were drafted by Mr Kevin Harris of counsel and forwarded to the Tribunal by Mr Gun Cunningham, who remains on record in conduct of the litigation as direct access counsel. The claimant's written submissions dated 9 August 2021 are referred to in these reasons as the CWS1. The claimant's written submissions in response are referred to as the CWS2. The respondent's written submissions dated 9 August 2021 are referred to in these reasons as the RWS1 and those in response to the CWS1 as the RWS2.

5. Although we take on board the reminder by Mr Harris in CWS1 para.2 of the Court of Appeal's words in Pimlico Plumbers Ltd v Smith [2017] IRLR 323 CA

to the effect that reliance solely upon written submissions should be avoided if at all possible, the parties agreed to that course in the unusual and unforeseen circumstances of the case. Furthermore, we had already outlined to counsel particular questions of both of their cases which we expected them to cover in closing submissions and, on the claimant's application, repeated those in writing in our case management order. In those circumstances the potentially adverse consequences referred to by their Lordships were, we consider, avoided. Had we had any questions about the way in which the parties put their respective cases after considering the detailed sets of submissions, we would have asked for further clarification.

6. Unfortunately, the members of the panel had been unable to arrange a date when they could meet until 2 & 3 September 2021, although this meant that there was time for the claimant to arrange alternative representation and for submissions to be exchanged. There was insufficient time for the panel to reach a conclusion on all the issues which needed to be determined within that two day discussion and a further day was arranged for 16 September 2021. That, combined with pressure of work thereafter has led to a regrettable delay in the promulgation of this reserved judgment.

7. The claimant's continuous employment started on 19 November 2007. At that time he was employed as a full-time ramp agent for Aviance UK Limited and then moved at his own request to a part time customer service agent (hereafter a CSA) working 20 hours per week on 18 August 2008. This employment was transferred by a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to Plane Handling Limited. This business was bought by the first respondent and, from 19 July 2011, his employer changed its name to dnata Limited (p.390).

8. The updated agreed list of issues was drawn from the 3 claims which the claimant has brought against the respondents – not all claims name all of the respondents. The claimant originally brought claims of disability discrimination, victimisation and harassment against the first to fifth respondents by Case No: 3318948/2019 (2019 claim 1) when his employment was ongoing. He then presented Case No: 3228234/2019 against the first respondent only (a claim of disability discrimination, breach of contract/unauthorised deduction of wages in respect of sick pay and victimisation) on 29 December 2019. By the time that 2019 claim 1 was case managed at a telephone preliminary hearing on 17 March 2020, time had not yet expired for presentation of the response. Additionally, the claimant's employment had been terminated and he notified the employment judge that he intended to bring a claim based upon dismissal. The 2019 claims had been consolidated and they were listed for a further case management hearing together with the third claim – which had been bought against the first to fourth, seventh and eighth respondents and was for unfair dismissal, disability discrimination and harassment and victimisation. A 10 day final hearing was also listed at that stage. The further case management hearing took place on 19 October 2020 at which Case No: 3306526/2020 was

directed to be heard together with the two 2019 claims. The final hearing was directed to consider issues relating to liability only.

The Issues

9. It was confirmed on behalf of Mr Joseph in the CSW1 that he no longer pursued his claim of indirect discrimination (originally LOI para.5) – see CSW1 para.112 and that he was not relying upon the meeting of 8 November 2019 or Case No: 3328234/2019 (2019 claim 2) as protected acts – see CSW1 para.114 (originally LOI para.8.1(a)).

10. Following that clarification, the issues to be considered by the Tribunal were as set out in the updated agreed list of issues (which is referred to in these reasons as LOI para. 1 to 10 or as the case may be). We preserve the original paragraph numbering for ease of reference. There was, at the time of the closing submissions, a dispute between the parties about whether all of the issues were fairly raised on the face of the pleadings but it was agreed on day 1 that that could be resolved by us when deliberating on the liability issues as a whole and did not need to be resolved prior to hearing evidence because the areas of dispute were evidentially very narrow. It was argued in the written submissions on behalf of the claimant that, in the event that we decide that he had not raised particular disputed issues on the face of the pleadings, he argued that leave should be given to amend his claim to add them.

1. Jurisdiction

1.1 In relation to some of the disability discrimination claims, has the Claimant presented his claims within three months of the acts complained of?

1.2 If not, do those acts form part of a continuing act of discrimination extending to within three months of the date the relevant claim was presented?

1.3 If not, did the Claimant present the relevant claim within such further period as was just and equitable so that the Tribunal should exercise its discretion to extend time?

2. Section 6 Equality Act 2010

2.1 The Respondents accept that the Claimant was disabled at the material time within the meaning of s6 Equality Act 2010 because of

2.1.1 A physical impairment, namely ischaemic heart disease, and that it had knowledge of that disability.

2.1.2 A mental impairment, namely stress, anxiety and depression from 23 December 2019 and that it had knowledge of that disability from about that date.

2.2 *Was the Claimant* disabled at the material time before 23 December 2019 within the meaning of s6 Equality Act 2010 because of a mental impairment, namely stress, anxiety and depression?

2.2.1 If so, did the Respondents know, or could they have been reasonably expected to know, of that disability prior to 23 December 2019?

2.2.2 If so, at what point did the Respondents have such knowledge?

3. Direct Discrimination (Section 13 Equality Act 2010)

3.1 In respect of the alleged treatment set out below, if found, have the Respondents:

(A) Treated the Claimant less favourably than the Respondents treated or would treat a hypothetical comparator whose circumstances were not materially different to his?

(B) If so, has the Claimant proved facts from which the Tribunal could conclude that the treatment was because of the Claimant's disability?

(C) If so, have the Respondents proved that the treatment was not because of the Claimant's disability?

3.2 Alleged claims of direct discrimination [The Respondents do not agree that allegations set out at (d) and (k) below have been pleaded as direct discrimination]:

(a) From October 2014 Debbie Mant threatened and/or tried to coerce the Claimant to reduce his hours to work part-time;

(b) On 17 October 2014 Debbie Mant pressurised the Claimant to sign a new contract which he subsequently discovered had less favourable terms regarding his contractual sick pay;

(c) From October 2014 and thereafter 2016 the First Respondent varied the Claimant's contractual sick pay entitlement without his knowledge or consent;

(d) On 20 February 2018, Benafsha Engineer required the Claimant to rush to the gate at Terminal 3 knowing that he is not able to move fast due to his disability;

(e) By letter dated 17 August 2018 DT did not uphold the Claimant's grievance regarding the changes to his contractual sick pay entitlement and the First Respondent's failure to honour the terms of his sick pay in his Aviance contract;

(f) On 24 August 2018 the Claimant was required to attend a welfare meeting because of his disability related absences and was threatened that any further sickness absence would lead to a first formal absence hearing;

(g) In around December 2018 Debbie Mant told the Claimant that he would work later shifts, despite his disability;

(h) At a meeting on 11 January 2019 Steve Smith stated he would check the Claimant's capability and given that the medical report from Dr Watts stated changes were at management discretion, he indicated that he did not need to comply. He further challenged the Claimant on why he had taken on the role if his condition did not permit it;

(i) By email of 14 January 2019 Debbie Mant told the Claimant he could work late shifts, despite his disability;

(j) Steve Smith failed to respond to the Claimant's email of 15 January 2019 which set out his disappointment and humiliation at the comments made by Steve Smith at their meeting on 11 January 2019 and his lack of support;

(k) By email of 22 January 2019 and thereafter Debbie Mant attempted to get Dr Watts to change his medical advice relating to the Claimant's ability to work full time and late shifts without the Claimant's knowledge or consent;

(l) On 31 January 2019 Gary Granger told the Claimant he could work up to 10.30 pm, as he did not have a medical condition;

(m) On 14 February 2019, the Claimant was required to attend an investigation meeting in respect of allegations raised by Benafsha Engineer;

(n) By letter dated 23 February 2019 the Claimant was given a first disciplinary warning, further to a disciplinary hearing on 17 February 2019;

(o) By letter dated 4 March 2019 Sarah Richards did not uphold the Claimant's grievance regarding the Respondents' refusal to make reasonable adjustments and the humiliating comments made by Steve Smith on 11 January 2019;

(p) By letter dated 16 April 2019 Andrew Saunders did not uphold the Claimant's grievance appeal regarding the Respondents' refusal to make reasonable adjustments;

(q) On 28 April 2019, Benafsha Engineer refused the Claimant permission to leave work an hour early and take the time as leave, due to his disability;

(r) By email of 8 May 2019 Andrew Saunders accused the Claimant of unacceptable and disrespectful behaviour towards the management team;

(s) By emails dated 24 May 2019 and 10 June 2019 Andrew Saunders failed to take into account the financial impact to the Claimant of the reduction of his shift allowance because he was unable to work later hours because of his disability and did not consider whether it would be a reasonable adjustment to continue to pay to him the shift allowance; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(t) By letter dated 29 May 2019 Alex Doisneau did not uphold the Claimant's grievance with regard to his complaint of victimisation against Gary Granger;

(u) From 10 June 2019 the First Respondent failed to pay the Claimant a shift allowance after changing his shift to an earlier finish time than he had requested as a reasonable adjustment; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(v) By letter dated 16 June 2019 LS gave the Claimant a first formal absence warning due to his disability related absences; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(w) By letter dated 8 July 2019 Gary Morgan did not uphold on appeal the Claimant's grievance with regard to his complaint of victimisation against Gary Granger;

(x) By letter dated 20 August 2019 SC gave the Claimant a second disciplinary warning arising from allegations associated with his mental impairment, despite a first warning having expired on 17 August 2019;

(y) By letter dated 30 August 2019 Steve Smith upheld on appeal the decision to give the Claimant a first formal absence warning because of his disability related absences; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(z) By letter dated 31 August 2019 Benafsha Engineer invited the Claimant to a formal stage 3 absence hearing, thereby omitting stage 2 and ignoring the Claimant's disability related absences; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(aa) By letter dated 9 September 2019 SaSa gave the Claimant a third formal absence warning because of his disability related absences; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(bb) By email dated 9 October 2019 Steve Smith refused the Claimant's request to work until 20.30 so that he could be paid his shift allowance as a reasonable adjustment; [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

(cc) By email dated 21 October 2019 and thereafter Gary Granger refused to investigate the Claimant's formal grievance with regard to his unpaid sick pay entitlement in accordance with the First Respondent's grievance procedure;

(dd) By emails dated 21 October 2019 and 31 October 2019 Gary Granger threatened disciplinary action against the Claimant for alleged insubordinate behaviour when he raised a grievance with regard to his unpaid sick pay entitlement;

(ee) Gary Granger failed to respond to or investigate the Claimant's grievance dated 9 December 2019;

(ff) In a disciplinary investigation meeting on 19 December 2019 Peter Herbert refused to allow the Claimant to move to the transfer desk as a reasonable adjustment, stated that a job could not be designed for the Claimant, harassed him by exaggerating the disciplinary allegations, refused to discuss the Claimant's medical history and threatened him with the capability procedure or a reduction to part time hours;

(gg) The Respondents failed to respond to or investigate the Claimant's grievance dated 1 February 2020 to LS;

(hh) By letter dated 16 February 2020 Jas Kaur gave the Claimant a final disciplinary warning, despite the Claimant only having a first disciplinary warning on file at that stage and the allegations being associated with his mental impairment;

(ii) In February 2020 Debbie Mant specifically directed in a referral to Occupational Health that the assessment should not be based on the Claimant's perceived stress relating to company management;

(jj) By letter dated 18 February 2020 Jas Kaur gave the Claimant a second disciplinary warning despite the allegations being associated with his mental impairment;

(kk) In a final stage 3 absence hearing on 12 March 2020 Steve Smith dismissed the Claimant, having failed to consider any alternatives to dismissal and the Claimant's disability related absences;

(ll) At appeal meetings on 23 and 29 April 2020 and thereafter Michael Ansell refused to respond to or investigate the Claimant's grievance set out in an email dated 21 February 2020;

(mm) By letter dated 5 May 2020 Michael Ansell upheld on appeal the decision to dismiss the Claimant;

(nn) The Respondents have to date failed to pay the Claimant his full sick pay entitlements pursuant to his Aviance contract; and

(oo) The Respondents have from 10 June 2019 failed to pay the Claimant his shift allowance that he was entitled to before his shift pattern changed because of his disability. [Note – the Respondents submit this is a reasonable adjustments claim, not a s.13 claim]

4. Discrimination because of something arising in consequence of disability (Section 15 Equality Act 2010)

4.1 Did the following matters arise from C's disabilities:

(a) his inability to work later hours at night arising primarily from his heart condition;
(b) the time and extent to which he was absent from work due to sickness arising from his heart condition or stress, anxiety and depression respectively in relation to each occasion of absence;
(c) his inability to undertake certain tasks at work due to his heart condition, such tasks being
(i) Walking to and from a departure/arrival gate quickly or frequently.

(ii) Carrying more than a passenger's hand luggage/5kg over a short distance.

(iii) Carrying anything over a long distance.

(iv) Working under pressure at check in where a long queue was waiting for a flight.

(v) Working after 8.30pm

(d) his inability to undertake certain tasks at work due to his stress, anxiety and depression.
(i) Working under pressure at check in where a long queue was waiting for a flight.

(ii) Concentrating on fine details in documents such as passport stamps or visas.

(iii) Working after 8.30pm.

(iv) Dealing with larger groups of passengers.

(v) Concentrating for a long time.

4.2 If so, did the Respondents treat the Claimant unfavourably because of those matters in the ways set out in 3.2 above?

4.3 If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondents rely on the following legitimate aims:

(a) In relation to 3.2(a)-(c), (e), (cc)-(ee), (nn):
(i) Providing employees with the same terms and conditions of employment to ensure consistency of treatment;
(ii) Providing employees with terms and conditions designed and developed by R1;
(iii) Providing employees with terms which reflected the most up to date collective consultation processes with Trades Union, in order to reflect and respect that process;
(iv) Providing employees with terms and conditions of employment (including R1's policies and procedures) which reflected R1's most up to date balancing of resources and employee benefits.

(b) In relation to 3.2(g)-(l), (o)-(q), (bb):
(i) Ensuring that its workforce and roster patterns fit in with the various flight schedules of the airlines to which R1 provides services; and
(ii) Meeting its contractual obligations to customers, in particular by ensuring that minimum service level requirements in contracts with its customers are met consistently.

(c) In relation to 3.2(s), (u), (oo):
(i) Allocating resources for employee pay and benefits in the most efficient way, in particular by:
- Compensating employees for working anti-social hours; and
- Ensuring sufficient demand to fill roles requiring work during anti-social hours; and

(ii) Ensuring equitable treatment of employees across different working hours.

(d) In relation to 3.2(m)-(n), (x), (ff), (hh), (jj):
(i) Maintaining appropriate and high levels of service, professionalism and conduct from its employees;
(ii) Proactively investigating and managing conduct issues in the workforce, in particular in order to prevent safety and security issues arising and to protect R1's business reputation;
(iii) Thoroughly investigating complaints received from its customers and/or passengers/service users;

(e) In relation to 3.2(f), (v), (y), (z)-(aa), (gg), (ii), (kk)-(mm), R relies on:
(i) The need to actively monitor and manage all absences from work;
(ii) Applying a consistent framework and systematic approach for dealing with absences for all employees across the business;
(iii) Promoting and maintaining consistent and regular attendance at work in order to meet business needs and ensure team effectiveness;
(iv) Ensuring that R1 delivered a consistent level of service not unduly impacted by absences.

(f) In relation to 3.2(d): the need to fulfil its contractual obligations and maintain high service levels by ensuring that a customer service agent was present to meet a landed flight;

(g) In relation to 3.2(r), (dd):
(i) The need to maintain respect and dignity in communications between employees and with management;
(ii) The need to maintain appropriate and effective structures of management and prevent insubordination.

(h) In relation to 3.2(t), (w):
(i) Ensuring grievances are treated consistently and in line with internal processes;
(ii) Preventing internal grievances from becoming unduly legal and/or adversarial.

5. **Indirect Discrimination** – withdrawn by the claimant.

6. Failure to make reasonable adjustments (section 20 Equality Act 2010)

6.1 (a) Did the Respondents apply a PCP which placed the Claimant at a substantial disadvantage when compared with persons who were not disabled?

(b) If so, were there reasonable steps that could be taken to avoid the disadvantage?

(c) If so, did the Respondents take such steps as it was reasonable for them to have to take to avoid the disadvantage?

6.2 PCP

(a) The First Respondent will only pay a shift allowance on weekdays if employees work between 7pm to 7am

(b) Comparator – hypothetical, customer service agents who worked between 7pm to 7am

(c) Substantial disadvantage – the Claimant could not work later shifts because it affected his ability to sleep with consequential stress and anxiety thereby affecting his asserted disabilities

(d) Reasonable steps– to pay the Claimant a shift allowance for an indefinite or fixed period or adjust his hours so that he finished at 20.15 in the winter (and was therefore eligible for the shift allowance) so he was not financially disadvantaged

6.3 PCP

(a) The First Respondent's sick pay policy provides that an employee has to work 12 months without absence before sick pay is paid after a period of absence

(b) Comparator – hypothetical

(c) Substantial disadvantage – the Claimant needed to be absent because of his disabilities within a 12 month period

(d) Reasonable steps – to pay his sick pay in accordance with the terms of his Aviance contract and/or to discount his disability related absences.

6.4 PCP

(a) The First Respondent's attendance policy requires employees to adhere to a certain level of attendance

(b) Comparator – hypothetical

(c) Substantial disadvantage – the Claimant needed to be absent because of his disabilities and received formal absence warnings

(d) Reasonable steps –to discount or reduce the amount of absences which were due to his disabilities when considering giving him formal absence warnings.

6.5 PCP

(a) The First Respondent's attendance policy requires employees to adhere to a certain level of attendance

(b) Comparator – hypothetical

(c) Substantial disadvantage – the Claimant needed to be absent because of his disabilities and was subsequently dismissed

(d) Reasonable steps –

(i) to discount or reduce the amount of absences which were due to his disabilities before dismissing him

(ii) to implement the recommendations in Dr Ojha's Occupational Health report (HR led mediation and/or waiting for the outcome of the Claimant's

CBT counselling) to see if his attendance improved before deciding to dismiss him.

7. Harassment (Section 26 Equality Act 2010)

7.1 Was the Claimant subject to the treatment set out below?

7.2 If so, was such treatment unwanted conduct for a reason which related to the Claimant's disabilities and which had the purpose or effect of either violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

7.3 If so, was it reasonable for the conduct to have that effect?

7.4 Alleged claims of harassment

(a) The identical matters pleaded as direct discrimination set out at paragraphs 3.2 (a) to (oo);
(b) On 11 January 2019 Steve Smith said to the Claimant that people who work in the ramp section lifting heavy bags have stents fitted and heart conditions. Mr Smith was in no way sympathetic to the Claimant's position; and
(c) By email of 8 May 2019 Andrew Saunders told the Claimant he had been disrespectful and insubordinate to his management team.

8. Victimisation (section 27 Equality Act 2010)

8.1 (a) It is accepted by the Respondent that the following were protected acts within the meaning of section 27(2) Equality Act 2010, making complaints of disability discrimination in his email dated 15 January 2019 (p 669), his solicitor's letter dated 30 January 2019 (pp 673-677), his solicitor's email of 12 March 2019 (p 765), his emails of 13 March 2019 (p 767-770), 21 March 2021 (pp 776-777), 22 March 2019 (pp 776-777) and 5 June 2019 (pp 974 to 975), emails dated 2 May 2019 (p 886), 10 May 2019 (p 905), 20 May 2019 (p 959), 10 June 2019 (p 983) and 23 June 2019 (p 1012), in a meeting on 9 August 2019 (pp 1036-1048), emails dated 26 August 2019 (pp 1067-1068), 23 September 2019 (p 1131), 2 October 2019 (p 1134), 23 October 2019 (p 1144), emails dated 9 December 2019 (p 1293), 1 February 2020 (pp 1372-1375), 21 February 2020 (p 1399-1401), in the hearing of 12 March 2020 (pp 1407-1415), by email of 28 March 2020 (pp 1420-1424), in the appeal hearing on 29 April 2020 (pp 1149-1458), by emails of 8 May 2020 (p 1490) and by his Employment Tribunal claim submitted on 7 June 2019 (pp 30-53). The claimant no longer relies upon the other alleged protected acts set out in LOI issue 8.1.

(b) Did the Respondents subject the Claimant to the treatment set out at below?

(c) If so, does the treatment amount to a detriment within the meaning of section 27(1) Equality Act 2010?

(d) If so, has the Claimant proved facts from which the Tribunal could conclude that the detriments were because of the protected acts?
(e) If so, have the Respondents proved that the detriments were not because of the protected acts?

8.2 Alleged claims of victimisation [The Respondents do not agree that allegation set out at (a) below has been pleaded as victimisation]:

(a) Between 22 and 24 January 2019 Debbie Mant emailed Dr Watts in an attempt to get him to change his advice, but did not inform the Claimant or ask for his consent. In view of the "varied" opinion by Dr Watts the Claimant was expected to work late shifts.

(b) On 30 January 2019 Gary Granger refused to engage with the Claimant's legal representatives following receipt of the grievance despite knowing that the Claimant struggles to fully and/ or clearly communicate his thoughts due to his lack of English skills and persistent stress;

(c) On 30 January 2019 Gary Granger wrote to the Claimant's legal representatives wrongly asserting that the Claimant had previously raised grievances and that they had been exhaustively dealt with, including the reasonable adjustments request;

(d) From 30 January 2019 to 16 April 2019 the Respondents delayed the grievance process, which largely centred on failure to make reasonable adjustments and exacerbated the Claimant's health conditions;

(e) On 31 January 2019 Gary Granger told the Claimant he could work up to 10.30 pm, as he did not have a medical condition;

(f) On 14 February 2019, the Claimant was required to attend an investigation meeting in respect of allegations raised by Benafsha Engineer;

(g) By letter dated 23 February 2019 the Claimant was given a first disciplinary warning, further to a disciplinary hearing on 17 February 2019;

(h) By letter dated 4 March 2019 Sarah Richards did not uphold the Claimant's grievance regarding the Respondents' refusal to make reasonable adjustments and the humiliating comments made by Steve Smith on 11 January 2019;

(i) On 12 March 2019 Gary Granger refused to accept the Claimant's appeal against the outcome of the Claimant's grievance through his legal representatives;

(j) On 27 March 2019 Dr Thomas (Occupational Physician) prepared a report recommending adjustments for the Claimant to finish earlier than 21.15 but this was not actively acted upon by the Respondents, leaving the Claimant to have to pursue his reasonable adjustment request internally through the grievance appeal process;

(k) By letter dated 16 April 2019 Andrew Saunders did not uphold the Claimant's grievance appeal regarding the Respondents' refusal to make reasonable adjustments;

(l) By emails dated 24 May 2019 and 10 June 2019 Andrew Saunders failed to take into account the financial impact to the Claimant of the reduction of his shift allowance and did not consider whether it would be a reasonable adjustment to continue to pay to him the shift allowance;

(m) By letter dated 29 May 2019 Alex Doisneau did not uphold the Claimant's grievance with regard to his complaint of victimisation against the Second Respondent;

(n) From 10 June 2019 the Respondents failed to pay the Claimant a shift allowance after changing his shift to an earlier finish time than he had requested as a reasonable adjustment;

(o) By letter dated 16 June 2019 LS gave the Claimant a first formal absence warning;

(p) By letter dated 8 July 2019 Gary Morgan did not uphold on appeal the Claimant's grievance with regard to his complaint of victimisation against the Second Respondent;

(q) By letter dated 20 August 2019 SC gave the Claimant a second disciplinary warning arising from allegations associated with his mental impairment, despite a first warning having expired on 17 August;

(r) By letter dated 30 August 2019 Steve Smith upheld on appeal the decision to give the Claimant a first formal absence warning;

(s) By letter dated 31 August 2019 Benafsha Engineer invited the Claimant to a formal stage 3 absence hearing, thereby omitting stage 2 and ignoring the Claimant's disability related absences;

(t) By letter dated 9 September 2019 SaSa gave the Claimant a third formal absence warning because of his disability related absences;

(u) By email dated 9 October 2019 Steve Smith refused the Claimant's request to work until 20.30 so that he could be paid his shift allowance as a reasonable adjustment;

(v) By email dated 21 October 2019 and thereafter Gary Granger refused to investigate the Claimant's formal grievance with regard to his unpaid sick pay entitlement in accordance with the First Respondent's grievance procedure;

(w) By emails dated 21 October 2019 and 31 October 2019 Gary Granger threatened disciplinary action against the Claimant for alleged insubordinate behaviour when he raised a grievance with regard to his unpaid sick pay entitlement;

(x) Gary Granger failed to respond to or investigate the Claimant's grievance by email dated 9 December 2019 that the Respondents were in breach of contract by not paying his full sick pay entitlement, he had been victimised and the Respondents were discriminating against him because of his disability when giving him formal absence warnings;

(y) In a disciplinary investigation meeting on 19 December 2019 Peter Herbert refused to allow the Claimant to move to the transfer desk as a reasonable adjustment, stated that a job could not be designed for the Claimant, harassed him by exaggerating the disciplinary allegations, refused to discuss the Claimant's medical history and threatened him with the capability procedure or a reduction to part time hours;

(z) The Respondents failed to respond to or investigate the Claimant's grievance by email dated 1 February 2020 to LS. The email set out inter alia his concerns with regard to Mr Herbert's treatment of him as set out above and in relation to a strategy on the part of Debbie Mant and Steve Smith to reduce his hours;

(aa) By letter dated 16 February 2020 Jas Kaur gave the Claimant a final disciplinary warning, despite the Claimant only having a first disciplinary warning on file at that stage;

(bb) In February 2020 Debbie Mant in a referral to Occupational Health specifically directed that the assessment should not be based on the Claimant's perceived stress relating to company management;

(cc) By letter dated 18 February 2020 Jas Kaur gave the Claimant a second disciplinary warning;

(dd) In a final stage 3 absence hearing on 12 March 2020 Steve Smith dismissed the Claimant, having failed to consider any alternatives to dismissal and the Claimant's disability related absences;

(ee) At an appeal meeting on 29 April 2020 and thereafter Michael Ansell refused to respond to or investigate the Claimant's grievance he had raised by email dated 21 February 2020 with regard to Jas Kaur;

(ff) By letter dated 5 May 2020 Michael Ansell upheld on appeal the decision to dismiss the Claimant;

(gg) The Respondents have to date failed to pay the Claimant his full sick pay entitlements pursuant to his Aviance contract; and

(hh) The Respondents have from 10 June 2019 failed to pay the Claimant his shift allowance that he was entitled to before his shift pattern changed.

9. Breach of contract/Unlawful Deductions from Wages

9.1 Was payment for sick pay due to the Claimant pursuant to the terms of a contract with Aviance which transferred under TUPE to his contract of employment with the First Respondent?

9.2 Did the Claimant agree to a variation to his sick pay terms and if so, when did such variation take place and in what circumstances?

9.3 If the Claimant was entitled to receive sick pay in accordance with the Aviance contract or as varied by PHL, has the Respondent failed to pay him for such sick pay?

10. Unfair Dismissal

10.1 Was there a fair reason for the Claimant's dismissal and was the dismissal fair in accordance with Section 98(4) of the Employment Rights

Act 1996? The Respondents assert that the Claimant was dismissed for the fair reason of capability or some other substantial reason.

10.2 Was a fair process followed in respect of the Claimant's dismissal? Specifically did the following alleged failures by the Respondents mean that a fair process was not followed:

(a) Failure to give any real consideration to any alternatives other than dismissal such as the recommendations of the Occupational Health report dated 17 February for HR led mediation and the Claimant's CBT counselling;

(b) Failure to consider the previous medical evidence and discounting or reducing the impact of the Claimant's disability related absences, instead considering that the Claimant's absences were not related to medical reasons but due to the Claimant not being prepared to resolve the relationship issues at work; and

(c) Failure to conduct a fair appeal hearing; the decision to dismiss was a fait accompli and pre-determined, the Claimant questions whether Mr Ansell was in fact the decision maker.

Findings of Fact

11. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

The claimant's health conditions

12. The claimant has a heart condition; ischaemic heart disease. It was accepted by the respondents that at all times relevant for these proceedings the claimant was disabled within the meaning of s.6 of the Equality Act 2010 because of that condition, and that that was known to them. The impact statement concerning the physical impairment is on page 107 and we find that he was first diagnosed with his heart condition when he suffered a heart attack in June 2010 (para.2 of the impact statement at page 108). He has undergone three coronary angioplasty procedures in June 2010, November 2010 and August 2016. He takes medication and describes how the condition impacts on his ability to carry

out normal daily activities such as walking quickly (para.5 of the impact statement page 108).

13. His unchallenged evidence was that the effect of the chronic heart condition is that he has to be careful not to walk too far or too fast or to do anything at a faster pace otherwise he becomes breathless, has chest and arm pain with pins and needles and occasional palpitations and is extremely fatigued (para.6 page 109). We also accept the evidence in para.25 of the claimant's written statement about his ongoing symptoms after the heart procedure in August 2016. His oral evidence was that he ignored the ongoing symptoms for some time but then told his GP about them and was told that he must not ignore them. He is a comparatively young man to suffer these symptoms and he has family responsibilities. The fear that living with his heart condition causes him is described in para.22 of his statement and we accept that evidence.

14. The claimant described experiencing psychological trauma because of the physical symptoms. See para.8 of his witness statement.

    "Especially since 2016, after my third angioplasty, I have suffered from stress, anxiety and depression. When working late shifts, I found it difficult to sleep and often failed to fall asleep until the early hours of the morning and sometimes woke up several times during the night. This led to me feeling extreme fatigue the following morning and the lack of sleep put stress on my heart. The lack of sleep caused me to lose concentration and escalated my cardiac symptoms."

15. His impact statement concerning his mental health is at page 249; it was adopted in evidence. We make the following findings about the impact upon the claimant's ability to carry out day to day activities of the mental impairment of stress, anxiety and depression.

16. On the claimant's evidence, the first symptoms of anxiety that he suffered were in June 2010 when he was admitted to hospital with physical symptoms connected with his heart condition. The discharge sheet from hospital states that the primary condition for which he was admitted was chest pain and anxiety (paragraph 4 on page 250). Similar incidents are recounted in para.7 where he experienced physical symptoms that he was advised were likely caused by "persistent stress and anxiety".

17. He does not recount any further particular incident or any particular impacts until August 2016 following heart surgery. He states in his paragraph 8 (page 251) that he began to suffer difficulty sleeping, shortness of breath, pins and needles, palpitations, extreme fatigue and as a result was struggling to concentrate and was irritable with his family. This evidence is mirrored in parallel 25 of his statement where he also said he experienced poor appetite however he was able to ignore the symptoms.

18. At an outpatient appointment in late 2017 or early 2018 he described symptoms to his cardiologist which led the latter to write a letter supporting the claimant's application for workplace adjustments (see C's statement para 29 and the letter

at page 522). That letter refers to the known coronary artery disease but makes no reference to the claimant's mental health or to psychological symptoms. Similarly, the letter written by his GP in support of workplace adjustments dated (page 1934) makes no mention of any mental health concerns. To judge by pages 1776 and 1777, this letter arose out of a consultation on 15 October 2018. The entry from the GP records for that day, likewise makes no mention of mental health problems and it therefore leads to the inference that a description of a mental health component to the claimant's symptoms has not been omitted from the GP's letter at page 1934 in error.

19. The claimant's mental health impact statement continues at paragraphs 12 to 15 to describe interventions between December 2018 and February 2019. From those we note in particular the claimant's allegation that alleged failure to adjust his shift pattern to avoid a late finish meant that he continued to suffer with insomnia and debilitating fatigue at work which he alleges caused him to make errors for which she received disciplinary sanctions. In January 2019 he was prescribed sleeping tablets, which he says did not help, and on 1 February 2019 he was prescribed zopiclone and was told that he would be referred for counselling. In his paragraph 15 (page 253) he says that his mood and symptoms of stress and anxiety were getting worse and he was certified unfit to work for one week from 1 February 2019 and for an additional week from 19 February 2019 in both cases due to "work related stress affecting mood and sleep" (page 1751 & 1752).

20. The claimant had undergone a disciplinary investigation meeting about a customer service complaint on 14 February 2019 (see page 702). He had also undergone a grievance meeting about his complaints of failing to make workplace adjustments and discrimination on the same day (page 707).

21. The claimant is, and was at all material times, understandably anxious about the impact of stress at work upon his heart because of his underlying heart condition. According to his paragraph 67, the claimant attributes what he calls his deterioration in mental health to the respondent's failure to accommodate the reasonable adjustments he had requested. He similarly attributes the mistakes for which he was being disciplined to the impact on him of not being given the adjustments he sought.

22. The claimant consulted with his GP again on 28 February 2019 when he is recorded as having presented with work stress. This was formally recorded as a new problem on 12 March 2019 (see page 1772 within the GP records) although he consulted with his GP on 21 January 2019 about insomnia when he is described as "getting very stressed about his job future as not accommodating the recommendations made by myself".

23. These matters, and those relied on in paragraph 73 of the CWS 1, paint a picture of an isolated psychological problem for which he sought treatment in 2010 and then deteriorating mental health from late 2018 but more especially from January 2019 onwards.

24. The claimant obtained a privately paid occupational health report from Dr Thomas (page 784) which was received by AS on 4 April 2019 (see para.8 of AS's statement). It was argued on behalf of the claimant that the respondent knew or ought to have known that he was disabled by reason of stress anxiety and depression from receipt of Dr Thomas's report on 4 April 2019.

25. In the first paragraph on page 786, Dr Thomas describes a recent psychological assessment as being "consistent with at least moderate depression and anxiety" for which he was due to begin counselling on 10 May 2019. We also note Dr Thomas's opinion in the second paragraph on page 785 that "it is sometimes difficult to know whether these symptoms are entirely related to the underlying cardiology condition or may be associated psychological/psychosomatic symptoms which are commonplace in conjunction with significant heart disease."

26. Further down the same page the doctor states "there is some evidence that cardiovascular conditions can be more difficult to control with shiftwork particularly if this is perceived by the person to cause sleep disturbance."

27. These matters also seem to us to point to the psychological symptoms not themselves having a significant impact until late 2018. It is in December of that year GP records stress at work as the reason for the consultation for the first time (page 1775). The symptoms which affected his ability to carry out day to day activities were difficulty sleeping, low mood and debilitating fatigue.

28. We consider that initially this was likely to be a reaction to the claimant's dissatisfaction with the respondent's response to his request to change his hours of work. The exchange between the claimant and DM about the occupational health report at page 642 took place in December 2018 (see paragraph 8 of the claimant's statement). He also describes being told on 14 December 2018 at a grievance meeting by SR that there were updated details from the occupational health physician's report. He had been told on 11 December 2018 that there would be a meeting to discuss the report between DM and SS and himself but that in the meantime he should continue to work his current rostered pattern and working hours (page 648).

29. For the purposes of the claim under s.15 EQA, we need to make findings about whether or not the matters relied upon by the claimant as being the reasons for the unfavourable treatment about which he complains did arise in connection with disability (LOI para.4.1). The respondents' position on this issue is set out in RWS1 para.73 to 79. It is accepted by them that the claimant's absences (LOI issue 4.1(b)) arose in connection with his disability.

30. This must be correct, regardless of our findings on the date on which the claimant's mental impairment became a disabling condition, in as much as his absences before that date were either directly connected with his heart condition or were as a result of stress connected with his response to the heart condition absences for stress arose in connection with the heart condition,

albeit indirectly. There can be several stages between the disability and the absence for them to arise in connection with the disability: although there are instances of absence which are triggered by workplace matters we accept that the claimant's heart condition or his anxiety about his heart condition had at least some contribution to the reasons for his absence. We are also of the view that the disability need not be the only cause of the absence for the necessary causal link to be made out and for the "something" to "arise in consequence" of disability. However, we are of the view that, in some instances, his disagreement with the way he was being managed triggered an absence against the background of an underlying anxiety about his heart condition. Furthermore, some of the claimant's absences were directly disability related and some not. As will be seen, we think that the precise cause of an absence is relevant to whether action taken under the MAP is lawful.

31. It is argued on behalf of the claimant that an "inability to work later hours at night arising primarily from his heart condition" (LOI issue 4.1(a)). The word "inability" in the LOI is just an ordinary English word. It's the claimant's pleaded case that he was unable to work later hours because primarily of his heart condition.

32. There is limited medical evidence directly concerning the ability of the claimant to work later hours and the reason for it. We agree with the claimant's counsel that all relevant evidence including the claimant's witness statements can be used to reach a conclusion on this issue (see CWS1 para.88). The OH report (incorrectly) dated 6 November 2018 at page 642 makes a recommendation to finish at 20.15 because that was what the claimant told the doctor he wanted (see para.121 to 125XXbelow). DM then questioned whether that was consistent with the advice that the claimant was fit to carry out his full duties and was told that there was no medical reason why the claimant could not work beyond 20.15.

33. The report as clarified tends to suggest that the claimant was not, in Dr Watt's medical opinion, unfit to work until 10.30 pm. Indeed, he stated in his email of 24 January 2019 that the claimant was fit to work until that time (page 671).

34. Although the claimant says in his statement (paragraph 46) that he told DM and SS that he wanted to avoid late finishes, the minutes of the meeting show that he confirmed that the shifts he was working at that time were suitable (see para.XX118 below). Furthermore, Dr Watt's rationale was that finishing earlier would "remove him from having to walk to and from the gate, as well as reducing the overall intensity of his workload." We find that this OH report does not support an inference that the claimant's symptoms increased due to the time of day at which the work was done but rather with the intensity of the work. As we set out below, this is not the only medical evidence available but it is relevant to the knowledge of the first respondent and their managers of any substantial disadvantage suffered by the claimant that Dr Watt's report does not communicate to DM or SS that the time at which the claimant does the work is a disadvantage to him.

35. There is then the evidence of the claimant's own general practitioner (page 1934) who said that

> "He would benefit from a regular routine of work/rest/sleep. I feel a too late working pattern would (sic) detrimental to his health. He is fit to work full time duties as a customer service agent but should avoid manual handling duties."

36. We consider that this provides some supporting evidence for the claimant's position because if an individual is working a "too late working pattern" in circumstances where that would damage his health then, for practical purposes, that individual is unable to work that pattern. To the extent that the reasoning is apparent from the GP's letter it appears to relate to the need for a regular routine.

37. Dr Thomas's evidence (page 784 at 786) about the time at which the claimant is able to work until is "his own perception would be the best guide". Dr Thomas is effectively saying that because the claimant perceives and experiences that he is unable to work beyond 20.30 then he is unable to work beyond 20.30. We accept that this was more than simply the claimant's preference; the claimant's position arose from the physical and psychological elements of the heart disease and from the moderate depression and anxiety he had recently been diagnosed with (para.25 above). Dr Thomas's evidence supported the claimant's request for an earlier finish time – subject to that being a reasonable step for the respondent to have to take. Dr Thomas's evidence is that the claimant is fit for "normal occupational duties with adjustments in place" – the adjustment he sees as necessary to enable him to certify the claimant as fit are the times at which the claimant is to work and the adjustments he sets out at the top of page 787.

38. On balance, we are of the view that the claimant has shown on the basis of that medical evidence and his statement evidence of fact that he was unable to work later hours at night and that this was in consequence of the physical and psychological effects of his heart condition. At the time of Dr Thomas's report (27 March 2018) the claimant was working one shift finishing at 17.17 with most shifts finishing at 21.15 to 22.15 depending upon the day. It is hours of this lateness which Dr Thomas referred to (see the rota on page 1583). We find that the claimant has shown that the matter set out in LOI issue 4.1(a) did arise in consequence of disability. Dr Thomas's report takes a more nuanced view of the interaction between physical and psychological effects.

39. The next matters which is said to arise in consequence of the disability of his heart condition are tasks or activities which arose during the normal working day. We refer again to page 786 in Dr Thomas's report where he explains that the claimant may "take longer when walking long distances" (LOI issue 4.1(c)(i)). We therefore accept that he was unable to walk to and from the departure or arrival gate as quickly or as frequently as someone without a heart condition. This seems to us to be sufficient to substantiate the claimant's

pleaded case. He was, however, fit to walk to the gate (page 671) provided he was given additional time.

40. As to LOI issue 4.1(c)(ii) and (iii) there was evidence that he should avoid manual handling but no issues between the parties suggested that this was disputed. We accept that he couldn't do these things without risking detriment to his health and, were he to do so, that would have been against medical advice. This, we consider, amounts to an inability to do the activity.

41. As to LOI issue 4.1(c)(iv) we agree with RWS1 para 77 that there is no evidence, and certainly no medical evidence, that the claimant was unable to work under pressure. As Mr Sanders pointed out in RWS1 para.113(c), on both occasions when the claimant sent untagged bags into the baggage handling area – errors which led to disciplinary action – he was already working his adjusted roster with early finishes which complied with Dr Thomas's recommendations.

42. LOI issue 4.1(c)(v) alleges that the claimant was unable by reason of his heart condition to work after 20.30. The medical evidence was not so specific as to say that, by reason of the claimant's heart condition he was unable to work after 20.30. The relevant chronology that the claimant asked for an initial reduction and then a further reduction: in the Spring 2018 the first respondent was able to adjust the summer roster to enable the claimant to finish 21.30 and his witness statement evidence was that he wasn't finding that his symptoms were going away so asked for an earlier finish as an adjustment. The letter from the cardiologist dated 12 March 2018 (page 522) requested adjustments to reduce his symptom burden. This was unspecific about what changes needed to be made in order to achieve this. The claimant visited his GP several times between June and August 2018 (page 1777 & 1778) which is consistent with his statement evidence that he continued to suffer symptoms despite the amended hours and suggests that adjustments made to that point were insufficient. On the other hand, he did not report experiencing any symptoms for a period of three months when he saw Dr Watts in December 2018 which is consistent with the way he presented to DM and SS on 21 November 2018. There was an occasion on which he asked to swop shifts to work a late shift which BE refused because he was on adjusted hours because of his heart condition; this suggests that, on this occasion, the claimant considered himself able to work after 20.30. On the other hand, there is the evidence to which we have already referred in para.37 above of Dr Thomas. Although this is a finely balanced judgment, on balance, we accept that the claimant was unable to work after 20.30 because of his heart condition.

43. In terms of what the first respondent knew about the effect on the claimant of particular aspects of his role we remind ourselves that, on 27 September 2018 IP sent the claimant the winter roster (page 617) which the claimant said was not good for him with his ongoing medical conditions. In response to that DM asked for medical evidence to back up what the claimant said. At the risk of repeating ourselves, the claimant said in oral evidence that it was at the

meeting of 21 November 2018 that he asked for a fixed finish time of 20.30 but we reject this evidence as it is contrary to the contemporaneous documentary evidence of the meeting (page 623 to 624 when he said that the hours which included shifts finishing at 21.15 and 21.30 were "Okay"). However when he saw Dr Watts (the report page 640 8 December 2018) he requested of the doctor who recommended that at management discretion he finish any later shifts 1 hour earlier at 20.15 and this was how the request was relayed. Until receipt of the report of Dr Thomas, we do not think that the first respondent had actual or constructive knowledge of any substantial disadvantage caused by a shift finishing specifically after 20.15. The claimant did not provide an explanation – either to Dr Thomas or in oral evidence to us - as to why finishing at 20.30 rather than, say 21.15 or 19.30 was likely to avoid symptoms of his heart condition.

44. In summary, what the claimant communicated to the first respondent directly and through medical evidence and what the doctors said about the rationale for the recommendation changed over time.

45. There is no medical evidence that the claimant was unable, due to stress, anxiety and depression, to undertake certain tasks including those set out at LOI issues 4.1(d)(i), (ii), (iv) or (v). Taking the evidence at its highest we accept that these conditions meant that the claimant had increased difficulty concentrating. We have accepted that there were substantial adverse effects of the psychological conditions, principally insomnia and fatigue. However the tasks listed in LOI issue 4.1(d) were integral parts of the claimant's job and three different doctors in the November 2018 report, Dr Thomas's March 2019 report and the OH report in February 2020 confirmed that he was able to carry out the full duties of his job with adjustments, none of which concerned the matters set out in issues 4.1(d)(i), (ii), (iv) or (v).

46. So far as working after 20.30 is concerned, in the first place, there is no need to make a finding about whether this was due to his stress, anxiety and depression because of our finding in para.42 above. Secondly, there is overlap between the effect of the heart condition and the psychological effects as explained in Dr Thomas's report.

47. Prior to the receipt of Dr Thomas's report there was insufficient information available to the first respondent for them to be aware that the claimant was unable to work after 20.30 because of his heart condition or unable to work longer hours because the rationale in the medical reports did not focus on the lateness of the hour so much as the intensity of the work, the reduction of one trip to the gate or the consistency of the shifts. Furthermore, the OH physician who had detailed knowledge of the role of a CSA said that there was no medical reason why the claimant needed to finish at 20.15. The intensity could be adjusted for in other ways. We take note of the contemporaneous comment by BE (page 555) that "due to Anton medical condition, he has an amended roster to allow him to finish work at 2130 as the days get too long and he struggles." However, we do not consider this to support an inference that the

respondent knew or ought to have known that the claimant was unable to work after 20.30 at that time. She refers to the length of the day rather than the time itself and the first respondent reasonably relied upon the OH report which based the recommendation upon reducing the intensity of the work/number of occasions the claimant was required to walk to the gate.

What the job of CSA entailed

48. The first respondent operates ground handling services for commercial airlines at various international airports throughout the U.K. including at London Heathrow where the claimant worked in Terminal 3. The claimant sets out in paragraph 5 of his statement the details of his role as CSA. He was not challenged upon that and we accept this part of his evidence in which he described the daily routine of his job.

49. An area of dispute between the parties concerned whether the work required was more intense in the evenings. This was what was reported by the claimant to Dr Watts, the OH physician (see page 643). The commercial airlines serviced by the first respondent out of Terminal 3 had a higher volume of departures scheduled for the evening. Indeed, SS's statement evidence was that the majority of the flights the first respondent handled operated their schedules in the evening (SS para.21). SS's evidence in cross examination, when asked about this in was that

"We had a higher volume of flights in the operation [but the] work intensity [did] not change. Check-in is check-in. But on PK [Pakistan Airlines] one of the biggest aircraft - sometimes [a] bigger aircraft. You are only checking in one flight at a time for one carrier. …Yes, it's just that [there are] higher volume flights in the evening that's why more staff in the late shift."

50. We consider that what he meant is that check-in has to take place in the same way regardless of the number of flights and numbers of passengers. It takes the same length of time, on average, to check in one passenger or group of passengers. Therefore, the first respondent allocates more check-in staff to the late shift to take account of that. We accept that the CSA can only check-in one person at a time. In this SS's oral evidence contradicts and, in our view, effectively refutes what the claimant told Dr Watts. AS also gave evidence that the CSA would only be able to process one passenger and one customer at a time.

51. The CSA role is there to cover the obligations the first respondent has to various commercial airlines under individual service level agreements (or SLAs- see pages 1967 to 1974). At the relevant time there were SLAs in place for the following airlines operating out of Terminal 3: Pakistan Airlines; Philippine Airlines; Royal Jordanian (from mid-2019 only); and Middle East Airlines.

52. SS gave evidence about requirements of the SLAs and what that meant about the required staffing level in his para.21. He explained that a minimum number of CSAs were needed to work until after certain flights had departed. Conversely, there were times in the day when fewer CSAs were needed because there were fewer or no flights. The key points of this, as expanded upon orally, were that the first respondent needed a minimum number of CSAs working until after certain flights departed either because that was a specific requirement of the SLA or that was a specific request/expectation of the station manager for that particular airline and not merely because the first respondent had made a judgment about the appropriate staffing level. We accept that a minimum number of CSAs was maintained because it was a customer requirement, even if not a contractual obligation.

53. As will be seen, the claimant was offered the opportunity to move to a shift at Terminal 4 where different airlines with different departure times meant there were different shift patterns. There was competing evidence about the intensity of the CSA work at Terminal 4. We accept the evidence of AS about the working conditions in Terminal 4. He accepted the claimant's point that some of the check-in in that terminal is done at a self-service check-in stand where the CSA would be required to stand up. The claimant regarded this as likely to mean that such work was unsuitable for him. However AS also said that some check-in work for premium customers was done at a check-in desk and the gate activity was part sitting and part standing – as it was in Terminal 3. Similarly, we accept that the staff in Terminal 4 would generally rotate between activities so that the claimant was unlikely to have to stand for the whole of an 8 hour shift. The supervisor on the day would decide on the allocation of duties and we see no reason why that would not have been able to take account of the claimant's needs as was done in Terminal 3. The work in Terminal 4 was not, we find, inherently unsuitable or more intense and more onerous.

Changes to the claimant's contractual terms and conditions with the first respondent during his continuous employment.

54. When the claimant transferred from Aviance to the first respondent (which was then called Plane Handling) he was a part-time CSA under Aviance terms and conditions which he initially retained (page 321). The transfer took effect on 31 January 2010. Relevant terms and policies under the Aviance terms and conditions included:

    a. At page 325 the sick pay and sick leave scheme for Aviance provided, among other things, that the employee would be entitled to 13 weeks' basic pay during period(s) of absence due to illness or injury in any rolling 12 month period subject to a 3 day waiting period. This increased with long service and by 2014 the claimant was entitled to 52 weeks' company sick pay (page 389).

b. The Aviance policy for long-term sickness absence is on page 338. We were taken to para.16 on page 344 which provides that if an employee becomes disabled during employment the managers must take into consideration the commitment to the Equal Opportunities Policy to retain the employee wherever possible and the requirement of the equality legislation. Para.16.2 & 16.3 say, in summary, that managers must obtain all relevant information, that where possible employees should be retained within the existing post with "'reasonable adjustments'" (in quotation marks in the original) if needed. It that is not possible, redeployment or alternative duties should be considered and managers will need to demonstrate that all possible action has been taken to make adjustments that are considered reasonable.

c. Employees have the right to self-refer to occupational health and the report will be actioned in the same way as those resulting from employer's referral: para.6.6 page 339.

55. The claimant was fit to work at the date of dismissal. The claimant did not advance a positive case before us that he would have been treated differently in any particular respect had the first respondent been expressly following the Aviance policy although it was argued that there was insufficient and no overt account taken of the Equal Opportunities Policy. The checklist in para.18.2 page 345 of issues for a manager to have considered before dismissal is a best practice checklist (with the exception of the penultimate bullet point which might apply in ill-health retirement situations).

56. The claimant wanted to increase his hours to full time and had been on the waiting list for a long time. Only a small number of CSAs are employed on permanent full-time hours. According to SS (para.21) as at January 2019, out of 90 staff in the department, 11 were full time positions but only 3 of those (including the claimant) were CSAs on full time contracts. The operational demands of specific periods of activity connected with flight departures mean that part-time contracts fit with the needs of the business better than would be the case were a larger number of CSAs working full time hours.

57. From the 1 January 2013 the claimant was working full-time hours but the first respondent made clear that this was on a temporary basis and did not amount to a permanent change of contract. Our finding is that the first respondent made clear that the increase in hours were temporary and we reject the argument that the claimant had a permanent change to his terms and conditions regarding hours of work prior to October 2014.

58. We make that finding for the following reasons. The chronology of contractual discussions from the start of January 2013 to the point at which DM gave the claimant a draft amended contract is not controversial. We take the following from the agreed chronology.

59. On 9 January 2013, the claimant emailed the Customer Service Manager stating that he had been on the full-time waiting list for almost five years and had been provided with a full-time position as from 1 January 2013 so asked for written confirmation of his full-time position and other contractual details. A reply was sent on 25 January 2013 (page 393) confirming the salary and leave details but the then Customer Service Manager stated

"None of the last staff working F/T have been asked to sign a new contract making them F/T permanently. Due to the number of changes to the operation and the uncertainty that the extra flight (…) we need to remain as flexible as possible. … We will be remaining as flexible as possible and will not be imminently issuing permanent FT contracts."

60. On 8 March 2013 the temporary change of hours to full time was extended until the end of the summer schedule and the first respondent wrote (page 394) to the claimant to inform him of this. Although the claimant wrote saying that he was still waiting for the confirmation of his full time position and was surprised with that letter he had already been told on 25 January 2013 that the change was temporary. This was reiterated by a mail dated 4 April 2013 (page 396). It also appears that it was then accepted that,

"As also explained in your own case, due to medication, you are unable to work the ordinary rostered shift hours for a FT member of staff on the Pakistan Airlines contract. In view of this we have amended your roster to meet your needs. This is currently possible and does not affect our operation – in the future, depending upon the operational requirements, this may not always be possible and as thus we need to retain our flexibility."

61. We find that when the claimant started to work full time, the change was initially categorised as temporary and this was explained to him on more than one occasion. The claimant alleges that the working hours stated in the correspondence is incorrect. The evidence about exactly what hours he was working when is equivocal but this is not a difference that we need to resolve in order to decide the case.

62. The first respondent extended the temporary change to full-time hours for nearly two years – each time on a temporary basis. The claimant continued to argue, unsuccessfully, that the change was a permanent change to his contract throughout 2013 and refused to sign statements acknowledging that to be the case but we are satisfied that the change in hours had not been offered on a full time basis until shortly before 22 September 2014 when the HR Administrator mailed him to check that he had received it. We consider this to be an illustration of a facet of the claimant's relationship with the first respondent in that he had an inability to accept something which, objectively, was accurate because he had not seen it that way or it was not what he wished to be the case.

63. By this date he had been sent a draft full-time contract on the first respondent's standard terms and conditions (page 403 and following), but did not immediately sign it. He was unhappy with the description on page 408 that his

commencement date of employment was 29 September 2014 because he considered his permanent full time employment to have started on 1 January 2013. The draft contract correctly stated that the claimant's continuous service date 19 November 2007.

64. DM gave evidence about the changes which moving from the Aviance terms to the first respondent terms entailed in her paragraph 8. In particular, there were changes to the annual leave entitlement, to managing sickness absence and to company sick pay. The claimant had been seen by his cardiologist on 26 September 2014 (see part letter on page 1895). He must have collected the amended contract on about 15 October 2014; he had been asked to do so on that date (page 411). The amended contract states that the commencement date of the full time role was Monday 20 October 2014 and the claimant signed it on that date.

65. We note that the appendix to the contract refers to shift pay and states that shift supplements are variable based on roster pattern worked (page 418). The HR Administrator also emailed the "current handbook and amended policies" to the claimant on 15 October 2014 (page 419 – also at page 1236). The claimant's handwritten annotation to page 420 confirms that this was the version of the Staff handbook which he was sent by that email. It has "Version One" at the bottom of the first page.

66. The claimant asked for an extension of time to sign the contract. DM then met with the claimant on Friday 17 October 2014. She describes the meeting in DM para.10. She made a brief hand written note. It was agreed by the claimant that this was given to him but his statement evidence was that that was on 20 October 2014. We consider DM's para.10 evidence that the note was made in the meeting on 17 October 2014 to be more plausible. It evidences that she drew the claimant's attention to differences between the provision for annual leave and sick pay as between the Aviance contract and the first respondent's contract. The claimant has annotated the note to the effect that it was given to him by DM.

67. In an email of the same date, probably written after the meeting, DM set out bullet points about the changes in contractual terms which would affect the claimant; she listed annual leave, overtime rates, sickness and death in service (page 480). She stated that if the contract was not signed by the following Monday the offer of a move to full time hours would be withdrawn. As we say, the claimant signed the contract on 20 October 2014.

68. Among the changes when moving from the Aviance contract and policy to the first respondent's contract and handbook are the following:

    a. The terms of the managing absence policy (from the Aviance policy at page 338 to the first respondent's at page 358) – hereafter referred to as the MAP;

b. The terms relating to the payment of sick pay (claimant para.20 and 21) – (page 433 in the version sent to the claimant in October 2014).

69. The claimant's case is that he was deliberately taken off the Aviance contract because of his heart condition. We reject the implication that the first respondent and DM acted in an underhand way because they drew attention to the difference about which the claimant now complains (see DM para.10 and her account of the meeting which we accept).

70. The manner in which the change to terms and conditions was implemented was the subject of the claimant's June 2018 grievance which was investigated by DT (see outcome letter at page 587). In this grievance, DT investigated whether the claimant had been treated differently in relation to his terms and conditions than other individuals who had moved to full time status and had not, he alleged, been required to agree to the first respondent's standard terms and conditions but had retained Aviance terms and conditions (see page 590 and following).

71. Some of those were relied upon before us as having been in materially the same situation as the claimant such that they were suitable comparators. In particular, in CSA2 para.10 and the claimant's statement paragraph 42 it was alleged that PP and another unnamed individual were permitted to retain their Aviance terms and conditions. The factual finding of DT, which the claimant did not provide evidence to challenge, was that those two individuals had been working full-time hours (albeit without Aviance having issued full time contracts) at the time of the relevant transfer of their employment to the first respondent. He considered this to be a different situation to the claimant who had transferred working part-time hours on an Aviance contract and had been expressly told that the full-time rosters were temporary when he first worked full time hours but when the permanent full-time position was offered to him was told that it would be on the first respondent's standard terms.

72. We consider that those circumstances put the alleged comparators in a materially different situation to the claimant such that they are not directly comparable: s.23 EQA.

73. We are not in any doubt that the change to the sick pay was notified to the claimant explicitly in about October 2014. The handwritten note (page 481) makes clear that DM had a conversation about the changes before the claimant signed the contract. There is a clear reference in that note to the new sick pay terms. Although the email which followed the meeting only refers to "sickness" and not to sick pay terms or the MAP expressly, the note provides evidence that the sick pay terms were explained orally.

74. We are quite satisfied that the claimant wasn't unfairly pressured into signing the contract – he suggests that he was rushed into signing it by the requirement to sign it by 20 October 2014 (page 480). The claimant gave oral evidence that

he didn't read it because it was not applicable to him – not because he did not have sufficient time. He received the handbook on 15 October and DM asked him to sign the contract (by which he would have moved onto the first respondent handbook) by the 20 October, having expressly explained in a face to face meeting the key differences which affected him. The claimant had had the draft contract since before 22 September 2014 (page 402) and could have read the details of that at any time since then although we accept that he was not sent the handbook and policies until 15 October 2014. However, in the circumstances that the key differences were expressly drawn to his attention, we are of the view that the time limit was not inappropriate. The claimant did not refuse to sign or say that he had a particular difficulty with those terms at the time although it was later the subject of his grievance. It is argued on his behalf that an explanation of the changes does not negate pressure. However the terms on which the permanent full-time position was to be offered was transparent. The claimant may have felt that in order to obtain one thing which he desired (the permanent full-time hours) he had to agree to a change which reduced his sick pay entitlement but that is a choice which was open to him to make. We do not consider there to have been unfair pressure brought to bear upon him.

75. The terms as to company sick pay in the 2014 version which was sent to the claimant in October 2014 are at page 433. Key provisions are that company sick pay is not applicable for the first day of any instances of sickness absence. It is then payable for up to a maximum of 150 hours at basic pay (exclusive of any allowances/supplements) and 150 hours at half basic pay in any consecutive 12 month period. There is no provision in this version of the handbook for company sick pay not to be paid in a subsequent period of absence once it has been exhausted in a particular 12 month period.

76. As it happens, the handbook sent to the claimant on 15 October 2014 was not the correct (as in the then up to date and applicable) version. On 8 November 2019 (see page 1158) GG sent the claimant the version which the HR Administrator apparently should have sent the claimant in October 2014. This is variously described as version 4 (in the covering email), version 2 (in the footer) or version one (under the page number).

77. The version at page 1158 includes the provision that "once company sick has been exhausted, the employee will have to work a 12 month period free of absence before sick pay is reinstated." (page 1171). This clause is also in the 2016 Handbook at page 18 of 59.

78. GG stated in his witness statement that he has decided to accept that, in the claimant's case, the first respondent would pay to him the unpaid occupational sick pay based on the version of the handbook which he was actually sent on 15 October 2014 rather than that which he should have been sent which was actually the current version at the time he signed his contract.

79. Within the first respondent's handbook (at page 424) is the following,

"The contents of Part One of this Handbook, and any subsequent amendments thereto are the general conditions of employment as set out in your Contract of Employment."

Within the contract at clause 8 it provides (page 413) that "Full details of sickness and all rights and obligations during periods of sickness are found in the Employee Handbook". Provisions regarding sick pay are within Part One of the handbook. It therefore seems to us that they are probably intended to be contractual rights and obligations.

80. Changes to the terms and conditions are provided for in clause 17 (page 415) and, perhaps unsurprisingly, are provided to be made by agreement between the company and employee. There is also provision that, from time to time, changes to the handbook will be made (clause 21). Clause 1 of the contract (page 412) says that the employee shall serve the first respondent subject to the terms and conditions set out below "and in the Employee Handbook". The Handbook itself provides that Part One shall be part of the general terms and conditions. The terms of the contract do not specify that they are subject to a collective agreement. In the absence of that reference there is nothing to alert the claimant to the fact that changes can be made to his terms and conditions by negotiation with a recognised Trade Union. Under the Law of Contract, there are circumstances in which a non-union member is bound by the changes to the handbook made under collective agreement even though he was not a member of the Trades Union. However this is nothing to suggest that such circumstances arose in the present case. The first respondent has been unable to show that the particular change to the sick pay terms and conditions set out in paragraph 77 above was notified to the claimant prior to November 2019 when they sought to apply it to him.

81. The respondent's evidence is that, in mid-2016 there was also an updated version of the handbook agreed through collective bargaining with the recognised Trade Union (2016 handbook). This issue came to light when the claimant argued that he should have continued to be paid sick pay at least by August 2019 (page 1065). He raised the issue in a grievance and the first respondent rejected that grievance on the basis that he was bound by the amendments to the terms and conditions which had been agreed with the recognised Trade Union. We remind ourselves that the claimant relied upon an email from his Trade Union representative denying knowledge of the agreement. However we don't place any weight on that. A version of the handbook with the disputed clause (as set out in paragraph 74 above) were around since 2014 but only drawn to C's attention in November 2019 when he was already affected by it. It cannot reasonably be argued that he agreed to a change at that point.

82. In due course we will set out in our conclusions that to fail to pay the claimant sick pay in accordance with the version of the Handbook sent to him on 15 October 2014 was a breach of contract. However we accept that as a matter of fact, the first respondent and all the relevant managers genuinely believed that the claimant had probably received a communication notifying him of this change to the sick pay policy which took effect as a consensual change to his terms and conditions. In the email at page 1279 GG refers to a copy of the handbook being available on the internet. The respondents also relied upon the emails at pages 1270 and 1271 which evidence an instruction to cascade the handbook to the individual employees in each of the HR Business Partners areas. The recipients include DM. The respondents have been unable to find evidence that it was sent directly to the claimant.

83. GG's explanation to the claimant at page 1280 to 1282 we accept reflects his then genuine and reasonable belief based upon his enquiries to that point. We accept that he believed at the time he wrote to the claimant that there had been lawful changes to the handbook and that the claimant was therefore bound by the updated version of the company sick pay policy. The concession GG makes at para.40 of his statement was made because he realises that there is no evidence of a direct communication to the claimant of this particular limitation of the company sick pay policy before the first respondent sought to applied the term to him.

The managing attendant policy

84. The details of the MAP in the dnata Company Handbook are found at page 358. It provides for a combination of triggers for management intervention based upon points (which are calculated with reference to the length of absence) and instances or numbers of absence.

85. It is apparent from the stated purpose set out on page 358 that the policy is intended to cover all employees. The objective of the policy is said to be to positively manage absence:

> "Absence should be dealt with fairly and consistently, and should take account of the needs of the business and sensitivity of the employee."

86. We also note the 3rd and last bullet points in the policy statement which provides that,

> "The Attendance procedure recognises both the needs of the Company and the need to be sensitive to the employee. Provision is made via the sick pay scheme in individual employment contracts." and
>
> "The company will ensure that any actions taken by the Company in managing the absence procedure are applied in a fair and consistent manner, whilst taking into account the employee's circumstances."

87. Further, from the introduction on page 359,

> "The following procedure is intended to identify, measure and record absence, whilst the 'trigger' points are there to deter unnecessary absence. Management retains the right to manage unacceptable forms of absence in a manner which they believe best suits the individual circumstances, whilst respecting the need for consistency, equity, fair and reasonable behaviour."

88. The details of the points and instances absence system is described from page 362 onwards and explained in summary form in a table on page 364.

Meeting Type	Points Trigger	Potential Sanction	Total Instances Trigger
Welfare Meeting	Points 60 or more	Recorded discussion on absence	3 instances of sickness in assessment period.
Absence Hearing 1 (ABH1)	Points + 100% on welfare meeting recorded points	Potential for 1st warning	A further 2 instance of sickness in assessment period.
Absence Hearing 2 (ABH2)	Points +50% from Absence Hearing 1	Potential 2nd Warning	
Absence Hearing 3 (ABH3)	Points +25% from Absence Hearing 2	Potential Final Warning	A further 2 instances of sickness in assessment period
Final Meeting	Points + 25% from Absence Hearing 3	Potential Dismissal	A further 1 instances of sickness in assessment period

89. We accept that the nature of the first formal stage welfare meeting is a "formal counselling meeting between the manager and the employee". No formal warning is issued at this stage but a note is made that the welfare meeting has taken place. The manager sets review periods both in terms of points and instances and exceeding either may cause the employee to hit a further trigger.

90. The policy provides (see page 364) that it is possible to skip from ABH1 to ABH3, once at the ABH1 stage:

    "If the employee incurs a further 2 instances of sickness within the next 12 months an Absence Hearing 3 will be triggered with Absence Hearing 2 being omitted provided hearing 3 has not already been triggered by the points system.

    Irrespective of points if the employee incurs a further instance of sickness within the next 12 months a Final Meeting will be triggered."

91. The Unions agreed to this policy.

92. There is some flexibility written into the policy, so (at page 365),

    "Reasons to not progress to a hearing would include:
    - any absences related to investigative appointments at a hospital, or with a specialist to establish the causes of repeated illness relating to a specific set of symptoms
    - ongoing bouts of illness relating to chemotherapy or similar treatments
    - where any action taken would be in contravention of the Equality Act
    - where the absence is maternity related, a sick review may take place, however the employee will not progress through the hearing stages and no warning will be issued.

    This is not an exhaustive list and there may be a number of similar situations where the manager feels it is inappropriate to progress the matter, in such circumstances they will confer with the HR Representative to establish a rationale as to why this set of circumstances are appropriate for not progressing the situation. In this way the Company will ensure consistency of approach and equity of treatment across all areas. Management do not have discretion to ignore 'trigger' points without providing an objective reasoned justification which must be noted on the Return to Work form."

93. The above reference to not breaching the EQA appears to be the only reference in the policy to the respondent's obligations under the Act such as to make reasonable adjustments in relation to disabled employees.

94. In the claimant's statement (claimant paragraph 26) he describes how he was taken to Hillingdon Hospital due to headache and chest pain and left arm pain and returned to work on 22 December 2016. It is apparent from the record of

the return to work interview on page 498 that this triggered a welfare meeting. We can see from the page 504 record of absences prior to 22 December 2016 that at that point he is recorded as having amassed 72 points and 2 instances of sickness absence.

95. There was an ABH1 on 3 June 2017 and we see from the outcome letter on page 509 dated 14 June 2017 that it was decided that no warning would be given and he would remain at the welfare stage. In this, we find the respondent was clearly discounting absences due to the claimant's heart condition. The claimant was also absent for 1 shift on 3 December 2017 and a return to work interview was conducted on 5 December 2017 (page 515). At that point it was recorded that he has at that date 48 points and had had 4 absences which would trigger ABH 1 on next absence.

96. He describes in his statement paragraph 29 how he found that he was still experiencing the symptoms of his heart condition and obtained the letter from his GP, Dr Sim which he gave to the first respondent (page 607 dated 12 March 2018).

97. In the meantime, there had been the next of the specific incidents which we are asked to consider (subject to the respondents' argument that the allegation is not included as a pleaded allegation). On 20 February 2018, the claimant was asked by his duty manager, BE, to go to the gate because the flight was zoning. His version was that he had been given very little notice to rush to the gate and needed to run despite BE being aware of the claimant's heart condition; a different duty manager, LS, went in his stead (claimant's statement paragraph 31). BE recalled the incident in her paragraphs 10 & 11 where she disputed that there was insufficient time for the claimant to get to the gate without having to walk more quickly than usual or run and, in any event, the CSAs were trained not to run or rush due to the risk of generating panic amongst passengers. She gave evidence that the claimant started to argue that she could not ask him to rush to the gate and raised his voice at her. Although in his written statement SS dates this from 2019 it is plain that it is the same incident (see SS paragraph 31). He corroborated BE's evidence that the claimant had responded to being asked why he had not gone to the gate in a rude and abrupt manner.

98. The incident was first raised by the claimant at the same time as his complaint about BE's actions in refusing to permit him to take leave at the end of his shift on 28 April 2019 – over a year after the incident. Even on the claimant's own account, the request was not directly related to his heart condition in any way and it was part of his duty as a CSA on shift to attend the gate when flights arrived. The information that the plane was zoning relates to the likely time which would elapse before disembarkation.

99. We accept the respondents' case that this amounts to, at worst, a difference of opinion between BE and the claimant about whether he would have had

sufficient time to reach the gate without having to rush because, in the event, a different member of staff went and the claimant was not required to go. However the claimant has read into the situation that he was targeted by BE when the evidence does not support that allegation.

100. We accept the evidence of BE that the general practice was for CSAs to avoid rushing or running for the reasons she gave. This means that, although she accepted in oral evidence that she asked the claimant to go directly to the gate (as in without delaying to complete some other task) she did not ask or tell him to rush or run. This appears to have been misconstrued by the claimant.

101. Although this was not a specific complaint, we also note that the claimant takes issue with another decision of BE on 23 June 2018 when she refused him permission to swop shifts (page 555). The claimant and another CSA had requested approval of a shift swop which would have meant the claimant working on 11 September 2018 until 22.45 when, as a result of his medical condition, adjustments had been made to his shift so that he did not finish after 21.30. We infer from this incident that BE was aware of and took account of the need to avoid over-taxing the claimant because of his medical condition. It seems unlikely that she would have acted in a way in February 2018 that would have put pressure upon the claimant as he alleges and this later incident supports our conclusion on the earlier one.

The 2018 grievance

102. On 5 June 2018 the claimant emailed GG questioning whether he had been given the correct annual leave entitlement (page 546 to 547). This was treated as a grievance and DT was appointed to investigate it (GG para.3). At about the same time, there were discussions going on about the claimant's roster because he had been allocated fewer hours than he was contracted to carry out (see his email to AS at page 549). He drew to AS's attention that, as he put it, the managers were now trying to amend his roster to give him the full time hours but that was resulting in "such a hectic roster" which was giving him "maximum hardships" and he asked AS to look into it because

"I have such a condition and how pathetic are they. They made an elementary error for my roster and now they are trying to give me maximum hardships which is giving an appalling attitude."

He asked AS to seek to accommodate a roster which "could avoid my cardiac symptoms".

103. AS responded the following day copying the email to GG who was asked to ensure that DM or one of the operational team sought to find a way forward. The claimant was absent from work with chest pains/palpitations the next day, 8

June 2018 (see page 552). He returned to work on 10 June 2018 by which time he has amassed 12 absence points with 2 instances of absence over the relevant 12 month period (page 551). There is no mention of stress as a reason for absence. He had apparently informed IP, who conducted the return to work interview, that he has "no special requirements" and is "capable of fulfilling all aspects of job role", which should be regarded as including the full time hours.

104. Ahead of his 2018 grievance hearing on 9 July 2018, the claimant clarified the details of his complaint in an exchange of emails with GG between 5 June 2018 and 4 July 2018 (pages 580 to 584). Even before the hearing, he indicated that he wishes to take the complaint to the highest level and after the hearing (but before the outcome) he asks for a meeting with GM, the CEO, regardless of the outcome (page 579). GG's response is that the claimant should wait to allow the grievance process to run its course.

105. On 20 July 2018 the claimant was certified unfit for work due to ischaemic heart disease, palpitations and awaiting an appointment for a heart scan between 18 July and 15 August 2018 (page 596). He had called an ambulance following nocturnal pain and had been admitted to hospital where his medication had been amended.

106. This absence meant that by 1 August he was classified as long term sick (page 597) and DM asked SS to arrange for his sickness to be managed. A customer duty manager made informal contact on 2 August 2018 (page 598) and there was a home visit on 9 August 2018 (page 604) when the claimant informed the first respondent that he had received another certificate (page 603) certifying that he was unfit to work because of heart disease between 9 August 2018 and 30 August 2018. He was advised of his remaining sick pay entitlement although he challenges the accuracy of the figure he was given. A possible referral to OH was discussed.

107. In the event, the claimant returned to work on 24 August 2018 (page 611) following a consultation with his cardiologist on 17 August 2018 (page 1926). The claimant is described as keen to return to work in a phased manner which the cardiologist describes as entirely sensible.

108. DT's grievance outcome dated 17 August 2018 is at pages 587 to 595. The issues to be considered by DT included the change to the contractual company sick pay and the allegation that he had been pressurised into accepting those changes (see our findings about that allegation at paragraphs 54 to 74 above). He also argued that when he had 10 years' continuous service he should have received an increase in his annual leave entitlement. The grievance hearing was noted in a minute at pages 557 to 563 (typed version of the manuscript notes which follow it).

109. The grievance about the discrepancy in the annual leave was between the 256 hours he had been told, prior to signing the 2014 contract, was his annual leave entitlement and the 244 hours he had been given. This seems to have been due to the 256 hours being based upon a miscalculation about the length of

shift which the claimant worked.

110. The grievance expanded within the meeting to include the compliant that he should be given a full-time Aviance contract effective from 1 January 2013 and should not be on a dnata contract. He cited 4 people (see bottom of page 590) whom he claimed were still on Aviance terms despite having transferred to full time working since the TUPE transfer. We have already referred to DT's findings about those comparators (see paragraphs 70 to 72 above) and concluded that there had been an agreed variation of the claimant's contract when he transferred to permanent full time hours on the first respondent's standard terms.

111. The claimant did not appeal the outcome of this grievance.

112. The notes of the return to work meeting on 24 August 2018 (page 612) record that he returned on reduced hours for 2 weeks and there were no special needs as a result of the medical condition which the company needed to know about in order to assist them therefore there was no need for an immediate referral to OH. The manager has recorded a current score of 225 points and 3 absences and a new trigger point of 2 further instances or 450 points in total. However she has also circled "no" in answer to the question "Could further sickness absence result in an ABH?".

113. This we consider to be contrary to the claimant's evidence that no account was taken of the fact that his absences were all disability related. He complains about lack of consideration to referral to OH but we see that the respondents were waiting for his appointment for a scan on 28 August. It is recorded that he has an appointment on that date and they would await results. (page 611). He had come back earlier within the currency of original MED3 but had obtained fit note to permit a phased return to work and amended duties. "No heavy lifting return has been agreed with cardiologist return to work 24 August 2018" (from the MED3 on page 610).

114. Given that medical evidence, it is not surprising that the first respondent did not refer him to OH at that time. The note covers the period until 7 September 2018 and the adjustments recommended by the claimant's GP for a return to work were accommodated.

115. The winter roster was sent to the claimant and on 27 September (page 617). The claimant told IP that he wanted to finish his shifts when the PR check-in closed which would make him less tired and balance his work and health. DM asked for medical evidence that he is unable to work until 22.30 due to health reasons (page 620) explaining that

    "Once the winter schedule was received it was necessary to adjust your shifts to fit the operational requirements of Terminal 3 and the airlines in which we serve."

116. To an extent the constraints of the winter roster are affected by the clocks going forward in March and back in October because, with some airlines, that means

that the departure time may change as the time difference between the countries served decreases or increases.

117. The claimant asked his GP to write a letter supporting workplace adjustments (page 1934). It is dated 22 October 2018 and contains the following,

> "I would be grateful if you could help this gentleman with some work place adjustments. The cardiologist had advised him to reduce his symptom burden as he is a patient with ischemic heart disease and on multiple medications. Please could you liaise with Mr Joseph so that regular work place adjustments can be agreed to continue his current working pattern. He would benefit from a regular routine of work/rest/sleep. I feel a too late working pattern would (sic) detrimental to his health. He is fit to work full time duties as a customer service agent but should avoid manual handling duties."

118. When reading this letter, it becomes obvious why DM and SS had a meeting with the claimant, because that is the recommendation of the GP; he recommends that they liaise with him.

119. The first respondent managed to adjust the rosters for the 2018/2019 winter schedule but DM wrote to say that she would still like to meet to discuss his health, working hours and the letter provided by the claimant's GP (page 621). The meeting between the claimant, SS and DM took place on 21 November 2018 (page 622 to 624). The minutes record that the adjusted hours he was then working for the winter roster 2018/2019 were 6 on and 3 off (that is a 9 day rotating pattern). The hours worked during the 6 days on were 14.30 to 21.15; 10.30 to 21.15; 14.30 to 21.30; 12.00 to 17.15; and 12.30 to 21.15.

120. It is clear to us that, at that meeting the claimant told DM and SS that he needed to work full-time but that he got tired. He is told that they cannot guarantee that the roster will always be in place and that its availability will always depend on flight schedules and the needs of the customer. They refer the claimant to OH in order to be satisfied that he is 100% fit to carry out the full role and duties. This is not surprising to us because a more permanent solution is being requested now and they need to explore that.

121. We accept that the claimant did not understand why they did not have sufficient information. However we also accept that the OH doctors used by the first respondent was well equipped to consider the reality of the role; they had seen the site and understood the CSA roles and duties. The OH referral was not out of the blue – the need for one had been explained to him on 21 November 2018. However, the claimant accepted in cross-examination that, at that stage he was not asking for further adjustments than those which had been made to the roster which resulted in the hours set out in para.119 above. He further accepted that this meant that when, in paragraph 46 of his statement, he gave evidence that "Adjustments were not made to my shift pattern. I was not seeking to work fewer hours, but to adjust my working hours to avoid too late

evening shifts. I was still working after 9.15 pm", in fact, as at 21 November 2018 he had not sought any further adjustments or to finish work earlier than 21.15. He did not adequately explain the apparently misleading implication that following the meeting of 21 November 2018 the first respondent had failed to implement some adjustment which he had requested.

122. The appointment was made for 6 December 2018 and the report (mistakenly dated November) is at page 642. The referral explains that the claimant has requested to work shorter days (although, in fact, he was asking to finish work earlier) but it is clear from the statement "we regularly suggest to him to reduce his working hours so he can finish earlier in the evenings but he refuses to work less hour" that DM did not, in fact, misunderstand what the claimant was seeking to achieve with his rosters.

123. The claimant seems to think that DM and SS were trying to encourage him to change from being a full-time employee. We find that this was suggested to the claimant as a potential solution but we do not consider that DM or SS put pressure on the claimant to go part time.

124. Dr Watts recorded that the claimant reported that "he is well and has had no chest pain or prolonged palpitations since his admission to hospital more than 3 months ago." (page 643). His opinion was that the claimant was fit to undertake his usual duties on a full-time basis and continued,

"At management discretion, I recommend that his shift pattern be adjusted to ensure a more consistent start and finish time, and also that he finish any late shifts 1 hour earlier (20.15). The overall length of the shift does not need to be reduced, but this amendment would remove him from having to walk to and from the gate, as well as reducing the overall intensity of his workload."

125. There is no mention of any mental ill health or mental health condition.

126. When the claimant was asked about Dr Watts' advice during the grievance hearing conducted by SR (see page 710) he told her,

"explained to him. 2115hrs but my symptoms not gone away, need some more time. Company to let me go at 2030 hrs. He shook his head and said, if they can do it, good for you. Said would mention on the report. My conditional requirement. Said if I don't ask, how do you know I want it. Be honest tell them my truth, up to them if they wish to listen."

127. The claimant accepted in oral evidence that this note accurately records what he told SR on 14 February 2019. It seems to us that we can legitimately read into this account of the conversation with Dr Watts that the claimant had not previously told DM and SS that he wanted to finish earlier than 21.15 and was advised to do so although whether they could accommodate that was up to them. It was suggested to him in cross-examination that by shaking his head, Dr Watts was indicating that he regarded the claimant's request to be unlikely

to be accommodated but was not stating that the earlier finish was medically essential. The claimant's answer was,

"He may not know the full company resources – may think you asking - this my recommendation. The doctor may not know the full capacity of the company. That may be the reference he is making."

128. It was suggested to the claimant that the reasoning of Dr Watts was not that the length of the shift needed to reduce but that the numbers of occasions when the claimant had to walk to the gate would be reduced. He accepted that and said that he had explained to Dr Watts that that would be the reason. However he also said that the cardiologist had said that he should make sure to go to an identical pattern. He also accepted that for the flights which were served during those shifts he was required to walk to the gates in any event earlier in the shifts although not every day.

129. It seems to us that in order to enable us to decide the issues we need to decide, we need to focus on what was actually in the report upon which DM and SS acted. However, we are bound to say that, as described by the claimant, the actions of Dr Watts are more consistent with the interpretation that the claimant was advised to ask for the earlier finish time and the physician would put that in his report but that Dr Watts did not intend to override the management discretion about whether a particular change was operationally feasible.

130. The claimant was sent further shifts on 3 December 2018 (page 632).

131. There was no reference in the OH report to the effect on the claimant's sleep patterns of a later finish time or of any mental impairment or psychological impact. The claimant portrayed himself to Dr Watts as essentially fit to do his job. The report was sent to DM on 11 December 2018. DM had a conversation with Dr Watts about his report on about 13 December 2018 and then exchanged emails with his practice manager in late January 2019 (see paragraph 139 – 140 below).

132. The claimant complains about a delay in arranging a meeting to discuss the report between 3 December and 11 January and he also alleges that DM told him in about December 2018 that he could work the later shift despite his disability (claimant's para.48 and LOI para.3.1(g)). We have not heard evidence which provides clarity about when this is said to have taken place within the context of the chronology of correspondence and meetings in December 2018 and January 2019. However, we are satisfied that DM only asked the claimant to work shifts which had he said on 21 November 2018 were not causing him any problems.

133. There was a meeting between SS, DM and the claimant on 11 January 2019 to discuss the OH report. The claimant found the meeting upsetting (see his email at page 668).

134. As we have indicated, the back ground to the 11 January meeting was that Dr Watts had made recommendations that the time at which the claimant should finish work should be adjusted at management discretion (page 644) but that the claimant was fit to work full time hours. The first respondent was not obliged to offer the claimant full time hours which accommodated that earlier finish time if it was not reasonable for them to have to do so. The discussion on 11 January 2019 was, in part (SS para.21), explaining that

    "Accommodating an earlier shift finish time for Anton would not only leave us understaffed during the evening, it would also mean we would be over-staffed at the start of his shift in order to maintain full time hours as there would be no flights to service."

135. Given that the OH report recommendations were subject to management discretion, the decision to confirm the claimant's existing start and finish time as communicated on 11 January 2019 was not contrary to the OH advice that they had at the time. They did discuss alternative shifts available in Terminal 3 (see SS para. 23) but these shifts were all part-time which the claimant was unwilling to move to.

136. Our findings about SS's conduct towards the claimant on 11 January 2019 is that, overall, he was sympathetic to the problem but clear about what the first respondent could do and what it could not do. Alternatives to the claimant's presented shift pattern which would have accommodated the recommendations were put forward but would have required a change by the claimant which he was unwilling to make. Any discussion about moving part-time was part of a suitable discussion about how to help the claimant to manage his workload and health and was not because that was a specific aim of SS or DM. It is quite probable that SS said words to the effect that since the OH physician had recommended changes to be made at management discretion, the OH advice did not oblige the first respondent to make particular changes. Both SS and DM interpreted the medical advice that way and that was a reasonable interpretation.

137. There was a particular comment made by SS which upset the claimant as he explained in an email on 14 January 2019 to DM (page 668). There was a slight difference in emphasis between the evidence of DM and that of SS about what was said. Our finding is that SS said something to the effect that the claimant was a CSA and that he, SS, was aware of members of staff who had had stents fitted and were able to work as ramp agents – a more physically demanding role. This was understood by the claimant to be SS making assumptions about what he could do and we agree that there is a risk that comparing the position of one employee with another could do that. However, we accept SS's explanation that he did not say that the claimant had chosen to be a CSA and that the comment about the employees on the ramp was said with the intention of being encouraging. The claimant was very clear in his oral evidence that his view was that this was a personal attack upon him by SS but our view is that this was not an attack but was intended to reassure the

claimant that SS accepted that the claimant could continue working his normal duties on a full time basis and that his heart condition was not an impediment to that, based upon the medical evidence. We accept that this was intended as encouragement of the claimant and not, as he appears to believe, empty encouragement. Furthermore, it is probable that any comment made by SS that was construed by the claimant as a statement that he would check the claimant's capability was, in fact, an explanation that the first respondent wished to clarify the basis for medical advice that the claimant was fit to do full time hours when there was also a recommendation that he finish at an earlier time.

138. The claimant wrote to SS on 15 January 2019 explaining that he considered that comment to have been intimidating, degrading and unprofessional (page 669). SS responded briefly to the effect that he would arrange a follow up meeting the following week and DM attempted to do so (page 669A) but the claimant did not wish to meet with SS. In his paragraph 27, SS explained that, following intervention by GM, SaSa called him from the check-in area and put the claimant on the phone in order that he could talk to SS, who sought to reassure the claimant that he was not harassing him. SS subsequently apologised for offending the claimant in any way (see paragraph 161 below).

139. Following the meeting on 11 January 2019 DM had sought clarification of Dr Watts about the content of his report (see pages 671 to 672) . The claimant only found out about this later. The reason why she did so was that she had had a telephone conversation with him on 13 December 2018 (as she explains in her para.27) during which she had asked for clarification of the recommendation for an earlier finish time when the physician's opinion was that the claimant was fit to work on a full time basis; she understandably considered that to potentially conflict. The oral confirmation she had received, we find, was that the OH physician's opinion was that it was the claimant's wish to finish at around 20.30 and that there was no medical reason why he needed to do so.

140. By this written clarification, Dr Watts confirmed that the claimant was fit to work up until 22.30 and therefore, in answer to the question "Is it his desire to finish earlier or is it justified medically?" he answered "N/A". The rationale for an earlier shift time provided by the OH physician was that it was to reduce the number of times that the claimant would have to walk to the gate.

141. However, as DM says in her para.30, an earlier finish time would not necessarily reduce the number of times he would walk to and from the gate because it would depend upon the flight departure and arrival times within the hours of the particular shift.

142. DM and SS had been given medical evidence that there was no medical reason why the claimant could not work to 22.30. This opinion evidence available to them seems to us to be likely to be the entire reason that any comment made to the claimant about whether he was able to work to a particular finish time was made.

143. We reject the allegation against DM that she got Dr Watts to change his mind. The first report reasonably appeared to her to need explanation and she asked him to add some detail. He did not produce a new report. He did not withdraw the recommendation, he merely adds that it is not one which, in his view, is necessitated on medical grounds.

144. The claimant was upset and frustrated by what appeared to him to be a change in Dr Watts' advice. He points to the later evidence of Dr Thomas which is to the effect that the claimant's own perception about how late he should work in the evening is the best guide and, according to the claimant, working beyond 20.30 will have a negative impact upon the quality of his work/rest pattern. It is said in the later report that that is more than his own preference, "reflecting reduced physical capacity to work late into the evening because of the effects of medication, the stress relating to the symptoms and the work situation" (see page 787).

145. This seems to us to be the sort of thing that two doctors can legitimately disagree about when carrying out different assessments at different times. Dr Watts did not have information available to him about a psychological test on any mental health condition. The opinion that there was an interaction with the anxiety experienced by the claimant was not one which the company OH physician had evidence about. He was more concentrating upon the physical symptoms of the heart condition.

Disciplinaries in 2018 and 2019

146. In the meantime, the claimant was investigated by SaSa following a complaint by the Pakistani Airlines representative (page 649) concerning the treatment of 4 passengers. The outcome letter at page 663 shows that no action was taken against the claimant and he doesn't make a complaint about it within these proceedings.

147. However, shortly afterwards there was another incident which led to a disciplinary hearing on 17 February 2019 conducted by SC. He had received only 69 hours' notice of the meeting instead of the minimum stated in the policy of 72 hours but refused an opportunity to reschedule the meeting. The allegation that a family of 4 passengers had been unsatisfied with the level of customer service which he had provided was upheld and the claimant was given a first formal warning by the outcome letter dated 23 February 2019 to be held on his file for 6 months (page 735).

148. Within the context of these proceedings, the claimant complains that that first disciplinary warning was an act of unlawful disability discrimination and harassment and victimisation as was requiring him to attend the investigation meeting which proceeded it and which was conducted by BE on 14 February 2019 (page 702). The investigation meeting had taken place on the same day as the grievance investigation meeting conducted by SR (our findings on the 2019 Grievance are set out at paragraphs 164 to 184 below).

149. The investigation took place because a complaint was received from the

Philippines Airlines Station Manager (page 689). When the claimant was asked about this complaint, and the passengers' perception that he had been rude he replied,

"Probably yeah maybe. I was under tremendous stress. I think management shouldn't be surprised my situation. I lost concentration. Sometimes I got angry I couldn't provide the proper service. That was my genuine situation at that time."

150. He accepted that in general it was appropriate for BE to investigate a complaint against a CSA but argued that requiring him to attend the investigation meeting had been discrimination by BE in the present case because he had left the grievance investigation meeting with SR in Terminal 4 running late for the meeting with BE in Terminal 3. He seemed to argue that BE should have taken it upon herself to postpone the meeting to another day although he volunteered that SR had reassured him that she would inform the duty managers in Terminal 3 that he was running late and BE had told him to take his break before conducting the investigation meeting. He had not asked her to postpone the meeting. In those circumstances we conclude that the claimant was not disadvantaged in relation to that investigation meeting.

151. When asked about this in cross-examination, BE explained that the claimant was asked whether he would like to reschedule but preferred to carry on and she was concerned that, given the amount of stress the claimant was under, if he wanted to finish the meeting so that it was over and done with, that option should be open to him.

152. As to the warning itself, the claimant's complaints are, in essence, about the short notice of the meeting (despite his agreement to carry on) and the failure to provide a copy of the disciplinary policy with the invitation. He accepted that he had been given the opportunity to adjourn. In those circumstances, when the claimant had recently been involved in a different disciplinary meeting and when SC received his permission to continue, we do not think that the claimant could reasonably consider himself to have been disadvantaged by her doing so.

153. The claimant did not appeal against the warning, it was given because SC made a judgement on the evidence in front of her that the claimant had provided poor customer service and, based upon the information in the record of the investigation meeting of 14 February 2019 and disciplinary hearing of 17 February 2019, there was evidence available to justify that conclusion.

The 2019 grievance

154. Contemporaneously, there was investigation of the grievance raised on 30 January 2019 on the claimant's behalf by email from Astute HR which was sent directly to the CEO on 30 January 2019 (page 674) following attempts by the solicitor to telephone him directly (page 684). This included, at page 676 para.12, a request for a workplace adjustment so that the claimant should not finish his shift later than 20.30.

155. In making an approach direct to GM, particularly one initiated by telephone calls

direct to the CEO from a solicitor, the claimant's actions were likely to be viewed as an escalation. GM made the valid point that, without confirmation from the claimant, he did not know that the solicitors were genuinely acting for him. The claimant came across in oral evidence as feeling desperate at the time that there should be action on the reasonable adjustments that he wanted and that was why he took the action he did.

156. GM forwarded the grievance to GG for him to arrange for it to be actioned. On 30 January 2019, GG emailed Astute HR (page 681-683) and said

"the issue of reasonable adjustment the individual has raised with the Company has been listened to and discussed with him on several occasions in an entirely supportive and constructive manner over several years and in addition, has been recently exhaustively investigated for him under the Company grievance process. The Company therefore considers the matter to be closed."

He concluded that he saw no valid reason to correspond with the solicitors directly.

157. The statement that the issue of reasonable adjustments had been "recently exhaustively investigated" was an unwarranted assumption based on misremembrance of the scope of the grievance investigated by DT. GG also forwarded the correspondence to DM, AS and AD asking the HR team to pick up the allegation of harassment with the claimant "and determine if there is an issues which needs to be taken forward" and recommending a review. In fact, the informal meeting referred to at paragraph 161 below had already been arranged.

158. GG also spoke to the claimant directly (see GG paragraph 9 & 10 and claimant paragraph 61). The claimant's allegation is that GG told him that he could work up to 22.30 as his medical condition did not prevent him from working after 20.30 (claimant's paragraph 61). GG denied saying the words alleged in the pleaded case (see paragraph 160 below) but stressed that a point of the conversation was to make sure that the claimant knew to follow the internal processes. In fact there is considerable similarity between their accounts with both saying that words to this effect were said, that GG confirmed that it was fine for the claimant to be supported by a solicitor but that the company would not engage directly with the solicitor and wished to communicate directly to the claimant.

159. The claimant gave a description of this conversation to SR during her grievance investigation (page 714 – 715; notes which were signed by the claimant to confirm their accuracy). In it he volunteered that GG told him that, if dissatisfied with the internal process, the claimant would be entitled to take his complaint to an Employment Tribunal. He also told SR that GG had said "According to the report you can work to 20.30hrs, no medical reason."

160. The pleaded allegation is therefore different to the claimant's evidence, and significantly so, in our view. The pleaded allegation is that GG told the claimant that he could work up to 10.30 pm "as he did not have a medical condition." It

seems to us that, based upon the medical evidence then available to the respondent, it was uncontroversial as at 31 January 2019 to say that there was no medical reason why the claimant could not work until 20.30 (or indeed 22.30). That is not the same as GG saying that he thought that the claimant did not have a medical condition. The claimant's account to SR and in his witness statement is to be preferred to the version which is set out in the agreed LOI. To the extent that the pleaded case reflects his instructions, that seems to us to be an example of the claimant misremembering a conversation viewed through the prism of the emotion he felt at the time (see his description of that emotion at the top of page 713). This seems to us to be something which adversely affects the reliability of his evidence in general.

161. There was an informal meeting on 31 January 2019 between the claimant, DM and SS at which the former appears to have accepted that the latter were trying to help him. The claimant accepted that at that meeting, SS talked pleasantly to him (claimant's paragraph 62). SS's account (which which DM agrees) at his paragraph 27 includes that they explained to the claimant about the limitations which the SLAs placed upon the company, their understanding of the OH physician's advice and apologised for offending the claimant in any way.

162. The claimant was certified unfit for work for a week on 1 February 2019 because of "work stress affecting mood and unable to sleep". This is the first reference in a medical certificate to stress being a cause of the claimant being unfit to work. His solicitors wrote complaining that there had been no response to their letter of 30 January 2019 (although there had been communications directly to the claimant) and stating that they would advise the claimant on his next steps including preparation for tribunal proceedings, should there be no response before 13 February. It should be recalled that the disciplinary matters arising from the customer complaint were ongoing at this time and disciplinary meetings and grievance meetings were held on the claimant's return from work.

163. One of the claimant's complaints in his witness statement (his paragraph 63) – said to be victimisation (LOI issue 8.2(c)), is that of alleged delay in investigating the 30 January 2019 grievance. SR first wrote to the claimant on 11 February 2019 seeking his confirmation that he wished to raise a grievance (since the communication had come unannounced from a solicitor without confirmation from the claimant that they were acting on his behalf). In fact the claimant had been absent due to ill health. The grievance investigation meeting was held on 14 February 2019. SR was away on leave for a week following the grievance hearing and informed the claimant of that at the end of the meeting. The grievance outcome was delivered by letter date 4 March 2019 (page 749) and SR nominated AS as the appeal officer, unaware that he was on leave until 25 March 2019. She accepts that she should have checked his availability and that that was an oversight (SR paragraph 20). The grievance appeal hearing was held on 4 April 2019 and, in the meantime, the claimant had obtained a private OH physician's report from Dr Thomas which he provided to AS on 4 April 2019. We see nothing in this from which it could be inferred that GG was deliberately delaying matters to affect the claimant's

ability to bring Tribunal proceedings – which is what the claimant alleges in his paragraph 63. In all the circumstances, the passage of time is fully explained.

164. Turning to the merits of the investigation by SR of the grievance raised on 30 January 2019, GG had inaccurately told the claimant's solicitors that the grievance about the rostered hours has been dealt with and send the allegations of harassment to SR for investigation. SR was sent a copy of the full grievance on 12 February 2019 by the claimant's solicitors (page 696). In that, they make clear that the grievance includes an allegation of failure to make reasonable adjustments. It is clear from her methodology and outcome letter that she did investigate this complaint. Therefore GG's inaccurate statement, of which she may not have been aware, did not lead SR astray in her handling of the grievance.

169. At the meeting on 14 February 2019 SR showed the claimant all of the rosters available (page 752). These included those in Terminal 3 but also he was shown the rosters in Terminal 4. Terminal 2 had no vacancies. SR found that, in practice he was not required to "again go to the gate all the time" page 750. The reason why she had investigated this was that the OH had explained that the rationale behind the earlier finish time was to reduce the number of times that the claimant would need to walk to the gate. The medical evidence then available to the respondent did not link the later finish time with disrupted sleep patterns or increased stress.

170. SR's grievance outcome letter of 4 March 2019 is at pages 749-751. The outcomes sought by the claimant are set out at page 677 within his solicitor's letter of 30 January 2019. The first paragraph is, in fact, the only personal workplace solution to the grievance that the claimant was seeking. It was "a permanent variation in his working hours so that he no longer needs to work beyond 8.30 PM".

171. She explained the reasons why she considered it not to be in accordance with the business needs. They were that an earlier finish

> "cannot be accommodated because our SLA with PK/PR requires that we have to have people present to close check in and to release you early would drive additional cost to the business as we would have to backfill your absence with another colleague on overtime. I have also reviewed if there were other options for you e.g. to start and finish your shift earlier, however, there is no requirement for an additional person at the start of the shift and so that cannot be supported for business reasons when we need the coverage at the end of the day."

172. It is clear to us that the reasons why SR rejected that part of the grievance was that the medical evidence available to her did not amount to a medical need for the claimant to finish earlier and to make the permanent adjustment which he sought would add cost or inefficiencies to the business.

173. As to the allegation of harassment against SS, SR's finding on page 750 recounts the claimant's view of the conversation of 11 January 2019. She does not set out her conclusions on that allegation in the outcome letter. Her statement evidence was that she had understood SS's comments to have been meant in a supportive way (SR paragraph 17). Our view is that she did investigate it and reach a conclusion which was open to her but did not, as she should have, articulate the reason for rejecting that part of the grievance in her outcome letter.

174. The claimant appealed on 12 March 2019 (page 758). It was argued that GG's statement meant that the decision on the grievance was premeditated, that there had been selective use of the medical evidence and that he had been subjected to harassment by SS (in relation to the 11 January 2019 conversation) which had not been addressed by SR. It was argued on his behalf that,

> "the key reason for an 8.30 pm finish for his shift is due to the need for him to reduce or inhibit his cardiac symptoms from escalating, as previously advised by his cardiologist. His cardiologist specifically advised to him to avoid sleeping late due to Anton being unable to sleep properly late at night. Anton's GP also advised him that too many late work finishing times would be detrimental to his health."

175. GG emailed the solicitor in response to the letter of appeal stating,

> "May I respectively (sic) ask as to why you are in direct contact with dnata UK personnel once again on this internal matter when I have already made in (sic) very plain and clear to you that this is being managed under dnata internal policy and process?"
>
> He repeated that the claimant has the right to be represented by a work colleague or trade union representative but not by any external party.

176. We understand the point that the claimant made to us in oral evidence which was to the effect that he was not confident in expressing himself in a technical area and thought that a communication from his solicitors would express his arguments more clearly. We equally can understand the perspective of the respondent that they wish to follow the policy about more informal representation. In terms of the reason behind this communication we accept that this was sent to the solicitors for the sole reason that the appeal had been initiated by solicitors and GG wanted to communicate directly with the employee as per process. It was not because of the nature of the complaint. He had made clear in the phone call with the claimant on 30 January that there was no objection to him being supported by the solicitors or taking advice from them and that it was his right to go to a Tribunal (see para.158 & 159 above). He could have been more conciliatory in his choice of language but we accept that this was his honest view and that supports our conclusion about why he declined to correspond directly with the solicitor.

177. GG also made that point directly to the claimant who replied including rosters which he proposed (pages 1574 – 1576) and which he wished to be considered by AS as part of the appeal. He complained that it was unreasonable to have appointed someone who was on leave to conduct the appeal because of the delay that that caused.

178. The claimant was assessed by Dr Thomas on 27 March 2019. Details from the report are set out in paragraphs 24 to 26 & 34 above.

179. The claimant complained about GG's behaviour, initially directly to GM on 21 March 2019 (page 776) but then to AD on 28 March 2019 since she was GG's manager. The essence of the complaint is about the inaccurate statement that the complaint about failure to make reasonable adjustments had already been investigated, the refusal to engage with his solicitor, which he described as victimisation. He also describes the failure to comply with Dr Watts' recommendation for a 20.30 hrs finish (actually the recommendation was for a 20.15 finish) as intimidation and harassment to a disabled person. AD replied on 28 March 2019 suggesting that her investigation of that complaint be postponed until after the appeal conducted by AS since there was some reference to GG in the issues considered within the appeal (page 793).

180. The claimant's summer roster was given to him on 31 March 2019 and all of the finish times were 2230 or later (page 1573).

181. The grievance appeal hearing took place on 3 April 2019 and the outcome was provided by letter dated 16 April 2019 sent the following day (pages 863 to 866). In that grievance outcome, AS properly investigated where in the business he could accommodate the claimant's wish for full time work with an earlier shift finish. We note, in particular, AS's statement evidence at paragraph 15 and the emails at page 860 to 859 whereby he urged IP - who was responsible for arranging the shifts - to look "long, hard and creatively" across the whole of the business.

182. This resulted in the suggestion for a move to Terminal 4 in the following terms (page 864)

> "We will be able to offer you a Full Time roster with a 2030 end time on the QR product in T4 with immediate effect. This will be on a 4:2 pattern[1]. We will offer you full training and support in transferring to this product. This is a new opportunity given the introduction of the Premium team and the Self Service check in product (CUSS) on 25th April 2019."

183. The claimant rejected this offer because he considered the workload at Terminal 4 to be too intense and the change to a 4:2 pattern disruptive to his family arrangements (page 870). As he explained in oral evidence, he had based his view about the workload solely upon one colleague's anecdotal

[1] As opposed to the 5:3 pattern which the claimant worked at Terminal 3.

account of working in Terminal 4. We accept the respondents' evidence (see paragraphs 48 to 51 above) that the workload was proportionate to the numbers of staff allocated on the shifts and that the supervisor would be expected to allocate staff to roles in order to manage the claimant's particulars needs (and those of the other members of their team). We accept that this offer was of a reasonable alternative which accommodated the claimant's known needs and was not inappropriate for any other reason. AS also explained in the outcome letter that Terminal 3 did not presently accommodated a roster pattern with a 2030 end time but "that may change on 10th June" when RJ joined the portfolio. He asked the claimant to say if that was likely to be of interest.

184. AS rejected the allegations that SS and the other management wished to remove him from full time employment and found that a number of steps had been taken to support the claimant.

185. The claimant's response by email (pages 870 – 871) was to accept the offer of the transfer to RJ when it commenced on 10 June 2019 and asked for a temporary adjustment to his hours to finish 2 hours earlier until then or, alternatively for 2 hours to be unpaid from his return to work on 27 April 2019. AS asked him to continue with the established shift pattern until the introduction of RJ, repeated the offer of the move to Terminal 4 and told him that the rosters with the introduction of RJ had not yet been concluded (page 872). He reiterated that supervisors would be briefed in relation to the need to minimise his trips to the gate and allowing him to pace himself and release him from duty when business needs permitted that.

Grievance against Gary Granger

186. The grievance against GG was partially upheld by AD on 29 May 2019 (pages 965 – 970) following a hearing on 15 May 2019 (page 912). She concluded that there were (page 969),

> "insufficient grounds to substantiate all except one of your grievance concerns relating to Mr Gary Granger.
>
> The one point I will be upholding is in respect of 'inaccurate information', Mr Granger admitted he had confused the timeframe relating to your contractual and annual leave concerns with your reasonable adjustments concerns, and this resulted in him statement 'several years' in his response to your Solicitor. I am satisfied this was a genuine error and there was no deliberate intent to provide inaccurate information."

187. AD apologised for that. In our view that apology was an appropriate response to the error of GG. We have accepted that it was an error.

188. The nature of the grievance was in part that GG had been controlling the grievance appeal however AD concluded that GG had been seeking to manage the grievance process within the procedure set out in the company policy whereas the claimant sought to engage with the CEO directly and to instruct a solicitor to engage with the company. In our view, it is reasonable for an employer to wish to correspond directly to its employee about a matter which has given rise to a grievance rather than to formalise the procedure too soon. GG made clear that the claimant was entitled to take advice from whomsoever he wished. The reason AD rejected the grievance about GG's refusal to engage directly with the solicitor rather than with the claimant was that she agreed that it was appropriate to seek to engage with the employee directly rather than, as she put it make the internal process "more protracted and potentially more formalised and adversarial". This was a reasonable conclusion and one open to her on the information available. Otherwise, she concluded following investigation that GG's explanation for the various matters complained about was reasonable and acceptable. Again, this was a conclusion open to her. We accept that she genuinely reached these conclusions on the basis of the evidence before her.

189. The claimant explains in his paragraph 99 that he appealed that outcome to GM on 5 June 2019 (page 974). In that appeal he did not limit his complaints to those about GG's conduct which had been the subject of AD's decision but included complaints about DM and revisited the matters which were the subject of the January 2019 grievance which had been explored in the meetings with SR and AS. He comes across in that letter as very aggrieved that he had (from his point of view) to go to an independent OH provider and seek legal advice to obtain reasonable adjustments. However, our view is that the decision made by the respondent's managers about the balance between the claimant's disability related needs and the business interest was made in good faith on the basis of the information they had at the time. Dr Thomas provided different and fuller explanations which led to a different decision. That does not mean that the previous decisions were discriminatory.

190. The claimant argues that GG's admitted mistake is "evidence of his prejudgmental mindset against me and victimisation against me from the outset." The outcomes he seeks are on page 975-976 and include training for all management, reimbursement of his costs and compensation for injury to feelings.

191. GM wrote to make arrangements for the conduct of the appeal explaining that a combination of lack of availability and pre-arranged leave means that he would not be available to hear the appeal until the second week of July 2019. He offered the claimant the option of a nominated deputy (page 978). The claimant agreed to wait until GM was available.

192. This grievance appeal hearing was conducted on 4 July 2019 (page 1021) and the outcome dismissing appeal being given face to face and confirmed in

writing on 8 July 2019 (page 1027). It appears from the minutes of the appeal hearing (page 1026) that the claimant's desired outcomes include a refund of his legal fees and had expanded to include requiring GG to admit that "he controlled the process from 30th Jan and treated me less favourably due to me brining (sic) this claim …" His position is summed up by the comment on page 1023 that he had no new evidence but the outcome was wrong.

193. It is clear from the minutes that GM carried out a review of AD decision because he stated he was looking to see whether there was new evidence, a failed process or an unreasonable decision. He found none of those (page 1026). The decision of GM was one amply supported by the information available to him about the process and decision making of AD.

Refusal of leave on 28 April 2019

194. On 28 April 2019, his second day back at work, the claimant asked a supervisor for an hour's leave at about 21.45 who, initially, said that she did not need him. However she checked with BE, the duty manager, who said that she could not grant the claimant leave as there were staff working overtime. The claimant complained that, even when the flight for which – on his account – the overtime was needed was airborne, BE did not grant him leave. See his email of complaint to AS that this was not consistent with the direction that accommodations should be given to him when business needs permitted (pages 876 to 887). His complaint was that this was harassment by BE.

195. He attacked BE in his letter of complaint in a manner which we consider to be unnecessary and unprofessional; "Such a (sic) arrogant extremely unpopular character with working staff". This is quite unnecessary and liable to give offence. Even in his letter of complaint he does not say that he had a particular need to do with his health to leave on that occasion. Although the supervisors and duty managers were in the habit of letting the claimant leave early if they were not busy, there was no medical need for the claimant to leave sooner than his end of shift on this occasion. The genuine reason was given by BE - even on the claimant's own account - was that they had staff on overtime. He was given that reason at the time. It was perfectly reasonable that BE should not let salaried staff go if there were staff working overtime. The claimant had been confirmed medically fit to work full hours. This seems to us to be an instance of the claimant considering himself to be entitled to leave and becoming unreasonably angry because he has not been given the accommodation which he thinks he is entitled to. This was a normal management decision by BE and not related to the claimant's disability or intended to target him.

196. Following this incident, the claimant had a discussion with BE which he recorded (see the transcript at page 878). The words on the transcript are consistent with her evidence about this (BE para.13) when she says that she intended to seek to clear up any misunderstanding. We consider her approach to be an appropriate attempt to seek to ensure a harmonious working

relationship. Readings through the transcript, which shows that the claimant told BE that he was recording the conversation, he directly accused her of harassing him three times. It appears from the top of page 881 that she asked him not to shout. She explained that he didn't seek permission to leave from her (page 880). Then at page 884 she explained that, from her perspective, she had said no to two other people who had requested to leave. This is another reasonable reason to refuse leave to the claimant on this occasion. The claimant's response suggests that he didn't accept that the first respondent has to consider the needs of other people apart from himself.

197. Following a further letter of complaint about BE to SS, which was copied to AS (page 886), the claimant had an exchange with SS and then an informal discussion with AS and AB of HR on 8 May 2019 which is minuted at page 898. AS sets out his concern about the claimant's conduct which could "potentially [be] viewed as being disrespectful and insubordinate." AS specifically refers to the claimant feeling it necessary to record the conversation with BE; AS stated that he considered it to be disrespectful to record routine conversations.

198. The concerns that AS expressed in the meeting were followed by a short email (page 904) which we consider to be completely proper reflection of genuinely held concerns that the claimant was showing disrespectful behaviour and, in particular, was recording conversations with his duty manager. The second occasion, when he had attempted but not succeeded in making a recording, had been accepted by the claimant to have been without BE's knowledge or consent. This email was appropriate action on AS part done entirely because of the claimant's disrespectful behaviour.

<u>The move to the RJ contract and dispute about shift allowances</u>

199. It appears from the claimant's response to AS's letter of concern (page 905) that he thinks it to be a reasonable adjustment that he should leave at 20.30. From the receipt of Dr Thomas's report the first respondent knows that there is medical evidence that the claimant has "at least moderate depression and anxiety" and that, although there is no medical test which would allow them to know exactly what length of time the claimant would be able to work with, his own perception is the best guide "reflecting reduced physical capacity to work late into the evening because of the effects of medication, the stress relating to the symptoms and the work situation."

200. It was AS who took action as a result and offered a solution (the transfer to Terminal 4) which would accommodate that in his grievance appeal outcome which the claimant, unreasonably – in our view- refused to try despite being offered full training in the new role. The claimant therefore worked from that time until 10 June on the then existing roster. The claimant asked AS to consider a 2 hour adjustment (page 870) until the RJ contract commenced. AS replied (as we set out above) saying that the role in Terminal 4 was still

available and that informal adjustments would be made when the programme allows.

201. Our conclusion is that this is what was put in place – the qualification that it should be when the programme allows was reasonable in all the circumstances.

202. In essence, the first respondent took the stance that the claimant had to work a shift which already existed. The managers were making ad hoc adjustments in Terminal 3 when the programme allowed. There is no reason to think that those in Terminal 4 would not have made similar ad hoc adjustments. Dr Thomas's opinion is that it is

> "optimal to obtain sufficient periods of rest away from work with the underlying condition which is moderate to severe particular in conjunction with psychological symptoms which themselves are at least moderate in severity. Without this it is likely be detrimental in my opinion to his overall medium to long-term health especially when considering both he physical and psychological elements of the heart disease."

203. However there is no suggestion that there is an urgent need – the sufficient periods of rest are described as optimal, without which it is likely to be detriment in the medium to long-term. It is not inconsistent with this to require the claimant to complete his regular shifts prior to a move to a regular early finish. The arrangement puts the onus on the claimant to say if he is feeling unwell on a particular day but otherwise he is to work a normal shift. Given that the claimant has unreasonably refused a move which would have taken place immediately, it was not a reasonable step for the first respondent to have to take to bridge the gap until business needed someone on the RJ contract by adopting one of the options put forward by the claimant.

204. The claimant wrote to AS on 20 May 2019 complaining about the effect of his new roster on his pay including by saying that the roster only allocates him the part-time hours of 30 hours per week and because of the effect on shift allowances (page 959). AS replied (page 960) saying that if the roster has only allocated 30 hours then IP will correct it but that the shift allowances are contractual and the first respondent will apply them as detailed in his contract of employment based upon his pattern of work.

205. In his oral evidence AS explained the standard process followed by the first respondent when changing a CSA's shift pattern. He described it as a very regular occurrence and said that there would always be a discussion with the individual.

> "There is a whole department headed by [IP] that modifies people's rosters between times of year and also, in the event that we had a new customer there were a whole group of people who would have had [their] roster modified to work with that. … from memory, there is a requirement to give 30 days' formal notice … and individual discussion and the team of planners to accommodate

the individuals and the needs of the airlines. [It] can't always be matched. The customer requirement is what drives the business."

206. From this we find that changes to shift patterns are frequent. The shift allowances material to the present case are payable if the individual works past 19.30 on any given day, although there are also shift allowances paid for weekend working. We also accept AS's evidence that there is an audit process to check the application of shift payments to individuals. With such frequent changes to shift, the shift allowances paid to individual employees must also change frequently and AS explained that there was no grandfathering or pay protection policy whereby, beyond the notice of the change which needed to be given, employees kept a shift allowance which was not applicable to their work pattern. With the acquisition of the Royal Jordanian (RJ) contract there would have been other employees moving shifts although there is some evidence which suggests some employees transferred into the employment of the first respondent when they took over the RJ contract. We accept that there will be times when many people will change rosters such as a change to the airlines flight times or when the first respondent loses or acquires a contract.

207. The claimant was unfit to work and returned to work on the RJ contract on 11 June 2019. On 10 June 2019 AS wrote confirming that the first respondent would continue to pay the claimant in accordance with his contractual terms and conditions following agreement on reasonable adjustments and that the pay details applicable to his revised roster had been correctly calculated (page 982). The claimant continued to argue that it would be a reasonable adjustment to adjust his pay (page 983).

Absence management procedure in 2019 to 2020.

208. We have already set out details of the MAP and the way in which the claimant's absences in 2017 were managed (see paragraphs 88 and 94 to 95 above). There were return to work meetings in 2018 when the number of points and instances are noted and a home visit on 9 August to which we have already referred. At a return to work interview on 24 August 2018 (page 611) following a period of absence starting on 19 July 2018 the manager noted that there was a current score of 225 absence points and 3 instances of absence. A welfare meeting under the policy was carried out on the same day (page 612). Although SC circled "No" in answer to the question "Could further sickness absence result in an Absence Hearing?" she also advised that the next trigger points were "further 2 occasions or 450 points". This would have been 100% increase on the then existing absence which is in accordance with the policy.

209. The claimant's oral evidence, and his primary case (see CWS1 para.116), was that he should have had all of those absences discounted in their entirety because he was a "long term disability case". The respondents accept that no absences were discounted.

210. There was an absence between 19 February 2019 on 4 March 2019 it was noted in a return to work meeting that work related stress affecting mood and sleep was the reason for absence (page 753). On his return to work after an absence from 24 May 2019 to 11 June 2019 (within 12 months of the welfare meeting) that it was noted that the reason for absence was "depression, work related stress, low mood, insomnia". It was recorded that he had had 4 absence occasions with the part 12 months and currently had a points score of 688. The invitation to an ABH1 dated 11 June 2019 (page 990) is therefore in accordance with the policy.

211. GG's evidence was that the MAP does not require them to discount disability related absence,

> "We'd always operate the points system regardless of the reason for absence. When [an absence] triggers the process the HR and manager would review the reason for absence. If they determine any reason for discounting they would do that then. Until that time the process would continue."

212. We find that the first respondent's practice in the case of underlying issues, including those such as a heart condition, would be to calculate the number of instances and points in the same way but take the underlying issue into account in deciding on the outcome of the hearing, not on whether to hold the hearing.

213. There is some inconsistency within the document itself at page 612. However the claimant clearly signed acknowledging that the company had explained that further absence could lead to an absence hearing and therefor to a warning as appropriate based upon his absences. The running total points and absences for a further trigger are consistent with an Absence Hearing being a potential next step. On balance this is within the first respondent's MAP. We are clear that claimant's objection to the ABH1 in June 2019 was not that the first respondent had failed to follow their policy at the Welfare Meeting stage or in progressing to ABH1 but that they should not have done so because he was in a different category. Indeed, when appealing against the warning given at the ABH1, the claimant argues that the first respondent should not have counted any of the absences "particularly those in 2018" (page 1012 2nd para). He does not allege that the first respondent misapplied the policy or that they misled him about when the next stage would be reached.

214. The first absence which was taken into account when moving from the welfare meeting to the ABH1 was that from 19 February 2019 to 4 March 2019. The GP certified the reason for the absence to be, in broad terms, psychological (see paragraph 210 above) rather than the heart condition itself. The first respondent had held a justified disciplinary hearing on 17 February 2019. It is common, and understandable, for employees to feel anxious around disciplinaries, but, in our view, the action was justified. We can understand the claimant being cautious about his health but the evidence suggests that this absence was triggered by a justified disciplinary action against him.

215. The second absence which was taken into account when moving from the welfare meeting to ABH1 was that from 24 May 2019 to 7 June 2019. ABH1 was conducted by LS on 16 June 2019 (outcome page 991). That outcome letter indicates that LS accepted that there were underlying medical issues which she summarised. The claimant blamed what he regarded as a lack of duty to care by individuals towards him and explained that he had been referred to a stress management course. The first respondent had accommodated him to leave work at 15.00 in order to attend the course at 18.00. He repeated that he did not consider the adjustments to be reasonable which imposed an additional financial burden upon him. The minutes of the ABH1 are at pages 993 to 999. LS administered a first formal absence warning which the claimant appealed to SS.

216. In context of the rest of the chronology, this absence ends when the claimant returns to start work on the RJ contract. On 20 May 2019, the claimant had complained to AS about the reduction of his money in the following terms (page 959),

    "Now it's more than eight months and why your management is still struggling to understand the full meaning of 'reasonable adjustments' it's beyond comprehension to me."

217. We consider this to have been a very rude statement, even giving latitude for the anxiousness the claimant was experiencing about his condition. It suggests to us that he had no understanding that any other consideration apart from his own should reasonably carry weight in the management decision. There was an error in the original roster because it shows PT hours. That was corrected. The start date of the absence immediately before ABH1 (24 May 2019) also was the date on which AS wrote (page 960) saying that error would be corrected but that the claimant would otherwise be paid in accordance with his terms and conditions. Page 961 is an email by which IP sent the corrected roster on what was the claimant's first day of a sickness absence. We stress that there is no reason to think that the claimant was not genuinely unfit; he was certified unfit by his GP. However the reason given was "reactive depression, work related stress, very low mood, insomnia" (page 963). Based upon the surrounding circumstances it seems to us that the claimant was, at least in part, reacting to this news about the money he would be receiving on the new roster.

218. For that reason, we do not think that the absence 24 May 2019 to 11 June 2019 related directly to his then disability of heart condition itself. It was a reaction to the financial impact of the new roster which accommodated his need for earlier finish times but permanent full time hours.

219. We consider that the decision to manage the claimant's absence at this time in accordance with the policy was a reasonable one. It would not have been reasonable to ignore the mistakes he made or to fear going through a fair process with him. The absence between 24 May 2019 and 11 June 2019 was, we find, triggered by workplace matters rather than by the claimant's heart condition. The respondent cannot be expected to ignore his absences or his

poor performance in case they upset him, provided they manage the processes fairly.

220. As we say, the claimant appealed to SS and the minutes of the appeal hearing are at page 1036. The matters of concern raised by the claimant in the ABH1 appeal predominantly concerned the matters complained of in the grievances about individuals and appeals. It seems to us that he seeks to rehear matters which had been dealt with in other procedures. His perception of those matters were affecting his mood.

221. Following the hearing, on 9 August 2019, the claimant forwarded to SS details of the medication which he had been prescribed. When the appeal outcome hearing was postponed, the claimant wrote to inform SS that he was suffering from stress and depression due to alleged gross negligence and, as he had in the appeal hearing, repeating the request that the roster he had advocated be implemented and saying that the RJ roster does not fulfil "my financial burden" (page 1054).

222. The claimant's rationale for not having the first formal warning is that the first two absences (from 2018) related to heart problems - see page 994 which shows that the absences which led to the August 2018 welfare meeting included absences for chest pains. However, that welfare meeting was not formal action against him. The absences with which LS & SS were concerned at ABH1 were not related to his heart condition itself. In any event, even though the chest palpitation absences were the reason why the welfare meeting was held - and therefore enabled the respondent later to start the formal stage of the managing absence policy – we do not think it was unreasonable for the respondent to hold the meeting. It was the informal stage of the formal process following which the employee has clear notice of what's expected of them in terms of attendance. We do not think that is unreasonable, even though those absences arose in connection with the heart condition.

223. At the reconvened meeting on 29 August 2019 (page 1077) SS's reasoning was that it was reasonable to take account of the two absences from that LS did for the first stage warning. This was an appropriate decision, in our view.

224. In the meantime, the claimant had had further absences which are detailed on the return to work interview form on page 1032 dated 27 July 2019. He had been absent between 27 June and 27 July 2019. The reasons given were "stress related, work related, depression, anxiety".

Second Disciplinary

225. There had also been a further disciplinary investigation into an allegation that he had sent a bag onto the conveyor belt when checking in a passenger without securing a tag on it. The incident was said to have occurred on 16 June 2019. The statement from the claimant on that date (page 1002) includes

the explanation that he had printed two tags and had got confused; he was supposed to be shadowing but had been asked to do checking in.

226. The investigation meeting took place on 22 June 2019 in which SaSa pointed out that tagging bags is done on all check-ins and that the claimant is an experienced CSA (page 1005 @ 1008). The disciplinary hearing was conducted by SC on 20 August 2019, after the claimant's period of sickness absence (page 1056). It appears from the minutes on page 1058 that SC believed that the claimant had a first formal warning for 6 months in place.

227. The claimant appealed (page 1067), including on the basis that the 6 month warning imposed by SC on 17 February 2019 should have expired on 17 August 2019 (the wrong year is in his appeal letter) and therefore should not have been given a second formal warning valid for nine month on 20 August 2019. This was corrected and downgraded on appeal: page 1099 – 1110. It seems more likely than not to us that this was a simple error; the incident had taken place within the currency of the warning but the disciplinary hearing had not.

228. It is worth noting that the claimant doesn't deny the incident took place but says that the first respondent was putting him under so much stress that they were responsible for it. In this instance in appears from the information provided by the claimant at the appeal hearing that the passenger was reunited with the bag 48 hours later. It is probable that that was inconvenient for the passenger and risked loss of reputation for the first respondent. We can well imagine that there are also security concerns about handling bags where the owner cannot be identified. We find that, in all the circumstances, it was appropriate for the respondent to investigate under the disciplinary policy and are satisfied that the reason why the first formal warning was imposed was because of the claimant's conduct.

ABH3 triggered

229. As we have noted, by the time of ABH1, the claimant had already had a further period of sickness absence. In his return to work interview (page 1032) it was recorded that, following the absence 24 May 2019 to 11 June 2019, he had had an absence from 27 June to 27 July 2019 of 21 days. This meant that he now had a total of 992 points and 4 absences. The reason for the latest absence was "stress related/work related/depression and anxiety." Under concerns about work it was recorded that the claimant had said "Managers should stop unfavourable treatment causing you stress/anxiety".

230. The 31 August 2019 invite to ABH3 is at page 1085. It states that at ABH1 on 16 June 2019 he had been told that "your absence score was 688 points and 4 instances and if you increased this by 50% or a further 2 instances would move

to the next stage of the process" (see the record of that warning on page 998). He was also informed that since his recalculated score of 1150 points and 5 instances meant that he had triggered on points and instances ABH2 would be omitted.

231. The meeting took place on 9 September 2019 (page 1092). The policy permits a jump from ABH1 to ABH3 where there have been 2 further instances of sickness in the next months. However it was triggered because he had both triggered on the points increase and the absence criteria (see page 1093) and therefore was in accordance with the policy to move to ABH3. His points trigger had been set at 1032 and a further 2 instances. Where the invite at page 1085 states that he had had a total of 5 instances by then that was inaccurate because he had had absences between 27 June 2019 to 24 July 2019 and 20 to 23 August 2019.

232. Our finding is that the first respondent applied the process and didn't adjust it for the claimant. By this time he was working on the Royal Jordanian contract. He had returned to work and started work on that contract on 11 June 2019. At this time it was "deemed that no underlying medical issues which would require medical intervention" and, according to our findings, the claimant was not yet disabled by reason of mental impairment.

233. We note that the respondent appears, to an extent, to have taken a different approach to absences because of symptoms overtly connected with the heart condition compared with those connected with depression, stress and anxiety. So the initial welfare meeting at page 611 took place after 3 instances totally 225 points whereas the policy could instigate such a meeting after 60 points. The two absences which cause the claimant to be moved to ABH1 were for work related stress, low mood and depression (page 994). We accept the timing of these were linked to periods when the claimant was in conflict at work and he himself says that the ill health is caused by the company, certain individuals and a lack of duty of care "which I have requested my requirements since last September".

234. In the ABH3 hearing his comments include complaints such as "How many meetings I have been through and I have had to spend my own money to see doctors as the company didn't agree with the company doctor. Now sick pay has run out without proper explanation. All of this adds to stress." (Page 1094).

235. This mirrors the comments he is recorded as having made at the return to work meeting conducted by BE on 27 July 2019 (page 1032). The claimant responded to a question about whether he has concerns about work which may be underlying the absence by saying "Company should and managers should stop unfavourable treatment causing you stress/anxiety."

236. The outcome of the ABH3 is at page 1098. He was issued with an absence warning dated for 12 months from 26 August 2019. There are errors in the

explanation where the points score is misstated. On page 1096, within the meeting itself, it is stated that his current points score is 1200 points and the trigger for the next stage will be a 25% increase or 1500 points or a further 1 instance. This appears both to be accurate and in accordance with the policy. However the figures included in the outcome letter at page 1098 are not accurate. The claimant did not appeal.

Sick pay entitlement dispute

237. A dispute arose in about August 2019 when the first respondent believed that the claimant's company sick pay entitlement had been exhausted (see the email from BE on page 1065 asking for an account of the claimant's entitlement).

238. We have found, that the claimant was entitled to be paid sick pay in accordance with the following term,

"Company sick pay is not applicable for the 1st day of any instance of sickness. Company sick pay is then payable up to a maximum of 150 hours at basic pay and then at ½ basic pay for a further 150 hours in any consecutive 12 months period."

239. For reasons we set out above, the claimant should have received sick pay because he did not need to acquire 12 months sickness free attendance before re-qualifying for company sick pay. His entitlement was to 150 hours full pay and 150 hours half pay in any 12 month period without further qualification. Once it reach the 12 months anniversary of the first day of sickness absence during which he had been paid company sick pay, he was entitled to be paid company sick pay again. It is not clear on the basis of the evidence before us exactly when he should have started receiving sick pay again because we have not received details of exactly when the claimant was paid sick pay and the entitlement is measured in hours not days. Given our conclusions on this issue, we will make directions for the parties to seek to agree the remaining area of dispute.

240. The claimant's complaint in LOI para.3(cc) & (dd) is about emails sent to him by GG on 21 October 2019 (page 1142) and 31 October 2019 (page 1151) – see the claimant's statement para.142 & 146. He alleges both that GG refused to investigate a formal grievance with regard to his unpaid sick pay entitlement and that he threatened him with alleged insubordinate behaviour for, from the claimant's perspective, raising a grievance. The act complained of in LOI para.3(ee) is connected with this in that, by it, the claimant complains that GG failed to respond to a grievance which he argues was brought by his email of 9 December 2019 (page 1293) – see the claimant's statement at para.158. The act complained of in LOI para.3(nn) is that the failure to pay the claimant his full sick pay entitlement is an act of discrimination. The same factual matrix therefore underpins all 4 allegations.

241. The rationale which GG gave in the email of 21 October and, subsequently, that of 30 November (page 1280 and para.38 of GG statement) was, in essence, that he declined to accept a grievance about non-payment of sick pay on the basis that the issue was covered by the Trade Union agreed collective agreement provide for in the recognition agreement.

242. For reasons which we set out above, it seems to us that the claimant's personal terms and conditions relating to sick pay did not include the limitation that, once company sick pay was exhausted, he needed to serve 12 months' without sickness absence to requalify for it. However, we are of the view that it was not an unreasonable position for GG to take to conclude that the 2016 Handbook available on the internet was an effective way of changing the claimant's contract based upon the information he had that an instruction had been given to cascade the changes down to individuals in each area. GG was unaware that the claimant had not been sent it; nor was he aware that, in 2014, the claimant had been sent the wrong version of the handbook – one which expressly included a version of the company sick pay scheme which did not require employees to serve 12 months absence free before requalifying for company sick pay.

243. The claimant was unwilling to accept that the recognition agreement (page 1257) was valid. The agreement provides, at Appendix A para.14., that the respondent shall negotiate all matters relating to terms and conditions of employment with the union (page 1262). Insofar as the claimant was arguing that he personally was not bound by a change to the handbook as part of the individual contract between him and the respondent, that was capable of being an individual grievance but insofar as he was grieving in the email dated 9 December 2019 (page 1293 and following) about negotiations which had been conducted between the respondent and the Trade Union, that was not suitable for an individual grievance.

244. GG and SS met with the claimant on 8 November 2019 to explain why GG had concluded that an individual grievance did not apply (SS statement para.21). The claimant challenged both what he was being told about the contractual entitlement and about the calculation (even were the respondent to be right about the contractual entitlement). Following that meeting, GG arranged for the calculation of sick pay entitlement to be checked and by an email dated 27 November 2019 (page 1249) told the claimant that he had been told that the number of hours recorded against the claimant was accurate. However, it seems that GG was very quickly told that there had been an error in the calculation which was corrected (see pp.1251-1252). GG further informed the claimant that his concerns about but says he will come back on the contractual point by 29 November 2019.

245. The claimant replied repeating the position that his 300 hours (half at full half at half basic pay) was exhausted for 2018/19 but not for 2019/20 (page 1273). On the 30 November 2019, the Trade Union agreement was sent by GG to the claimant with a detailed explanation of GG's position (page 1280). The

claimant wrote two emails: page 1292 - which concerned the corrections to the calculation of his hours - and page 1293 - about the decision in relation to whether his contractual right to company sick pay was exhausted. GG's evidence about receipt of this second email is at para.39 of his statement. He accepted that he did not respond to the claimant's email as he was

"again seeking to open up further discussion on a wide range of matters on which I had no direct involvement, including absence management and disciplinary processes which had concluded (and against which Anton had appealed). I was not willing to continue to open up issues which had previously been closed following the internal processes."

246. We are quite satisfied that, at the time GG received the email of 9 December 2019, he believed that he had done all of the investigations which were possible and that was the entire reason why he did not reply to the email from the claimant.

247. The other specific allegations raised in LOI issue 3(cc), (dd) and (nn) are of a refusal to investigate a formal grievance about unpaid sick pay, threatening disciplinary action in the emails of 21 October 2019 and 31 October 2019, and failing to pay the full sick pay entitlement. GG did investigate the claimant's C concerns and produced full answers and LOI issue.3.2(cc) did not happen as matter of fact. In the email of 21 October, GG merely says that he needs to review the background because the claimant may not be able to raise an individual grievance into something covered by direct collective consultation and agreement with the Trade Unions.

248. To the extent that GG criticizes the claimant in the 21 October 2019 email (page 1142) it is clear that he is warning the claimant about "some of the content, tone and style within your emails" and not the fact of bringing the complaint. GG highlights in red some statements about some of the first respondent's personnel and warns the claimant that if he does not apologise for those specific comments that could lead to disciplinary action. The highlighting is apparent in the version of the claimant's original email which is at pages 1143A to 1143B.

249. We accept GG's evidence that some staff in his team were affected by the tone adopted by the claimant. It was put to him that his warning was prescriptive and he accepted and volunteered that he had been prescriptive and assertive,

"The reason [for] the strong message back is - what the claimant doesn't understand is the upset that he may have caused members of my team in respect of individuals against whom this [was] aimed. I had to deal with those matters before [I dealt] with the claimant. I had to support members of my team - to understand that they are supported. Genuine issues for members of my team"

250. Viewed objectively, we agree that the claimant's language is not just confrontational or accusatory as is commonplace when raising concerns of great personal importance. In comments such as that against DM that she "has to take full responsibility for this unlawful deduction" or that the HR team "deliberately try to frustrate me to leave the job they trying to give me hardships as much as they can", the claimant using very heightened language and our view is that to issue some form of warning that personal targeting of individuals is inappropriate was reasonable and the sole reason for it was the specific comments by the claimant.

Events of late 2019/early 2020

251. The claimant continued to be unhappy that he was not working at times which qualified him for a shift allowances. Page 1135 is an email from the claimant to SS complaining that he has received no reconsideration of his shift pay. It appears that he was asking to be rostered on two early and two lates until 20.30 so that he may gain some shift allowances. SS replied (page 1136) saying that this cannot be accommodated within the shifts available in Terminal 3. He offers the option of the claimant trialling working at Terminal 4 again but this was not followed up on by the claimant.

252. The outcome of ABH3 (page 1098) was formal absence warning and the claimant was told that future triggers were to be 1500 points and/or a further 1 instance of sickness absence in the 12 month assessment period (page 1096). This was in accordance with the policy.

253. On 13 November 2019, SS conducted a final absence hearing because of one day's absence due to the claimant experiencing arthritis in his hand (page 1237 to 1247). SS considered his decision and said that would not dismiss but that the claimant would still be on 12 month warning from 13 November 2019 (see the outcome letter at page 1248). The claimant was also warned that any further absence within 12 months would trigger a further meeting.

254. The claimant makes particular complaints about PH's conduct of the investigation hearing on 19 December 2019 (page 1306). The claimant had been investigated for sending a bag down without a tag because on 14 December 2019 some passengers noticed when they were at the gate that they only had 3 tags when they had checked in 4 bags (page 1303). When asked for an explanation, among other things, the claimant said (page 1308)

"Mistakes happened twice in 6 months due to genuine mistake and same time and lost consideration [?concentration] and I am under tremendous and persistent stress due to company ill treatment. I will not take responsibility whatsoever over this incident and company try to penalise my work at and they have no solution whatsoever for my persistent stress."

255. It is true that, in the middle of this meeting, he asked to be placed on the transfer desk as he has ongoing stress (page 1310). In our view, this was

neither the time nor place to raise the request. We accept PH's oral evidence that his belief is that his full comment was that there is no specific role on the transfer desk at that time of year. At this time, the claimant was working in a role and doing hours and times which satisfied all of the medical evidence available to the first respondent, evidence which said that the claimant was capable of fulfilling his role. PH's response to the request was "No, we don't make jobs but we can assess you under capability". However, we do not regard this as a threat. As PH put it in his oral evidence,

"The claimant was saying at the time that check in was really problem for him and struggling at the time to do on daily basis and process available to us both would be capability."

256. We find that what PH meant was if you are not capable of doing the job of CSA we can make that assessment through the capability process. This would then require the first respondent to consider alternative roles.

257. Overall, our view of the parties' respective positions at this time is that the first respondent's managers thought that they had dealt with all of the issues raised by the claimant. However he blamed the first respondent's managers every time he made a mistake.

258. PH's evidence, which we accept, was that he didn't refuse to discuss the claimant's medical history, threaten him with capability or a reduction in hours. When the claimant said that the first respondent needs to find out why the mistakes keep happening PH said "and we will but I am not going to go down your medical history with you." Read as a whole, that is not, as the claimant appears to suggest, a statement that his medical history was irrelevant. Further, the error of sending a bag down to the handling area without a tag had potential reputational issues so it was not unreasonable for the respondent to regard it as a potentially disciplinary matter. We do not see that the seriousness of the incident was overstated in PH's investigation.

259. The claimant was then absent from work between 21 December 2019 and 1 February 2020 due to ill health. During that sickness absence, he presented a claim form on 29 December 2019.

260. LS conducted a return to work meeting on 1 February 2020 (page 1376). On same day as that meeting, the claimant forwarded a complaint to LS (page 1372). The subject line of the email is that "The following details are related to my recent sickness absence". The email is the claimant's explanation of the reason why he's suffering the stress he has been experience and, therefore, why he has had the absence. He sets them out as explanations to be taken into account within the MAP. We do not read this as having been a grievance.

261. The claimant was referred to OH. The disciplinary for the second tagless bag incident took place on 16 February 2020, so had apparently been postponed until the claimant's return from sickness absence. The meeting was conducted

by JK who was new to Terminal 3 at that time. After an adjournment JK announced that her decision was to issue a final disciplinary warning "as you are currently on a 9 month warning" (see the meeting notes page 1384 at 1388). The claimant then informed JK that he was only on a first warning because the previous warning had been withdrawn. JK then adjourned the meeting and investigated what the claimant said and reconvene when investigated.

262. We find that the final disciplinary warning was not administered because the meeting was adjourned and the warning was not confirmed in writing. The decision to issue a final disciplinary warning was made because JK mistakenly believed that the claimant was currently on a 9 month warning, based upon the information provided to her. Apparently, the records had not been updated following the claimant's successful appeal against SC's warning (SS paragraph 57). Subsequently, JK administered a second formal warning effective from 16 February 2020 for 9 months by a letter dated 18 February 2020 (page 1395).

263. On appeal this was removed (page 1402) for reasons SS gives in his paragraph 59. To the extent that the decision by JK was criticised in the claimant's email of 21 February 2020 (page 1399) that was acceptably dealt with as part of the appeal against the disciplinary warning.

264. The occupational health report dated 17 February 2020 is at pages 1390 to 1393. It contains the phrase "you do not wish for an assessment based on Mr Joseph's perceived stress relating to company management". This stems from the referral form at page 1368 where the whole question which DM asked is

"We are not asking for assessment based on Anton's perceived stress relating to the Company management, it (sic)specifically whether he fit for work for full normal duties in his contracted role."

265. Despite this, the OH physician gave the following opinion (page 1392),

"I am not in a position to know what may or may not have transpired in Mr Joseph's employment but I mention that he feels this way because it provides context of the situation and because unresolved issues of this kind have the potential to act as barriers to work on their own right. These days we increasingly understand that sickness absence tends to be a multifactorial phenomenon rather than purely a medical one. …It appears that perceived issues within the employment relationship that appear to be the principal barrier to work. In situation like this there is relatively limited scope (sic) medical intervention for what are fundamentally employment relationship problems although we would typically advised (sic) that the employee is sign posted to the employee assistance program for any supportive counselling that there may be…"

266. The claimant was cross-examined about this report and his health at the time and accepted that this passage broadly matched what he had been told by his

GP, that there was no medical resolution to his stress issues. He accepted that he had received advice both from his GP and the OH physician that there was no medical resolution which could improve his absence. He volunteered that his GP had advised him that if the management would not listen to his concerns and that was aggravating the stress and depression he should find another job.

267. We find that, in the question which we quote at paragraph 264 above, DM was trying to get the OH physician to focus on the actual medical rather than perceived management problems. Her oral explanation, which we accept, was,

"I wanted a report on his health only. Not his perception of the management and his personal opinions of his management."

268. Perhaps this could have been better expressed since one might read it as suggesting that the claimant did not suffer stress but we do not think it improper, in effect, to point out that the claimant's complaints about management conduct were not necessarily accepted.

269. In his OH report, Dr Ohja told the respondents that the claimant has long term mental health problem and that his advice is that there is no medical resolution to difficulties of this kind (page 1392). The long term condition is stated to be "long-term chronic condition (ischaemic heart disease) and the stress alongside his anxiety and depression had been ongoing for 18 months." The opinion was that the claimant was fit to perform his current role with suitable amendments if available at the management's discretion. What he suggested was some discussion between the claimant and management to restore the employment relationship. No specific additional adjustments to the requirements of the role were suggested.

270. The claimant was then referred to final meeting on 12 March 2020 under the MAP conducted by SS. The minutes are at page 1407 and the invitation letter at page 1401. At the time of the hearing the claimant was at work. The hearing concerned an absence of over a month which concluded with his return to work on a phased return on 1 February 2020. The first question he was asked was about the "roster adjustment" and the claimant replied that it was a good roster. In answer to question about a good working relationship says that there is a "Collective effort to get rid of me. Systematically and unfair treatment". SS asked if he had gone to counselling and C said that was not effective because put on hold and he did not find the EAP helpful.

271. When the claimant was asked if his attendance was acceptable he said that the company needed to take responsibility. SS outlined to the claimant (see page 1411) that there was a pattern of absence occurring after performance related issues; for example, the second bagless tag was on 20 December 2019 and the absence started on 24 December 2019. SS refers to there having been some errors in the disciplinary process but, "I admit some errors have been made but they have been resolved to your benefit."

272. The claimant, on the other hand does not give any reason to think that anything will change

> "I'm in this position to day due to management own action, therefore management has to consider seriously about my wellbeing if they are looking to get improvement attendance rather than keep treating unfairly and unreasonably"

273. SS decided to terminate the claimant's contract "with immediate effect". His rationale, as expressed in the hearing included,

> "Based on OH report and your lack of participation in resolving these issues and the fact I have already given you an alternative to dismissal in your previous final absence hearing I am afraid I will be terminating your contract of employment with immediate effect."
>
> We also accept SS's statement evidence (his paragraph 78) that he had reached the conclusion that they were unlikely to see a significant and sustained improvement in the claimant's attendance. Further, on page 1415 SS told the claimant "OH report clearly states you are of (sic) work due to your views of the company – this is unacceptable".

274. The claimant had been invited to and had made some corrections to the minutes of the meeting at the time and wrote to correct further details in his email of 15 March 2020 (page 1416). Among other things, the claimant said that a reference by SS to the first ET claim had been omitted. SS had been served with that claim on 15 July 2019.

275. The outcome letter is dated 16 March 2020 (page 1418). The claimant was told that any appeal should be lodged within seven days. The outcome was dismissal with immediate effect and the claimant was told that he would be paid "4 weeks' notice in lieu of working". This was an error; given the claimant's length of service he was entitled to 12 weeks' pay in lieu of notice.

276. The claimant appealed his dismissal on 28 March 2020 (page 1420) explaining the delay as being due to health grounds. It was accepted out of time. The bases for the appeal included that

    a. There were errors in the minutes of the meeting of 12 March 2020;
    b. SS wasn't impartial;
    c. The payment in lieu of notice was incorrect;
    d. The company had "Failed to intervene earlier to prevent further sickness" and ignored his length of service. He blamed his sickness on his relationship with SS and
    e. At page 1422 the claimant set out various complaints which broadly mirror those which have been the subject of this hearing.

277. The claimant was invited to an appeal hearing to be conducted by MA, the Operations Director on 23 April 2020 (page 1428). The minutes of that hearing are at page 1429. It was scheduled to be conducted by Zoom video platform at the claimant's request. MA accepted that the 4 weeks' pay in lieu should be 12 weeks' pay and informed the claimant that, if the dismissal were not overturned on appeal, he will be paid the additional 8 weeks. Then the claimant informed MA that he wished to adjourn the hearing because he was under stress and wished to have a face to face meeting (see page 1432).

278. There was then a face to face meeting on 29 April 2020 (see invite at page 1443 and the minutes at page 1449). MA asked the claimant about any uptodate information regarding the claimant's health but the OH report of 17 February 2020 was still the current medical evidence.

279. MA took time to consider his decision. The outcome, upholding the decision to dismiss but awarding notice pay of 12 weeks, was given in writing by letter dated 5 May 2020 with an electronic signature (page 1486). We are satisfied that this letter was approved by MA before he signed it using a digital signature platform.

280. We consider that SS was impartial in the way that he approached the decisions he was faced with in this matter. We make that finding because he showed his impartiality by his decisions at the first final hearing under the MAP (when he declined to dismiss) and when he overturned the second disciplinary warning administered by JK – which was a decision open to JK within the terms of the policy. In these decisions, he exercised discretion in the claimant's favour. While, as SS accepted, it may well have been unfair had he dismissed for that absence, the fact that he could see that that absence should be viewed differently shows he was able to assess the claimant's case impartially. Notwithstanding that, MA's approach was to reconsider the arguments and his involvement addresses any concern there might have been.

281. A specific criticism of MA is the allegation that he refused to investigate an alleged grievance of 21 February 2020. What he said, as set out in the outcome letter, was that "we would only hear your appeal against the decision to dismiss you and not cover grievances raised in the same correspondence". In the circumstances, this was an appropriate course of action and done to focus his task on the grounds of appeal.

Law applicable to the issues in dispute

The meaning of disability

282. A person has a disability, for the purposes of the Equality Act 2010 (or hereafter the EQA), if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EQA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the

effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT. As it says in paragraph B1 of the Guidance on the definition of disability (2011), this requirement reflects the general understanding that disability is a limitation going beyond the normal differences which exist among people.

283. When considering whether the adverse effects on the claimant's ability to carry out day-to-day activities are substantial the following factors are taken into account (see the Guidance Section B),

    a. The time taken to carry out an activity,

    b. The way in which an activity is carried out,

    c. The cumulative effects of impairments,

    d. How far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of the impairment,

    e. The effects of treatment

    f. There may be indirect effects, such as that carrying out certain day-to-day activities causes pain or fatigue (See Guidance on definition of disability (2011) paragraph D22).

284. In the Court of Appeal's decision in All Answers Ltd v W [2021] EWCA Civ 606, their summary of the relevant law is at paras 24 to 26:

    "24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities….

    25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056,...

    26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after

the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

285. The EQA provides that, where an impairment is being treated, then it is to be treated as having a substantial adverse effect if, but for the treatment, it is likely to have that effect (Sch 1 para 5(2)). However, where the effect of continuing medical treatment is to create a permanent improvement rather than a temporary improvement it is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect (See 2011 Guidance at B16 and C11). And C5 and following.

286. When considering the effect of a mental impairment such as depression the most frequently cited case is J v DLA Piper [2005] I.R.L.R. 608 EAT. Paragraphs 40 & 42 of the judgment of Underhill LJ read,

"40: Accordingly in our view the correct approach is as follows:
(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.
…
42: The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within

the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – […] - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived."

287. This passage was applied in Herry v Dudley MBC [2017] ICR 610 EAT paras 55 & 56 where HH Judge David Richardson commented that,

"experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievance, or a refusal to compromise (if there are similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction, but in the end the question whether there is mental impairment is one for the employment tribunal to assess."

Direct discrimination

288. The claimant alleges that he was the victim of a number of acts of disability discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting him to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

289. All claims under the EQA (including direct discrimination, discrimination for a reason arising in consequence of discrimination, victimisation and harassment) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the following guidance is still applicable to the equivalent provision of the EQA.

    a. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

    b. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

290. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconsious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

291. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

292. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

Discrimination arising from disability

293. Section 15 EqA provides as follows:

"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."

294. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

"In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or

any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."

EHRC Employment Code paragraph 5.6.

295. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

> "the proper approach can be summarised as follows:
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
>
> (e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the

chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

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

296. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

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

b. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

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

d. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

e. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see *Hardy & Hansons plc v Lax [2005] ICR 1565* , paras 31–32, and *Chief Constable of West Yorkshire Police v Homer [2012] ICR 704* , paras

20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

297. The other potential defence is lack of knowledge of disability. This requires the respondents first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA)

Harassment

298. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

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

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

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

(i)violating B's dignity, or

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

(2) …

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

(a)the perception of B;

(b)the other circumstances of the case;

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

299. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT (a race related harassment claim) at paragraph 22, Underhill P (as he then was) said:

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by

racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

300. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

301. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

302. In Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31, the EAT considered the meaning of "related to" within s.26 EQA and contrasted it to the test of "because of" within s.13 EQA,

"Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. … "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It

was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

303. It should be noted, however, that by reason of the definition of detriment within s.212 EQA, conduct cannot both be direct discrimination and harassment.

Breach of the duty to make reasonable adjustments

304. The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EqA 2010.

a. By s.39(5) the duty to make reasonable adjustments is applied to employers;

b. By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

c. When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

d. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

e. By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EqA 2010, was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it

could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

f. Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

305. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions."

306. The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL where it was described as being "triggered" when the employee becomes so disabled that he or she can no longer meet the requirements of their job description. In Mrs Archibald's case her inability, physically, to carry out the demands of her job description exposed her to the implied condition of her employment that if she was not physically fit she was liable to be dismissed. That put her at a substantial disadvantage when compared with others who, not being disabled, were not at risk of being dismissed for incapacity. Thus the duty to make reasonable adjustments arose.

307. Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it was explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP. So there the PCP had been a refusal to allow a phased return to work and the comparator group was other employees who were not disabled and were therefore forthwith able to attend work and carry out their essential tasks; the comparators were not liable to be dismissed whereas the disabled employee who could not do her job, was.

308. In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

"The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on

behalf of the employer or any physical features of premises which the employer occupies"

309. Furthermore (at para.19);

"The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

310. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

311. The question of whether protection of pay or changes to pay can be the subject of a reasonable adjustment was considered by the EAT in G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820 when it was held that there was no reason in principle why pay protection should not be regarded as a reasonable adjustment; the question is always whether it is reasonable for the employer to have to take a particular step to alleviate a substantial disadvantage. Nonetheless, it would not be "an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent" (Powell at para.60). O'Hanlon v HM Commissioners for Revenue and Customs [2007] IRLR 404 CA is an example of a case where it was held that it would not be a reasonable adjustment to apply the sick pay rules differently in the case of a disabled employee. The respondent relies upon Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley (UKEAT/0417/11) as an example of a case where the EAT found that the relevant PCP did not put the employee to a substantial disadvantage when returning to work on a part-time basis because she was in no different situation to anyone else returning to work on a part-time basis for a different reason, such as maternity.

Victimisation

312. Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. In this case it is common ground in all bar two instances, that the claimant did protected acts as set out in the LOI. The claimant has confirmed that he no longer relies on those two. The question for us to decide is whether the acts complained of or any of them were done because the claimant did those protected acts.

313. The determinative issues in the present case are therefore likely to be first, whether the claimant suffered a detriment or detriments as he alleges (which requires us both to consider whether the core facts alleged are made out and whether they amounted to a detriment in law) and secondly, what, subjectively,

was the reason that the respondents acted as they did. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases.

Unfair dismissal

314. The starting point in relation to the unfair dismissal claim is s.98 of the Employment Rights Act (hereafter the ERA). It is for the respondent to satisfy the tribunal of the reason for dismissal and that it was one of the potentially fair reasons which include capability, by which in the present case is meant the capacity to carry out the role which the employee is engaged to fulfil for the hours which he is contracted to provide. If the respondent can show that the reason for dismissal was a potentially fair reason we need to go onto consider the general fairness considerations in s.98(4) ERA. Alternatively, a dismissal is potentially fair if it was for some other substantial reason of a kind which justifies the dismissal and this is relied upon in the alternative by the respondent.

315. In the case of capability dismissals it is relevant to consider the decision of East Lindsey District Council v Daubney [1977] ICR 566 EAT. Mr Justice Phillips, as he then was, amongst other things, said the following:

> "Unless there are wholly exceptional circumstances before an employee is dismissed on the ground of ill health, it is necessary that he should be consulted and the matter discussed with him and that in one way or other steps should be taken by the employer to discover the true medical position."

316. Thus the following are relevant matters for us to consider when looking at the relevant respondents (by which we mean the first respondent, SS and MA) decision to dismiss and whether it was reasonable in all the circumstances.

a. Did the respondents take sensible steps to consult the claimant and to discuss with him his condition and his continued employment?

b. Did the respondents inform themselves of the true medical position?

c. Did the respondents keep abreast of changes in the claimant's diagnosis and prognosis and seek up to date medical information if none was available?

d. Did the respondents consider what could be done to get the claimant back to work?

e. Did the respondents consider alternative employment and whether that was available?

f. In general, there is a balance to be struck between the employee's need for time to recover from his illness and the employer's need for work to be carried out.

317. An important consideration for the Tribunal is "whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice": Monmouthshire County Council v Harris (EAT/0332/14 para.60).

Conclusions on the Issues

318. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Was the claimant disabled by reason of a mental impairment prior to 23 December 2019?

319. The respondents accept that the claimant had a mental impairment, namely stress, anxiety and depression from 23 December 2019 and that it had knowledge of that from that date. The claimant argues that he was disabled at all material times for the purposes of the claim prior to 23 December 2019 that the respondents had actual or constructive knowledge from that date (see LOI para.2). However, during the hearing, it was argued that the respondents had actual or constructive knowledge that the claimant was disabled by reason of his mental impairment from receipt of Dr Thomas's report on 4 April 2019. This is also the pleaded case (para.9 on page 140).

320. The evidence about anxiety in 2010 does not support a finding that the effects at that time lasted 12 months. For that reason, this is not a recurring condition. We have found that there was an isolated psychological problem at that time and then deteriorating mental health from late 2018, but especially from January 2019 onwards.

321. We have found that the claimant first consulted his GP about "stress at work" in December 2018 (para.27 above). By the time the claimant saw Dr Thomas on 27 March 2019, 3 months had passed. As we say in para.28 above, initially the claimant's psychological symptoms are likely to have been a reaction to his dissatisfaction with the actions of management; that is consistent with the description as stress at work. He had previously had issues about particular situations, none of which seemed to last for lengthy period of time. At the time he visited Dr Thomas, the significant adverse impact of psychological symptoms had not yet lasted 12 months. There is no evidence, certainly none in Dr Thomas's report, that those symptoms were projected to last long enough to be 12 months overall. As at March 2019 when he visited Dr Thomas, the impact on the claimant of his psychological symptoms was not yet long term in the sense required by statue. It is when those symptoms had lasted 12 months that we conclude the claimant was disabled within the meaning of the statutory definition by reason of the mental impairment of stress, anxiety and depression. We conclude that the claimant disabled by reason of a mental impairment from December 2019.

Knowledge of Disability

322. The respective submissions make clear that the difference between the parties on this are in CWS1 para.75, RWS1 para.65 to 72 especially para.72, CWS2 para 8, and RWS2 para. 11 to 14. In essence, the claimant relies upon receipt of Dr Thomas's report on 4 April 2019 and the information disclosed in the return to work interview forms from June to August 2019. The respondents argue that it is the start of the period of absence in December 2019 that they knew or ought to have known of disability due to stress, anxiety and depression.

323. We consider the reasons given for the absences in May, June and July 2019 and the relevant medical notes. They refer variously to reactive depression, work related stress, very low mood, insomnia, (page 1753), depression anxiety work related stress (page 1755), stress at work and depression (page 1755). Whether or not as a matter of fact the claimant was disabled at this point (and we have found that he was not), the information then available to the respondents would not reasonably have alerted them to this being a long term problem. The absences were associated with specific procedures or events at work and were probably reactions to them. That was certainly how the respondents reasonably regarded them.

324. We agree with the respondents' argument that it is not until the December 2019 absence, the first after we have found him to be disabled by reason of the mental impairment, 9 months after the respondent received information via Dr Thomas' report that the claimant has recently been found to have moderate depression and anxiety that the respondents knew or ought to have known of the fact of disability. That certified absence started on 23 December 2019. We conclude that the respondents had actual or constructive knowledge of disability by reason of the mental impairment of stress, depression and anxiety from 23 December 2019.

Pleading Points

325. The clarification provided by Mr Sanders in RWS1 paras 25 and 26 indicates that the objections taken in the LOI paras3.2(s), (u), (v), (y) – (bb) and (oo) are not to whether they are part of the claimant's pleaded claim but whether they can succeed as claims of direct discrimination. As such, we set out our conclusions on those below.

326. The pleading points are thereby reduced to those concerning 2 allegations only: the allegation that BE's actions on 20 February 2018 were direct discrimination, discrimination arising from disability or harassment and the allegation that DM's actions when corresponding with Dr Watts, the OH physician, on 22 January 2019 were direct discrimination, discrimination arising from disability, harassment or victimisation.

327. As to the first of those matters, we consider that a fair reading of para.51(ii) of the amended particulars of claim in the first 2019 claim (page 69) is that no distinction can reasonably be made between the actions alleged against BE in relation to 20 February 2018, 14 February 2019 and 28 April 2019. All are referred to there as alleged acts of harassment. It has been accepted by the respondent that the last two can also be argued to be contrary to s.13 and s.15 EQA. It is plainly, we consider, raised as an allegation of harassment.

328. The second of these is accepted to have been pleaded as a harassment claim (RWS1 para.25(b)) but argued not to be any other type of claim. This is disputed by the claimant (see CWS2 para.4). We accept the arguments on behalf of the claimant that the allegation against DM is on the face of the amended particulars of claim as an allegation of direct discrimination, disability related harassment and victimisation. It is therefore not on the face of the pleadings as a claim of unfavourable treatment contrary to s.15 EQA.

329. The desire of the claimant to rely upon the above as other types of discrimination, harassment or victimisation to that which appears on the formal pleading has been known since the List of Issues was negotiated. The matters have been thoroughly covered in evidence by the relevant witnesses without apparent sign of prejudice to those witnesses in recalling the events. The factual matters are referred to on the face of the pleadings and therefore, at worst, the claimant seeks now to relabel existing claims as different types of legal wrong. We consider that the prejudice to the claimant in refusing leave to do so would outweigh any prejudice to the respondent in having to respond to the claims. Taking all of those matters into account, we grant any leave necessary to the claimant to amend his claim to argue it as set out in the Updated Agreed List of Issues.

Direct discrimination

330. Where appropriate to do so, we also set out in this section our conclusions on whether or not the actions alleged by the claimant in LOI paras.3.2(a) to (oo) amounted, in law, to discrimination arising from disability, disability related harassment and victimisation.

331. LOI para.3.2(a) and (b). Our full findings on the introduction of the first respondent's standard terms are set out in paragraphs 56 to 74 above and we have regard to those but do not repeat them. The claimant had been on the waiting list for a full time contract for some time when he was given the opportunity to work full time hours on a temporary basis which continued from 9 January 2013 until September 2014 when a permanent full time contract on the first respondent's standard terms was offered to him. What DM did was to explain to the claimant that the permanent full time contract was only available on those standard terms and that, if he wished to stay on his Aviance contract, he needed to do so on the contractual part-time hours. The issue for us was whether the contract was varied to become a full time contract on Aviance standard terms. We have found that when the claimant started to work full time

the change was initially categorised as temporary and the first respondent consistently explained this to the claimant. In those circumstances, we are not satisfied that there was a permanent variation of contract to full time hours until the written contract was signed. Therefore the claimant has not shown that DM threatened and/or tried to coerce the claimant to reduce his hours to part-time. She merely stated the accurate contractual situation.

332. Neither has the claimant shown the facts alleged in relation to LOI para.3.2(b). DM did not pressurise the claimant into signing the new contract and explained the terms relating to sick pay in the new standard terms (see paragraph 66 and 74 above). The factual allegation against DM is not made out. The direct discrimination, s.15 EQA, and disability related harassment claims based upon LOI paras.3.2(a) & (b) are not well founded and are dismissed.

333. As to LOI para.3.2(c) it is true, in one sense, that the first respondent sought to vary the claimant's sick pay entitlement between October 2014 and the November 2019. The claimant had been sent a copy of the first respondent's handbook which contained the limitations on availability of sick pay set out in paragraph 75 above. This was sent in error and the then applicable version contained a further limitation that, once exhausted, an employee needed to serve 12 months without further absence to re-qualify for sick pay. Changes to the terms and conditions should be made by consent (see paragraph 80 above) but the terms as to sick pay are covered by collective bargaining with the recognised union. The trade union agreed to this change but there is no evidence to show that the change was communicated to the claimant and our conclusion based upon the evidence before us in the present case is that there was no consensual change to this claimant's terms and conditions relating to company sick pay.

334. When the claimant challenged the position that he had exhausted his company sick pay entitlement, the first respondent, through GG, genuinely and reasonably (but, viewed objectively, mistakenly) believed that there had been an effective change of contract to adopt lawful changes to the handbook and, therefore, that the claimant was bound by the updated company sick pay policy (paragraph 83 above). In that sense, the respondent did not in 2019 *seek to vary* the claimant's sick pay entitlement but to *enforce* the contract as they believed it to be. This was detrimental to the claimant but the entire reason for doing so was GG's mistaken belief at the time as to what the terms were, Therefore, this act was not less favourable treatment than would have been given to a non-disabled employee and was not done because of disability. Furthermore, it was not related to disability but to the changes to company sick pay provision which had been introduced via collective consultation and therefore did not amount to disability related harassment. The fact that the claimant did not realise that the first respondent regarded the company sick pay to have been exhausted until he was absent on sick leave (which was not, in 2019 prior to 23 December 2019, disability related sick leave) does not make the action of the first respondent (or GG) related to disability. The reason for

GG's actions did not arise in consequence of disability and the s.15 EQA claim is not well founded.

335. LOI para.3.2(d). We have found that BE did not require the claimant to rush to the gate. At worst this amounts to a difference of opinion between the claimant and BE as to whether he would have enough time to reach the gate without having to rush. Our finding is that the claimant misconstrued BE's request that the claimant should go directly to the gate (see paragraph 100 above). The core factual allegation is not made out. In any event, the action was not related to disability or done on grounds of disability or anything arising in consequence of it and the claims under ss.13, 15 and 26 EQA are not well founded.

336. LOI para.3.2(e) is an allegation that DT treated the claimant less favourably than he would have treated another comparable employee when he did not uphold the claimant's 2018 grievance. We have found that the changes to the company sick pay entitlement about which the claimant complained in that grievance were not unlawful because there was an agreed variation of the contractual terms. For the avoidance of doubt, the issue about whether it was necessary to requalify for company sick pay did not arise until after the conclusion of this grievance. We are therefore find that the claimant has not shown that he was treated less favourably than any other employee would have been in like circumstances. We also conclude that this did not amount to an unlawful act of harassment. Although the claimant wanted his grievance to be upheld, it is not reasonable to consider dismissing the claimant's grievance to have the harassing effect because the judgment of DT was sound. Furthermore, his actions were not related to disability or done because of disability or any consequence of it.

337. The factual basis of the allegation at LOI para.3.2(f) is made out: the claimant was required to attend a welfare meeting on 24 August 2018 (see paras.112 to 114 above). He had triggered the requirement for a welfare meeting under the MAP. Given that he was dealt with in accordance with the applicable policy, there are no grounds for concluding that he was treated less favourably than another employee would have been treated on grounds of disability. The reason for that absence (para.105 above) was the heart condition and therefore we consider this allegation further below as an allegation of discrimination arising in consequence of disability. We consider that it is not reasonable to regard the imposition of a welfare meeting under the policy as having the harassing effect in these circumstances: the first respondent applied the policy, the claimant had had 3 absences within the relevant 12 month period, it was the first informal stage of the formal policy and gave the respondent an opportunity to consider the then current medical evidence. Adjustments to the claimants workload were made in the form of reduced hours for 2 weeks and no heavy lifting. Overall, it was a supportive first stage of the policy. The clams under s.13 and s.26 EQA are not well founded.

338. LOI paras.3.2.(g) to (l) are a series of allegations against DM and SS arising out of their communications with the claimant and Dr Watts when they were

discussing the winter rosters for 2018 to 2019 so we shall consider them collectively. The claimant had been sent winter rosters and wanted to finish his shifts when the PR check-in closed (rather than when the flights were airborne) – see para.115 above. His GP wrote a letter supporting a request for work place adjustments as set out in para.117 above. This letter did not specify a particular time by which the claimant needed to finish and DM asked for medical evidence that the claimant was unable to work until 22.30.

339. In the discussion the claimant had with DM and SS on 21 November 2018 (page.623) he told them the hours in the roster he was working and said that he was happy with these hours – which include some late finishes. Therefore, that is what DM and SS (and consequently the first respondent) thought.

340. Notwithstanding that, by the time, on 11 December 2018 (page 648) DM told the claimant that he would continue to work those shifts, she had, by then, received OH advice recommending, at management discretion, that the shift pattern be adjusted "to ensure a more consistent start and finish time, and also that he finish any late shifts 1 hour earlier (20.15)". In other words, there is an OH recommendation that he not work after 20.15 "this amendment would remove him from having to walk to and from the gate, as well as reducing the overall intensity of his workload". There was no mention in the OH advice of medical advice that finishing late affected the claimant's sleep which was detrimental to his stress and the advice was that the claimant was fit to work his full role on full time hours.

341. DM had a conversation with the OH physician on 13 December 2018. We have found that it was not inappropriate to phone him for clarification about what seemed to her to be an inconsistency between the physician certifying the claimant fit for his full range of duties and recommending an adjustment to the time at which work was carried out. It would, perhaps, have been good practice for DM either to record a note of the call or to ask for a supplementary OH report. She effectively did that through the email communications on 22 January 2019. We have found that that communication did not change anything in OH report. It merely clarified that the basis for his recommendation was not that there was a medical reason why the claimant needed to finish work at 20.15 (see para.139 above).

342. The claimant had told Dr Watts that he was currently well and had had no chest pain or prolonged palpitations for more than 3 months and was very keen to work full-time. This is despite telling us now that he was still suffering symptoms. Understandably both Dr Watts and DM/SS acted upon what they were told at the time by the claimant.

343. So turning to the specific allegations made against DM in paras.3.2(g) and (i), on 11 December 2018 DM did tell the claimant to work his then current shifts (which included some late finishes), but he had told her that he was managing with them. Similarly, when on 14 January 2019 (page 667), DM wrote to explain her oral communication with Dr Watts and repeated that he should work

the roster patterns which were necessary to support the SLAs with particular airlines, she was relying upon what both he and the OH physician were saying to her. We are quite satisfied that DM would have written in identical terms to another non-disabled employee in like circumstances and that this was not less favourable treatment on grounds of disability. The reasons she wrote in those terms were that the first respondent needed its employees to work shifts to support the SLAs with particular airlines and the information she had from the claimant and the OH physician was that there was no medical reason why the claimant could not carry out his full job role, including at the times set out in the winter rosters.

344. We therefore conclude that these two matters were not direct disability discrimination, were not done for a reason arising in connection with disability and were not disability related harassment.

345. LOI para.3.2(h): Our findings about what was said by SS on 11 January 2019 are in paras.136 & 137 above. SS probably did say words to the effect that since the OH physician had recommended changes to be made at management discretion, the OH advice did not oblige the first respondent to make particular changes. That was the interpretation of the medical advice of both SS and DM and was a reasonable interpretation. Based upon the medical evidence they had, the first respondent did not have to accommodate the claimant's request to have an earlier start and end time in order that he could finish earlier with no effect on his full time hours. SS had said something to the effect that the claimant was a CSA and that he, SS, was aware of members of staff who had had stents fitted and were able to work as ramp agents – a more physically demanding role. However we have found that he did not say that the claimant had chosen to be a CSA and made the comment he did make with the intention of being supportive and encouraging.

346. In the context of a supportive conversation in which alternatives to assist the claimant with his symptoms which fitted the business's needs were being considered, we reject the allegation that SS's comments were reasonably viewed as a criticism of the claimant or were intended to belittle him. Any reference to having chosen the role of CSA was merely a statement of fact and seeking to encourage the claimant to have confidence that people have full working lives within the first respondent's organisation with a similar condition to him.

347. In that context, we conclude that the claimant did not suffer a disadvantage or unfavourable treatment by reason of SS's comments and also that SS's words were not said on the grounds of disability itself but because he wanted to reassure and encourage the claimant. Therefore, the direct discrimination claim is not made out. It was not reasonable for the exchange to have the harassing effect and, viewed objectively, SS's remarks do not meet the test for harassment in s.26 EQA. The reason why SS made the comments does not fall within any of those relied on by the claimant for his s.15 EQA which we have found proven: LOI issues 4.1(a), (b), (c)(i) to (iii) & (v) or (d)(iii). The

claimant has not shown that the reason for his treatment arose in consequence of disability and the s.15 EQA claim based upon this incident also fails.

348. As to LOI para.3.2(j), SS did not fail to respond to the claimant's email. He tried to do so, initially by a quick email asking for a meeting, and then by telephone (para.138 above). However, the claimant declined to meet with SS or, at first, to speak to him by phone. Following the intervention of a duty manager, the claimant did speak to SS and then they met on 31 January 2019 (para.161 above). The claimant accepted that the meeting of 31 January 2019 was entirely supportive. Therefore the claims based on this incident fails as the facts alleged have not be established to have happened.

349. As to LOI para.3.2(k) we find that the actions of DM in seeking clarification of the OH physician's advice were appropriate steps in all the circumstances. DM did not seek to get Dr Watts to change his medical advice and therefore the core facts on which the allegation is based have not been established. For that reason also the claims of direct discrimination, s.15 EQA discrimination, harassment and victimisation (LOI para.8.2(a)) based upon this alleged action all fail.

350. We have found that what GG said on 31 January 2019 (paras.159 & 160 above) was that there was no medical reason why the claimant could not work beyond 20.30, which was consistent with the medical evidence available at that date. The gravamen of the accusation is that GG said that the claimant did "not have a medical condition" (LOI issue 3.2(l)). That was not said. The core facts on which the allegation is based have not been established. For that reason also the claims of direct discrimination, s.15 EQA discrimination, harassment and victimisation (LOI issue.8.2(e)) based upon this alleged action all fail.

351. LOI issues 3.2(m) and (n) can be taken together because they both concern the disciplinary action taken because the claimant was suspected of providing poor customer service. There is no evidence that any other individual was not investigated or disciplined when the first respondent received a comparable complaint so there is no direct comparator evidence. We consider that formal action by investigating and then sanctioning the claimant on receipt of the particular complaint was appropriate. Neither act amounts to less favourable treatment of the claimant on grounds of disability nor are they in any way related to disability such that they amount to harassment under s.26 EQA. Our findings about the reason for the action preclude a finding of victimisation in relation to LOI issue 8.2(f) or (g).

352. The claimant's complaints about BE's actions in proceeding with the investigation and SC's at the disciplinary appear, in fact, to be that the grievance meeting prior to the investigation overran and the later meeting should have been postponed (despite the claimant asking for it to continue), that there was short notice of the disciplinary meeting and the failure to provide a copy of the disciplinary policy with the invitation. We do not think that the claimant could reasonably consider himself to have been disadvantaged by BE

or by SC proceeding for reasons we outline in para. 150 to 152 above, so complaints of direct discrimination and/or harassment based upon those aspects do not, in our view, amount to detriments or could not reasonably in all the circumstances be viewed as having the harassing effect.

353. LOI issue 3.2(o) relates to the decision in the 30 January 2019 grievance by SR (paras.163 to 173 above). SR investigated both points which she was asked to investigate. As we set out in para.172 above, SR rejected the grievance about alleged failure to make reasonable adjustments on the basis of medical evidence available to her at the time and because the information about shift availability confirmed that there were no shifts available in Terminal 3 with earlier finish times. She rejected the allegation of harassment against SS after considering the allegation and that was a conclusion validly open to her (see para.173). We conclude that the claimant was not treated less favourably on grounds of disability by SR's rejection of his grievance and that it is not reasonable in all the circumstances to view that rejection as having the harassing effect. Nor was her decision related to disability. The allegations of direct discrimination and harassment based upon this incident are dismissed. SR was not influenced by the fact that the complaints were protected acts and LOI issue 8.2(h) is also dismissed.

354. As to LOI Issue 3.2(p), the decision by AS to reject the grievance appeal was done on the basis that the evidence available to him did not, in his view, support a finding of harassment by SS or the other management. He did, in our view, a particularly thorough job of attempting to find an innovative solution to the claimant's desire to remain on full time hours while finishing by 20.15 (the latest finish time recommended in the OH report of 6 December 2018) while still using existing rosters and meeting the business needs (para.181 above). Although not upholding the grievance in relation to previous handling, AS did make an offer to the claimant of an immediate move to Terminal 4 – which the claimant refused even to trial (see para.182 to 183 above). In this we do not consider that his actions were less favourable treatment of the claimant compared with a non-disabled employee in materially identical circumstances or to have been done on grounds of disability. Furthermore, we conclude that the actions of AS in rejecting the appeal cannot reasonably be regarded as having the harassing effect in all the circumstances and were not in any way related to the claimant's disability. He was not influenced by the fact that the complaints were protected acts and LOI issue 8.2(k) is also dismissed.

355. LOI Issue 3.2(q). The claimant's belief that BE targeted him deliberately in refusing him leave is contrary to our findings which were that she was following the reasonable practice of not letting salaried staff go early when there were workers on overtime (see para.195 above). BE was not targeting the claimant because of his disability or anything connected with it; indeed the evidence of the transcript referred to in para.196 above is that BE refused the requests of two others for leave on the same day. In other words, she treated two other employees exactly the same. We do not have evidence whether they were disabled of not but it suggests that she did not target the claimant personally.

Furthermore, it was not harassment of the claimant to expect him to stay to work his full shift when there was no reason why he couldn't. This action, viewed objectively, is not reasonably regarded as having the harassing effect.

356. LOI Issue 3.2(r): AS quite properly expressed concern that the claimant could potentially be seen as disrespectful and insubordinate because the claimant had recorded a conversation with BE (informing her of this after the conversation started) and attempted to record another (paras.196 and 198 above). We have no grounds for thinking that AS would have not given such a warning to a non-disabled employee who had behaved as the claimant had done; his behaviour was giving concern. The entire reason for the warning was, we have found, that behaviour and it was not done on grounds of or related to disability. For that reason, the claims of direct discrimination, s.15 EQA discrimination and harassment based upon this alleged action all fail.

357. By LOI Issue 3.2(s), the claimant alleges that AS failed to take into account the financial impact to the claimant of the reduction of his shift allowance because he was unable to work later hours because of his disability and did not consider whether it would be a reasonable adjustment to continue to pay the claimant a shift allowance. What AS did was to tell the claimant, in effect, that he would be paid his contractual entitlement regarding shift allowances. Our findings in relation to the payment of shift allowances and what happened when rosters were changed are set out in paragraphs 205 to 207. In essence, shift allowances change frequently for many employees because they are contractual entitlements dependent upon whether an individual is working particular hours or on particular days. It is very usual for an employee to lose some shift allowances when changing rosters and there is never any pay protection or grandfathering arrangement. In applying the claimant's contractual terms to payment of shift allowances the first respondent, through AS was not treating him less favourably than anyone else. We agree with the respondents' argument that this allegation is not made out as an allegation of direct discrimination. We consider it further as an allegation of discrimination arising in consequence of disability and as an alleged breach of the duty to make reasonable adjustments. It is not reasonable to regard the action of AS in treating the claimant in accordance with his contract as having the harassing effect and his response in pointing out that shift allowances are contractual was not related to disability. The allegation of harassment based upon this incident also fails. Given that the reason for AS's actions was a consistent application of contract, the victimisation claim also fails (LOI Issue 8.2(l)).

358. LOI Issue 3.2(t) is the allegation that AD's failure to uphold the claimant's grievance against GG was an act of direct disability discrimination. This is also relied on as unfavourable treatment for a reason arising in consequence of disability and disability related harassment. In fact, she upheld the grievance in part (see para.186 above). Our findings on AD's reasons for rejecting the rest of the grievance are set out in para.188 above. We are satisfied that there are no grounds for concluding that AD would have upheld other parts of the grievance had she been considering a like complaint by a non-disabled

employee. She investigated with sufficient thoroughness and upheld the grievance only in part on the basis of the evidence before her. Her actions were not done because of any matter which arises in consequence of disability and were not related to disability. For that reason also the claims of direct discrimination, s.15 EQA discrimination, and harassment based upon this alleged action all fail. AD was not influenced by the fact that the complaints were protected acts and LOI issue 8.2(m) is also dismissed.

359. As to LOI issues 3.2(u) & (oo) – which are, in substance if not in wording, exactly the same allegation - it is true that the first respondent failed to pay the claimant the same level of shift allowances from 10 June 2019 when he started work on the Royal Jordanian contract as he had previously been paid. However, as we say in para.352 above, this does not amount to difference in treatment – the claimant was paid his contractual entitlement based upon his rostered hours and working days. As the application of a policy, it is clear that other employees would have had their shift allowances altered when transferred to the Royal Jordanian contract and did not amount to less favourable treatment of the claimant. Nor was the reason for the change in shift payments to the claimant anything other than the contractual terms. The allegations of direct discrimination, harassment and victimisation based upon LOI issues 3(u) & (oo) are dismissed (the equivalent allegations for victimisation are LOI issues 8(n) & (hh)). However, we conclude that, among the reasons for the failure to pay the shift allowance was that the claimant was on the Royal Jordanian contract and he was on that contract because of medical advice recommending that to reduce the burden of his symptoms he should finish his working day. We therefore consider this allegation further in relation to the complaint of discrimination for a reason arising in consequence of disability.

360. By LOI Issue 3.2(v) the claimant asserts that the first formal absence warning imposed on him by LS on 16 June 2019 was direct disability discrimination and harassment. The respondents argue that it should, rather, be considered as a reasonable adjustments claim. The sick note for the absence (page 963) says that the conditions which make the claimant unfit for work are “reactive depression, work related stress, very low mood, insomnia”. The claimant was not disabled due to mental impairment at this point and, therefore, the claims under s.13, s.15 or s.26 EQA cannot be concerned with whether the actions were on grounds of or related to the mental impairment. However, absences for these conditions did, in our view, arise in consequence of the disability of ischaemic heart disease because it the claimant’s anxiety and stress about his heart disease contributed to the mental impairment. We therefore consider this incident separately in relation to the s.15 EQA claim. The immediate trigger for the relevant absences were the disciplinary action taken against the claimant for his errors and/or the loss of shift allowance and we consider that the first respondent managed the claimant in according to policy. It is therefore clear that he was treated exactly the same as another non-disabled employee would have been treated and the claim of direct discrimination fails. Furthermore, the imposition of this warning was not in any way related to the disability of

ischaemic heart disease and it was not reasonable to regard lawful treatment under the MAP as having the harassing effect. The claims of direct discrimination and harassment based upon this action fail. There are no grounds for concluding that LS was influenced in her reasoning by the fact of the claimant having raised discrimination or victimisation complaints and LOI Issue 8.2(o) is dismissed.

361. LOI Issue 3.2(w): our findings about GM's dismissal of the claimant's grievance against GG are at paras.189 to 193 above. He made a decision which was amply supported by the information available to him. There is nothing from which we could infer that this amounted to less favourable treatment of the claimant than another non-disabled employee in materially the same circumstances would have received or that the grounds for the decision were the claimant's disability or anything arising in consequence of it. This act is also alleged to have been victimisation under s.27 EQA, however we are satisfied that the entire reason for GM's decision was that the allegations against GG had not been substantiated and he was satisfied that AD had conducted the first stage grievance properly. GM was not influenced by the nature of the complaints made by the claimant. The claims of direct discrimination, s.15 EQA discrimination, victimisation, and harassment based upon this action all fail.

362. LOI issues 3.2(x) and 8.2(q) concern the second disciplinary warning which was imposed by SC on 20 August 2019 when she should only have imposed a first disciplinary warning as the claimant's February 2019 warning had expired before the date of the postponed disciplinary meeting. The details are set out in para.227 above. The minutes provide evidence from which we found that SC believed that the claimant had a first formal warning in place. It was SC herself who had imposed the February 2019 warning. The incident happened within the currency of the warning but the disciplinary hearing did not. There is nothing from which to infer that the reason a second level warning was imposed was discriminatory rather than a simple error or that it was done on grounds of disability or related to disability in any way. Equally there is nothing from which we think it right to infer that the nature of the claimant's complaints influenced SC's decision on this in any way. The claims of direct discrimination, victimisation, and harassment based upon this alleged action all fail. We consider the s.15 EQA claims in relation to disciplinary action below.

363. LOI issue 3.2(y) and 8.2(r) concern the decision by SS to uphold on appeal the warning which is the subject of LOI issue 3.2(v). For the same reasons we relied on in relation to that allegation (para.360 above), we consider this matter separately in relation to the s.15 EQA claim and that of breach of the duty to make reasonable adjustments. The decision to uphold LS's warning on appeal was in accordance with the MAP and there is nothing from which to infer that a non-disabled employee in materially the same circumstances would have been treated more favourably. The decision was not related to disability. The claims of direct discrimination and harassment based upon this action all fail. Similarly, in rejecting this appeal and applying the policy, we accept that SS

was not influenced by the nature of the claimant's complaints and the victimisation claim fails. SS did allow appears in relation to disciplinary matter where appropriate which causes us to think he made decision on their merits and was not influenced by impermissible considerations.

364. The matter complained of by LOI issue 3.2(z) is BE's invitation to the claimant to ABH3. We have found that, by doing so, BE was applying the first respondent's policy which sanctioned the manager omitting ABH2 where the employee had triggered the next stage of the policy on the points increase and on the absence criteria (see para.231 above). There is therefore no evidence from which we could infer that another non-disabled employee in like circumstances would have been treated more favourably. The decision was on grounds that the claimant had triggered the next stage for action and was not related to disability. For reasons which we have already explained, we shall consider this separately in relation to the s.15 EQA claim and we agree with the respondent that this needs to be analysed as a reasonable adjustments claim because the claimant argues that these absences should have been discounted. The claims of direct discrimination and harassment based upon this action all fail. BE was not influenced by the fact that the complaints were protected acts and LOI issue 8.2(s) is also dismissed.

365. LOI issue 3.2(aa) and 8.2(t) concern the warning imposed by SaSa at ABH3. As we set out in the previous paragraphs, this was the application of the first respondent's policy which was not adjusted for the claimant. We consider the warning further below in relation to the s.15 EQA claim and the reasonable adjustments claim. However, we do not find that there are facts from which we could infer that the claimant received less favourable treatment than a comparable non-disabled employee would have received or that the grounds for the warning were disability itself or related to it. The claims of direct discrimination and harassment based upon this alleged action all fail. There are no grounds for concluding that SaSa was influenced in his reasoning by the fact of the claimant having raised discrimination or victimisation complaints and LOI Issue 8.2(t) is dismissed.

366. LOI issues 3.2(bb) is another allegation concerning the reduced opportunity to earn shift allowances. It is said that SS's refused to allow the claimant to work until 20.30 so that he could be paid his shift allowance "as a reasonable adjustment". For reasons which we explain in paragraph 359 above in relation to LOI issue 3.2(u), we reject the claims of direct discrimination and harassment based upon this allegation and consider it further in relation to the s.15 EQA and reasonable adjustments claim. We are satisfied that the entire grounds for the refusal were that the shifts which the claimant asked for would not meet business need and the victimisation claim (LOI Issue 8.2(u)) also fails.

367. By LOI issue 3.2(cc) and 8.2(v) it is alleged that GG failed to look into the claimant's formal grievance with regard to his unpaid sick pay entitlement. Our findings on this were that GG did not refuse to look into the claimant's grievance. He said that he needed to review the background because the

claimant may not be able to raise an individual grievance into something covered by direct collective consultation and agreement with the Trade Unions (paras 237 to 250 above – particularly at paras.241 & 242). He did make those investigations and met with the claimant to explain why an individual grievance did not apply. In the alternative, if the responses given by GG can be regarded as refusing to investigate the grievance, he did so because he reasonably believed the matter to be covered by collective consultation and not suitable for an individual grievance. His decision was not influenced by or related to disability in any way and we conclude that he would have made the same decision had the grievance been raised by a comparable non-disabled employee. The claims of direct discrimination, s.15 EQA discrimination, victimisation and harassment based upon this alleged action all fail.

368. As to LOI Issue 3.2(dd) and 8.2(w), we refer to our findings in paragraphs 248 to 250 above. We are satisfied that GG gave his warning because of the tone adopted by the claimant which was more than usually confrontational and liable to cause upset. GG was not in any way motivated by the fact of the claimant's complaints of discrimination and/or victimisation, the claimant's heart condition or mental health issues or by any of the matters said to have been connected with them. The claims of direct discrimination, s.15 EQA discrimination, harassment and victimisation based upon this action all fail.

369. The complaints in LOI issue 3.2(ee) and 8.2(x) are about GG's failure to respond to the claimant's email of 9 December 2019. It may not have been best practice to give no answer. In our experience, it is better for a manager in that situation to reply that he has looked into it to the best of his ability and is not going to engage in further correspondence about it. However, we have found that the entire reason why GG did not reply to the email from the claimant dated 9 December 2019 was that he reasonably believed that he had done all of the investigations which were possible and that the claimant was seeking to re-open completed internal processes (paragraph 245 above). The claims of direct discrimination, s.15 EQA discrimination, harassment and victimisation based upon this alleged action all fail.

370. Our findings about the actions of PH which are the subject of LOI issue 3.2(ff) are in paras.254 to 258 above. It was not unreasonable for the first respondent, through PH, to investigate the claimant for an error with the potential to cause reputational damage and we do not accept that the allegations were exaggerated. The statement made by PH that "we don't make jobs but we can assess you under capability" was not a threat so much as a suggestion for the route available to assess whether the claimant was capable of doing his role on check-in because he was putting forward as an explanation for his error that he was under stress at the check-in desk and suggested a position on the transfer desk. We are of the view that for the claimant to ask to be placed on the transfer desk was not a reasonable request by the claimant, who was seeking to avoid any responsibility for his own errors. The comments about medical history were in context that there could be further investigation

about why the claimant made errors but PH himself was not going to go through the medical history.

371. Consequently, to the extent that the facts alleged by the claimant against PH are made out, we are satisfied that they do not amount to less favourable treatment than would have been given to a comparable non-disabled employee who was being investigated for a similar error and put forward a similar explanation. PH's comments, in the factual context we have found, could not reasonably be regarded as having the harassing effect. The claims of direct discrimination and harassment based upon these actions fail. The claim of victimisation based upon these actions fails because there is no evidence from which we could infer that PH was motivated by the nature of the claimant's complaints in making those statements which we have found actually were made.

372. As to LOI issue 3.2(gg) and 8.2(s), we have found that the email of 1 February 2020 was not a formal grievance (para.260 above). It was a written explanation of the claimant's explanation for his sickness absence which LS was considering under the MAP. The claimant has not established the core facts underlying this allegation. Alternatively, there was no detriment to the claimant by her not treating it as a grievance and/or it was not reasonable to regard it as an act of harassment. The claims of direct discrimination, s.15 EQA discrimination, harassment and victimisation based upon these actions fail.

373. LOI issues 3.2(hh) and (jj) should be taken together. We have found that the final disciplinary warning was not administered at the hearing on 16 February 2020 (not by a letter of that date as appears to be alleged by LOI issue 3(hh)). JK announced at the hearing on 16 February 2020 that her decision was to impose a final disciplinary warning and it is clear from the minutes that she mistakenly believed based upon the information available to her that this was the next level up from the warning which the claimant was then on. When the claimant pointed out the error she investigated and the correct level of warning was that which was imposed by letter on 18 February 2020. Therefore allegation LOI issue 3(hh) has not been established by the claimant on the facts. The claims of direct discrimination, s.15 EQA, harassment and victimisation (LOI issue 8.2(aa)) based upon JK's actions on 16 February 2020 fail.

374. LOI issues 3.2(jj) and 8.2(cc) fail as claims of direct discrimination, harassment and victimisation: the entire reason for JK imposing the second disciplinary warning was that the claimant's error in sending a tagless bag down to baggage handling on 14 December 2019 – the second such incident in 6 months – merited a disciplinary warning and the hearing happened within the currency of the first disciplinary warning imposed on 20 August 2019 as adjusted on appeal. It was not done for any unlawful grounds and it is not reasonable to regard such a warning as having the harassing effect. As a claim under s.15 EQA, LOI issue 3(jj) is considered further below.

375. By LOI issues 3.2(ii) and 8.2(bb) the claimant complains about the wording of DM's referral to OH (see para.264 above). Our finding on her reason for including that sentence is that she wanted the OH physician to focus on the medical needs of the claimant and not perceived management problems (see para.267). We do not consider this to have been a detriment to the claimant. The OH physician explained his professional opinion to be that "sickness absence tends to be a multifactorial phenomenon rather than purely a medical one" notwithstanding DM's request. Furthermore, in asking the OH physician to focus upon his area of medical expertise, DM was not, in our view, treating the claimant less favourably than she would have treated a comparable non-disabled employee who was expressing the view that management treatment was responsible for his sickness absence and the errors which were dealt with under the disciplinary policy. It was not reasonable in all the circumstances to regard this comment as having the harassing effect nor was it related to the claimant's disability but rather to his complaints about treatment by a number of the first respondent's management in a number of different aspects of his working life. The claims of direct discrimination, s.15 EQA, harassment and victimisation based upon this statement to the OH physician fail.

376. We consider LOI issue 3(kk) to (mm) together. They are the decisions to dismiss the claimant and actions in relation to the appeal against dismissal. SS's reasons for dismissal were, in essence, that he had reached the conclusion that the first respondent was unlikely to see a significant and sustained improvement in the claimant's attendance despite having taken a number of measures to support him to remain at work. He reached that conclusion because he believed that the claimant blamed management actions for his sickness absence and those complaints had all been exhaustively dealt with through internal processes.

377. The absence which triggered this final hearing arose because of the mental impairment and started on 23 December 2019. There is no doubt that that final absence was disability related because, from that date, the claimant was and was known to be disabled both by reason of his heart condition and by reason of his mental impairment(s). It is not suggested by the respondents that the claimant was not genuinely ill. However the claimant's explanation for becoming ill and only suggestions for how to improve attendance concern his views that he had been ill-treated on a range of employment related issues.

378. We are satisfied that it was not disability itself or any complaints of disability discrimination, but poor attendance, which was the grounds for SS's decision to dismissal and, subsequently, for MA's rejection of the appeal against dismissal. We are also satisfied that the claimant was not treated less favourably than a non-disabled employee would have been who had had the same level of absence over the same period, been managed in the same way under the MAP and who was believed to be unlikely to achieve a significant and sustained improvement in attendance in the future. The claims of direct discrimination, harassment and victimisation based upon LOI issues 3.2(kk) and (mm) are dismissed (the equivalent victimisation claims are LOI issues 8.2(dd) and (ff)).

379. LOI issues 3.2(ll) and 8.2(ee) are complaints that MA did not investigate an alleged grievance made by email dated 21 February 2020. Our findings about this are at para.281 above. MA considered all points made by the claimant which were relevant to his appeal and carried out the task which he was assigned – that of conducting the appeal. We do not consider that there are grounds for inferring that claimant was treated less favourably in this respect that a comparable non-disabled employee would have been who had raised grievances within a dismissal appeal or that MA's actions were on grounds of or related to disability in any way. Neither do we conclude that there is a basis for thinking MA acted because of the nature of the claimant's complaints of discrimination. The claims of direct discrimination, s.15 EQA discrimination, harassment and victimisation (LOI issue 8(ee)) based upon this action all fail.

380. In any event, to the extent that the complaint in LOI Issue 3.2(ll) is that AS did not considering the claimant's complaint against JK (page 1399) that was taken up by SS as part of the successful appeal against JK's disciplinary action. To the extent that the claimant's complaint was that JK should not have imposed any warning at all, the grievance was futile because JK clearly acted in good faith based upon the information available to her at the time.

381. LOI issue 3.2(nn) and issue 8.2(gg) are that the respondents have, to date, failed to pay the claimant his full sick pay entitlements pursuant to his Aviance contract. There is significant overlap between this allegation and those covered by LOI issues 3.2(a) to (c) and (e) and we refer to our conclusions on those issues in paras.331 to 334 and 336 above. The straightforward answer to this allegation is that is that there was an effective, consensual change to the claimant's terms and conditions from the Aviance standard terms to the dnata standard terms with effect on 20 October 2014 when the claimant signed the permanent full time contract. It is not discrimination under s.13 or s.15 EQA, harassment under s.26 EQA or victimisation under s.27 EQA for the first respondent to pay the claimant in accordance with the terms of his contract.

382. Lest it should be argued that this complaint should be interpreted as a claim that the failure to pay the claimant company sick pay in 2019/20 was unlawful under the various sections relied upon by the claimant, we have found that GG genuinely and reasonably concluded that the claimant was bound by the standard dnata terms which required an employee to serve 12 months continuously without sickness absence before re-qualifying for company sick pay once it had been exhausted (see, in particular, para.242 above). It was this conclusion which meant that the first respondent did not pay the claimant sick pay in 2019/20 and although we have concluded that that was a breach of contract, we reject any allegation that it was discrimination (whether under s.13 or s.15 EQA), harassment or victimisation. To the extent that it necessary for us to do so, we are of the view that, the mistaken belief that the claimant was not entitled to the company sick pay being reasonable, the failure to pay company sick pay was justified such as to form a valid defence to any claim under s.15 EQA.

Discrimination arising in consequence of disability

383. We set out our findings on whether, as a matter of fact, the particular matters relied upon in LOI issue 4.1 arose in consequence of the claimant's disabilities of ischaemic heart disease and (from 23 December 2019) stress, depression and anxiety in paragraphs 29 to 47 above.

    a. For reasons we set out in paras.30 to 35, we found that the matter set out in LOI issue 4.1(a) was made out by the claimant;

    b. It is accepted by the respondent that the sickness absence arose in consequence of disability. Given the way that that phrase is interpreted in the authorities, that would have been our conclusion in any event: LOI issue 4.1(b);

    c. We found that the matters set out in LOI issue 4.1(c) did arise in consequence of the claimant's disability of ischaemic heart disease with the exception of the alleged inability "to work under pressure at check-in where a long queue was waiting for a flight".

    d. We found that the only matter set out in LOI issue 4.1(d) which arose in consequence of the claimant's disability of stress, depression and anxiety was the inability to work after 20.30 but that this did not add much to the claimant's case that this arose in consequence of his heart condition (see para.42 and para.46 above).

384. Some allegations of unlawful treatment under s.15 EQA have been dismissed for reasons set out on a case by case basis above. It can be seen from some of our conclusion above, that we dismissed the s.15 EQA claims where either the actions did not happen as the claimant alleged, or we have found that the reason for the action was one which precluded a finding that the reason was "something" which arose in consequence of disability. The arguments that the remaining actions set out in LOI issue 3.2 were unlawful under s.15 EQA can considered in relation to groups of actions. The types of action which can be considered collectively are,

    a. Disciplinary investigations, hearings and appeals;

    b. Non-payment of shift allowance, and

    c. Action under the MAP including dismissal and the appeal.

385. We turn first to those matters which concern disciplinary investigations and action: LOI issues 3.2 (m) to (n), (x), (ff), (hh), (jj). It is alleged by the claimant that when he was investigated or disciplined for errors or rudeness and poor customer service, these were matters which arose in consequence of disability. We have rejected his claim that he was unable to work under pressure, concentrate on fine details, deal with larger groups of passengers or concentrate for a long time or that, if he was, this arose in connection with

either impairment. Although the claimant asserted that he had made the errors for which he was disciplined because he had been put under stress by management, we are not satisfied that this is made out. The medical evidence was that he was fit to carry out his role in full. The two instances of sending tagless bags through occurred when the claimant was working the adjusted hours which were recommended by his OH report. He has not shown that the actions for which he was disciplined arose in connection with disability.

386. If we are mistaken about that, we have considered whether the formal action taken against him was a proportionate means of achieving a legitimate aim. The aims relied upon by the first respondent in connection with these actions (LOI issue 4.3(d)) are, in essence, alleged to be maintaining high levels of service, professionalism and service from its employees and investigating complaints in order to prevent safety and security issues arising and to protect their business reputation.

387. We accept that these were the first respondent's aims and that they were legitimate. All three of the disciplinary matters arose following complaints. We accept the evidence from a number of the witnesses, but in particular SS, about the requirements of the SLAs and the relationship with the airlines who are the customers of the first respondent. We accept that there is the potential for reputational damage if passengers' bags are lost and that this is a realistic outcome if a bag is not tagged by the CSA. In one instance the passenger had to travel without the untagged bag and was reunited with it a couple of days later. We accept that it is right and proportionate to regard these matters as potential disciplinary misconduct.

388. In general, we accept that the disciplinary action taken against the claimant was a proportionate means of achieving those legitimate aims. The claimant did not dispute what had happened but blamed his errors on the actions of his management. To the extent that he argues that there was a deliberate effort by HR and others to force him out we reject that allegation. There were errors in the way the procedure was administered. So SC initially imposed a second disciplinary warning because she believed that the first disciplinary warning was still current when it had expired. JK decided to impose a final warning because she had been provided with inaccurate information about the level of current warning that the claimant was subject to. Those errors were corrected – the first on appeal and the second following investigation by JK herself. Viewed objectively the errors were technicalities which do not affect the proportionality of the action taken against the claimant. Similarly, the fact that JK originally said that she would issue the outcome verbally and then did so in a letter was a sensible action to avoid delay given that the claimant had originally agreed to and then refused to accept short notice of the outcome meeting.

389. As to LOI issue 3.2(jj), the second disciplinary warning was appropriate and fair action by JK. It is true that it was overturned on appeal but we consider that whether or not in all the circumstances to impose a warning upon the claimant was something about which two managers, acting reasonably, could disagree.

The fact of the successful appeal does not mean that JK's decision was wrong in the first place.

390. The complaint about the failure to pay shift allowances are the subject of LOI issue.3.2(s), (u), (bb), and (oo). As we have set out above, the reason why the first respondent did not pay the claimant more by way of shift allowance (and the reason why AS and SS responded as they did where the above issues concern them personally) was that the hours worked by the claimant on the RJ contract did not, under the first respondent's shift allowance scheme, entitle him to be paid more; he was paid his full contractual entitlement.

391. However, we accept that, since he was unable to work after 20.30 by reason of disability (see para.42 above), he was working on the RJ roster because it was an existing roster (that is to say not one created especially for him) which could be accommodated by the first respondent without business inefficiency or increased cost and which offered the hours he needed and wanted to work. Part of the reason why the claimant was on that roster was that he needed to finish before 20.30. Part of the reason why he was on that roster was that he wanted to work full time. He had been offered a move to Terminal 4 where a full time roster with a later finish (but still no later than 20.30) was available which, we infer, would not have had so great an impact upon his shift allowances. However, without accepting the offer of a trial of that contract, the claimant rejected the suggestion.

392. Taking all that into account, there is a causal connection between the claimant's disability and him no longer being contractually entitled to the shift allowances which he had formerly received. The matter which arose in consequence of his disability (an inability to work after 20.30) was only one reason why he accepted the offer of a move to the RJ contract but that is sufficient for us to conclude that the reason why he was not paid shift allowances after 10 June 2019 (or not at the same level as before) arose in consequence of disability.

393. The respondents rely upon the aims set out in LOI issue 4.3(b) in relation to SS's refusal of the claimant's request to work until 20.30 (LOI issue 3.2(bb): ensuring that the roster patterns fit in with the flight schedules of (in this instance) RJ and meeting its contractual obligations to customers. Had the claimant's roster been changed he would not have been available at the start of the shift and would have been available when CSAs were no longer needed. We accept that these were genuinely aims of the first respondent and were legitimate aims. They have obligations under the SLAs and it is legitimate for them to fit the disposition of their workforce to the need for CSAs to do the work.

394. Taking into account all that had gone before, we consider that it was proportionate for SS to refuse that request. We remind ourselves of our findings in paras.205 – 206 above. Our findings about SS's refusal are at para.251. He offered again the option of trialling the move to Terminal 4. The

position of the respondent remained that the claimant needed to be allocated to work existing shifts. Given that the claimant was offered that alternative, we consider the refusal to have been a proportionate means of achieving those legitimate aims.

395. In relation to the other specific allegations within this category, the respondents rely upon the aims set out in LOI issue 4.3(c): including allocating resources for pay and benefits in the most efficient way, compensating employees for working anti-social hours, and ensuring equitable treatment of employees across different working hours. We accept that those are all genuine aims and legitimate. They are all apt to be achieved by the consistent application of a transparent shift allowance policy. The one which is apt to be achieved by a refusal to give more favourable treatment to the clamant is the last: ensuring equitable treatment of employees across different working hours.

396. Employees have frequent changes to shift patterns and frequent changes to shift allowances. There is the requirement for a period of notice to be given but otherwise pay protection is not generally paid when shift allowances change. This can happen if the first respondent acquires a new contract (as in this case) or, presumably, if they lose a contract with an airline which had flights leaving during unsociable hours. The claimant had the option of trialling a move to Terminal 4 which would have attracted a higher shift allowance than the RJ contract but refused. We accept that, given that and the fact that pay protection is not paid to other employees when they are moved onto less highly remunerated hours it was proportionate not to pay the claimant shift allowances to which he was not contractually entitled. They are designed to compensate the employee for working at hours generally regarded as antisocial and the claimant was not working those hours. There may well have been other employees transferred to the RJ contract (a new contract) in June 2019 who also had reduced pay because the hours worked no longer attracted a shift allowance. The first respondent needs to have the flexibility to be able to direct its workforce to work on particular contracts because the times of day at which they are required to work is not wholly within the control of the first respondent. The limitations which the claimant was working under because of medical need is only one factor in the objective balancing exercise and, although we take account of the fact that the claimant risked increased symptoms connected with his heart condition if he worked after 20.30 and that was why he agreed to work on the RJ contract that does not, in our view, outweigh the first respondent's needs set out above and the interests of equitable treatment of employees generally, who may have had their own personal reasons for working shifts which limited the opportunity to earn shift allowances.

397. The series of steps taken by the first respondent under the MAP against the claimant are the subject of the following specific issues argue both to be direct discrimination and discrimination arising in consequence of disability: LOI 3.2(f) (v), (y), (z) – (aa), (kk) to (mm). The claimant's sickness absences were the grounds for the action taken by each of the first respondent's managers in each of those several acts. At each stage the action taken was in accordance with

the respondent's policy. It is accepted (and, indeed, averred) by the respondent that the absences were the reason for the action taken under the MAP. Our findings are that absences which were certified by the GP to have been for psychological reasons (as those in 2019 were) – and were not directly connected with the heart condition – nonetheless arose in consequence of the heart condition because the claimant was anxious about his heart condition. In any event, if one looks at the documentation for the 9 September 2019 ABH, (page 1094) the absence on 19 July 2018 for chest pain/palpitation was one of the absences noted. That plainly arose out of the heart condition and was the absence which triggered a welfare meeting. Consequently for both those reasons all action taken under the MAP arose in consequence of disability but the degree of connection with disability is not the same in relation to all of the absences. The determinative issue for us is whether the action taken at the various stages of the procedure were proportionate means of achieving a legitimate aim.

398. The claimant argues as part of his reasonable adjustments claim that all of his absences which were disability related should have been discounted. We have regard to our findings on that part of the claim by which we concluded that discounting absences was not a step which it was reasonable for the first respondent to have to take.

399. The aims relied upon by the respondents are set out in LOI issue 4.3(e). We accept that all of those were genuinely the aims of the respondent and are legitimate aims. A highly structured approach to managing sickness absences is in place in the first respondent's workplace, achieved with the input of the recognised Trade Union. Applying such a framework consistently is a legitimate aim in itself in the interests of harmony in the workplace. However, sickness absences in general make it challenging for a business to deliver the services it is contracted to deliver and can put a strain on teams so enforcing a policy in order to promote and maintain regular attendance is also a legitimate aim. Applying an MAP is apt to achieve those aims.

400. The next question is whether the action taken at the different stages about which complaint is made was proportionate. We consider the welfare meeting on 24 August 2018 was proportionate. The claimant had had three absences due to his heart condition in 12 months and it gave the respondent the opportunity to consider the up-to-date medical evidence; they were waiting for the results of an upcoming cardiologist's appointment. It is argued that the policy does not require the first respondent to take account of the impact of disabling conditions and of whether the absences are disability related. However, we remind ourselves of the findings at para.92 above. This may be the only reference to the EQA but it is clear that the policy advises the manager that they could decide not to proceed to a hearing if there is, for example, an unaddressed need to make reasonable adjustments.

401. When ABH1 and ABH 3 are reached on 16 June 2019 (LOI issue 3.2(v) and (y)) and 9 September 2019 (LOI issue 3.2(z) and (aa)) respectively , the

absences are not directly related to the heart condition (para.210 and 224) (see wording of the relevant MED3 certificates). The claimant was not, at that time, disabled by reason of stress, anxiety and depression. Nonetheless, we accept that the claimant was unfit to work because of stress he experienced and his anxiety about his heart condition. The first respondent had made reasonable adjustments by changing the claimant's roster to one which fitted the medical need set out in Dr Thomas's report. There were no unaddressed needs for changes to his work conditions which were supported by medical evidence. The immediate trigger for the absences was the disciplinary and/or the loss of shift allowance not the hours the claimant was working. The timing of the absences was linked to periods when the claimant was in conflict at work. We are of the view that in all those circumstances, the first respondent was justified in managing the claimant according to their policy.

402. The final group of issues in this category are those concerned with the final absence hearing at which the decision to dismiss was made and the appeal against dismissal. For reasons already explained, we conclude that these decision arose in consequence of disability. Furthermore, the final absence which was taken into account by SS and MA arose directly in consequence of the disability of stress, anxiety and depression. Therefore the live issue is whether the actions were a proportionate means of achieving legitimate aim.

403. The aim relied upon by the respondent is at LOI issue 4.3(e). For reasons set out in para.399 above, we accept that those were all legitimate aims of the first respondent. Managing attendance by actions up to and including dismissal is capable of achieving those aims.

404. We have concluded that the decision to dismiss the claimant was proportionate. We refer to but do not repeat our findings at paras.264 to 281 above. On the one hand, the claimant was severely impacted by the decision because he lost his job and he was a long serving employee. On the other hand, SS took the decision (confirmed by MA on appeal) after correctly applying a process which had been accepted as reasonable in negotiation with the Trade Unions.

405. The first respondent had attempted to remedy the issues raised by the claimant. His attitude was increasingly that he bore no responsibility for his absences and we accept that the triggers for his absences were management decisions which he did not like. Our view is that the respondents acted entirely reasonably in not paying the claimant a shift allowance to which he was not contractually entitled. They were justified in disciplining him based upon errors which he made.

406. All those things caused the claimant to say that he was badly treated. That was his perspective but not, we have found, objectively the case. When this caused him to suffer symptoms which caused him to become sick and unfit for work all he could suggest as something which could improve his attendance by irradicating the periods of unfitness was that management needed to stop treating him unfairly and unreasonably (see para.272 above). The scope for

medical treatment to improve the claimant's absences was limited to counselling to try to support an improvement in the employment relationship (para.265 above). However the claimant's view was that there was a collective effort to get rid of him. Objectively, we have found no evidence to support such a view. Against that background, there was nothing the respondents could reasonably do to help him improve his attendance. As AS put it in the appeal outcome letter at page 1488

"As per the OH report there is no medical resolution which is likely to resolve the attendance issues you have, and as you have also exhausted the company processes regarding the issues you view to be outstanding without an outcome you can accept, there is a greater risk of further absences from work should your employment continue."

407. We agree that that was an accurate description of the situation notwithstanding the fact that the claimant was fit to work and also in work at the time of this dismissal. There was every likelihood of further periods of absence in the future. The last absence had been for over a month and it was not unusual for the length of the absences to be 2 or more weeks. We do not think that the first respondent could have been expected to continue to support periodic absences of this regularity and length.

408. For all those reasons, the claims under s.15 EQA are dismissed.

Failure to make reasonable adjustments

409. The first alleged PCP is that set out at LOI issue 6.2 PCP: that the first respondent will only pay a shift allowance on weekdays if employees work between 7 pm to 7 am. As we have previously noted, weekend working also attracted shift allowances and the rotating patterns worked by employees including the claimant meant that some weeks they would work at weekends and some weeks not. It is the weekday shift allowances and not the weekend shift allowances which were affected by the claimant's move to RJ. We accept that the first respondent had such a PCP.

410. It follows from our findings on the impact of the claimant's disability on his ability to work after 20.30 that this PCP put the claimant to a substantial disadvantage. Strictly speaking not the substantial disadvantage *that* he could not work later shifts as the wording of LOI issue 6.2(c) appears to suggest is his case. His substantial disadvantage was that *because* he could not work later shifts without it adversely affecting his sleep he would not be available for rosters on Mondays to Fridays which included as many hours for which shift allowances were paid as a full time employee who did not have a disability which had that effect would have been. As a result of his disability he was less likely to be paid the shift allowance while working hours which were in accordance with his welfare than a comparable non-disabled colleague.

411. The respondents argue, based upon Bagley, that the claimant was not put to a substantial disadvantage compared with a comparable non-disabled CSA because the same shift allowance policy applied to all and any CSAs moving from an evening pattern to a daytime pattern would suffer the same disadvantage. They argue that any disadvantage stems from the claimant's financial situation.

412. We consider that the present situation differs from that in Bagley because this claimant was limited by reason of disability to the times at which he could work and the first respondent would only allocate CSAs to rosters which aligned with the flight times of the airlines they serviced. A comparable CSA would not be limited in the times at which they could work and so although their rosters might be subject to change and the first respondent could direct where they worked, they were more likely to be allocated to rosters which would lead to them being paid the shift allowance. We recognise that this is not exactly the wording of the substantial disadvantage used in the LOI but consider it to be within the scope of the argument and evidence aired before us.

413. The steps which it is advocated the first respondent should have had to take are set out in LOI issue 6.2(d): that the first respondent should pay the claimant a shift allowance for an indefinite or fixed period or adjust his hours so that he finished at 20.15 in winter.

414. The point at which the claimant started complaining about the loss of shift allowance was once he transferred to RJ in June 2019. On 8 July 2019 he made a request to adjust the roster to accommodate "his shift allowances" (page 1030). We take into account our findings on the applications of shift allowances and the claimant's pattern of working on the RJ contract but, in particular,

    a. The claimant was not deprived of the shift allowance entirely because he was sometimes rostered at weekend (see e.g. page 927 – 928). He therefore did not get as much of the shift allowance as he had previously had but he did not receive no shift allowance.

    b. He was given the usual amount of notice of the change.

    c. He'd been allocated to particular contracts and the rosters were designed to provide the right number of CSAs to service the flights which the first respondent had contracted to service. The times of arrival and departure were not within the control of the first respondent.

    d. CSAs' rosters changed regularly including because of a biannual switch between the summer and winter timetables.

    e. It seems from the claimant's evidence that his understand was that if the CSA works at any time past 7 pm they would qualify for a shift allowance although we have not been taken to the details of the shift allowance policy.

f. The claimant did not have the inconvenience of working anti-social hours.

415. Both at the time the RJ contract was offered and later when the claimant asked for his shifts to be adjusted to include two later finishes within the shift allowance period, he was given the option of trialling a move to Terminal 4 and rejected it.

416. He did not raise the impact on shift allowances when he was offered the RJ contract. By that contract the first respondent had found a solution to the medical advice from Dr Thomas, the privately instructed OH physician. They acted on that advice despite their own OH advice that there was no medical requirement that the claimant should not work past 20.30. They reasonably understood Dr Thomas to have given medical advice that the claimant should not work past 20.30. The new roster also met the requirements for consistent hours and full time working. There was no medical recommendation that the claimant should work *until* 20.30.

417. We accept the respondents' evidence that there is no pay protection for shift allowance. Many CSAs work part time with shorter shifts than those worked by the claimant. We also accept the respondents' evidence that no employees receive the shift allowance for a particular pattern of working without working that shift.

418. The adjustment asked for is to pay the claimant the shift allowance for an indefinite or fixed period. A fixed period would have the effect of time limited pay protection but the shift allowance policy provides for notice to be given of a change to enable the CSA to adjust to changes caused by the change of rota – whether to personal arrangements such as childcare or financial arrangements. An indefinite payment of his previous shift allowances would simply reward him indefinitely for working anti-social hours which he was no longer working. He had the option of trialling a roster on Terminal 4 which would not have had the same impact upon the shift allowances which he was paid and rejected that without mature consideration. Although the disadvantage caused to the claimant compared with that caused to others was more than trivial, it was a disadvantage shared by others and acting equitably as between different groups is a relevant consideration. We remind ourselves of the comment in Powell that it would not be an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent.

419. Taking all that into account we do not think it would have been a reasonable step for the first respondent to have to take to pay the claimant the difference between the shift allowance to which he was entitled prior to 10 June 2019 and that to which he was entitled after 10 June 2019 either indefinitely or for a fixed period.

420. The alternative adjustment contended for is was for the claimant to finish at 20.15 in the winter. However, the claimant did not trial the other shift which met

the medical criteria. We do not think that it would be a step which it was reasonable for the first respondent to have to take for them to put the claimant onto the RJ contract but working hours which did not fit with the business needs of that contract in those circumstances.

421. LOI PCP 6.3 concerns the provision in the first respondent's sick pay policy that an employee has to work 12 months without sickness absence after they have exhausted their company sick pay entitlement before requalifying for that right. We have found that that particular part of the handbook was not part of the claimant's terms and conditions because he had been given the version of the handbook which omitted that provision. We were not satisfied that he had been notified of any different version of the handbook or that that particular provision had been incorporated into his contract by any other route. It is part of the present version of policy and the policy was applied to the claimant but should not have been. We consider that any employee, regardless of their status, would have been disadvantaged by having their contractual terms misapplied to them and there was no substantial disadvantage to the claimant by reason of what happened on the facts of the present case.

422. The claimant argues that it would have been a reasonable step for the respondent to have to take to pay his sick pay in accordance with the terms of the contract which had applied prior to 20 October 2014. Even were it the case that the first respondent applied a policy to the claimant concerning sick pay which put him to a substantial disadvantage, we do not think that it would be reasonable to expect them to effectively turn back time and pay the claimant in accordance with sick pay terms which he had voluntarily agreed to change when he agreed to work on the permanent full time contract.

423. It is not necessary, therefore, for us to consider whether it would have been a reasonable step for the first respondent to have to take to discount the claimant's disability related sickness absences in the year 2019/20. Had it been necessary for us to do so we would have taken into account the guidance in O'Hanlon. We do not think that in all the circumstances of the present case, including, in particular, that the reasons for the absences in that particular 12 month period were not all directly related to the heart condition and the claimant's view was that they were caused by management actions which we have found to be lawful, it would have been reasonable to expect the first respondent to discount or ignore those absences and to pay company sick pay. However, our principal conclusion is that this allegation fails because the first respondent acted in breach of contract towards the claimant and did not, in this instance, apply a PCP which put him to a substantial disadvantage compared with a non-disabled employee.

424. PCP 6.4 and PCP 6.5: It is the case that the first respondent's attendance policy requires employees to adhere to a certain level of attendance. We also accept that the claimant needed to be absent for reasons which included the physical and psychological impact on his of his heart condition and, in the case

of the absence from 23 December 2019 onwards, the impact of his mental impairment.

425. Under LOI issue 6.4 it is argued that the claimant was put to a substantial disadvantage of receiving formal absence warnings because of disability related absences. The term "disability related" is not one found in the statutes in this context. As used by the claimant in argument it seems to us that it can cover different degrees of causal link and the claimant argues that *all* disability related absences should be discounted, regardless of the degree of connection of the other surrounding circumstances. The relevant authorities do not require that of an employer. At all times it is a question of what is the substantial disadvantage and whether there is a step which it was reasonable for the respondent to have to take to avoid it.

426. The absences which triggered the ABH1 and ABH 3 were not directly disability related although the claimant was in the formal process because of an earlier absence which was. There was a psychological element to the effects of the claimant's heart condition. The reason for the absence between 19 February 2019 and 4 March 2019 was "work related stress affecting mood and sleep" (para.210 above). The absence was triggered by justified disciplinary action (para.214 above). The absence between 24 May 2019 to 7 June 2019 was for "depression, work related stress, low mood, insomnia" (see para.210). This absence started immediately after the claimant wrote to complain about the financial impact of the move to the RJ contract which accommodated the recommendation for an earlier finish time (para.216 above). The reason for the absence which triggered ABH3 was stress related/work related/depression and anxiety (para.229 above) and it came immediately after the investigation meeting for the second disciplinary.

427. The claimant was not disabled by reason of psychological conditions until 23 December 2019 so we have concluded that these absences were not, in truth, related directly to the disabling condition (see para.218). The relationship to the disability of a heart condition was indirect so the disadvantage relied on was, arguably, not one to which the claimant was put compared with a non-disabled employee: one with a non-disabling condition which had a psychological element which caused them to become unfit for work. We have found that the first respondent did not have actual or constructive knowledge of the mental impairment until 23 December 2019 – after the absences which triggered ABH1 and ABH3.

428. In any event, it is relevant to whether it would have been reasonable for the respondents to discount or reduce the amount of absences or not to give him warnings that the reasons for the absences which triggered ABH1 and ABH3 were only indirectly related to disability and were triggered by the claimant's unhappiness with reasonable management action. Because of the latter, there was nothing the respondents could have done to avoid those absences. Even if, contrary to our primary conclusion, the duty to make reasonable adjustments did arise we are satisfied that it would not have been reasonable for the

respondents to have to discount or reduce the amount of these absences or not give him the warnings.

429. At the point of dismissal the PCP of requiring a certain level of attendance was applied. It is clear that it was the lack of conviction that there would be reasonable and sustained improvement in attendance that caused SS to decide to dismiss the claimant and MA to uphold that decision. The last absence was disability related and from 23 December 2019 the claimant was disabled by reason of stress, depression and anxiety. In general, the claimant was, by this time, more likely than an employee who was not disabled by reason of stress, depression and anxiety to have absences related to those conditions. The duty to make reasonable adjustments therefore arose.

430. We do not think that it would have been a reasonable step for the first respondent to have to take to discount or reduce the absences to zero. All reasonable steps to support the claimant in work had been taken. He was working rosters which complied with the workplace adjustments recommended by Dr Thomas. Where possible, his duty managers released him earlier and accommodated his need to walk more slowly. The reasons for his absence were a combination of his mental impairment and his perception of workplace management matters which the respondents had done all they reasonably could to address.

431. It is also argued that the first respondent, through SS and MA, should have implemented the OH physician's suggestion of HR led mediation or waited for the outcome of CBT counselling before dismissing. The claimant's account was that the counselling was ineffective. The first respondent had previously let the claimant leave his shift early in order to attend stress management counselling which, whilst not the same as CBT, would have been designed to help the claimant react with more equanimity to decisions which he disagreed with but which, objectively, were fair. We think it extremely unlikely that HR led mediation would have been effective given that the claimant's views about HR were that there was a concerted effort to exclude him from the business. The claimant had had so many disagreements with so many manages that it would have been very difficult, if not impossible to know how to approach mediation with so many people. The claimant's view was that his absences were entirely the fault of the first respondent's managers. Mediation requires both sides to compromise and come together and we see no prospect at all that that would have happened. Viewed objectively, we do not think that either of those steps were reasonable ones for the respondents to have to take.

432. For all of the above reasons, the claims of breach of the duty to make reasonable adjustments are dismissed.

<u>Harassment</u>

433. Claims of disability related harassment based upon LOI issues 3.2(a) to (oo) are dismissed for reasons which are set out issue by issue in the above section where we explain our conclusions on the direct disability discrimination claims.

434. There are two other matters set out in the LOI as alleged acts of harassment: that on 11 January 2019 SS said that people who work in the ramp section lifting heavy bags have stents fitted and heart conditions and that by email of 8 May 2019 AS told the claimant that he had been disrespectful.

435. The first of these relates to the same incident as the allegation at LOI issue 3.2(h) – see our findings at paras.136 & 137 above. We dismiss this allegation for the same reasons as we relied upon in paras.345 & 346 above. We do not think that it is reasonable for the comments which were made to be regarded as having the harassing effect and viewed objectively what SS does not meet the test for harassment in s.26 EQA. It is important to give full effect to those words and not to encourage a culture of hypersensitivity.

436. The allegation set out in LOI issue 7.4(c) appear to be essentially the same allegations as those set out in LOI issue 3.2(r). We dismiss that allegation for the reasons which applied as set out in para.356.

Victimisation

437. We have set out our conclusions for dismissing all bar 5 of the allegations of victimisation with our conclusions on claims of direct discrimination based on the same factual allegations.

438. LOI issue 8.2(b): We explain in para.188 why we consider it appropriate for GG to have tried to engage with the claimant as an employee of the first respondent directly rather than through legal representatives. The claimant had instructed his solicitor to telephone the CEO directly as a first step in raising a formal grievance about a failure to change his roster to fit the recommendation of Dr Watts which was made the previous month. He needed to be reminded of the procedure. He was told he was welcome to take legal advice but AD is right that communication can become protracted and adversarial when direct correspondence between employer and employee stops. GG's refusal was not because of the fact of a complaint of disability discrimination but because this was the policy and standard practice of the first respondent; indeed of most employers, in our experience. This claim is not well founded.

439. LOI issue 8.2(c): The claimant has established this factual allegation in that when GG wrote to the claimant's legal representatives saying that the reasonable adjustments request had been previously dealt with in earlier grievances that was incorrect. The claimant had previous raised a grievance which was investigated by DT and the question of the claimant's rosters had been subject of discussion over more than one season but the grievance had not been about the rosters. GG explained in his para.8 that there were unrelated matters which cause him to reply without verifying his recollection.

We have accepted that these were the circumstances in which he made this mistake. We do not think that his error is sufficient to lead to an inference that GG victimised the claimant. We accept that there was no unlawful intent in making the inaccurate statement. GG passed on the rest of grievance to be investigated (GG para.11) and it would make no sense for him to deny part only. This was a clear error. The conversation which the claimant reported having with GG (page 714 in the grievance hearing notes) is unexceptional. We are satisfied that this allegation of victimisation is not well founded.

440. LOI issue 8.2(d): It is alleged that the respondents delayed the grievance process conducted by SR and AS because it contained protected acts or because the claimant had done protected acts. The chronology is set out in para.163 above together with our finding that the passage of time is fully explained. There were some delays due to annual leave of SR after the grievance hearing (of which the claimant was warned) and because the appeal had been allocated to AS and it had to await his return. However part of the passage of time was when the claimant was on sickness absence. Overall, we do not think that the claimant suffered a detriment by reason of the timescale and there is no reason to think that any part of the reason for the length of time taken was that the claimant had done protected acts.

441. LOI issue 8.2(i): Our reasoning in para.439 applies in relation to this allegation also. We are satisfied that the entire reason that GG responded as he did to the solicitors was that he wanted the claimant to follow the practice or policy of the first respondent and communicate directly with his employer. This allegation of victimisation is not well founded.

442. LOI Issue 8.2(j): This allegation is not made out because the first notice that the first respondent had of Dr Thomas's report was in the grievance appeal process when it was acted upon.

<u>Breach of contract/unauthorised deduction from wages</u>

443. LOI issues 9.1 to 9.3: As a result of our findings on the agreement between the claimant and the first respondent to vary the claimant's contract (see, in particular, para.74 above), the claimant was not due payment at any time after 20 October 2014 under a contract which included the Aviance company sick pay scheme.

444. However, he should have been paid more by way of company sick pay than he was because his contract did not include the requirement that he should serve 12 months without sickness absence before requalifying for company sick pay once he had exhausted company sick pay in a particular 12 month period. They are in breach of contract for failing to do so.

445. The first respondent has expressed itself willing to pay the claimant in line with the entitlement in the handbook which he was sent in October 2014 which is the claim which was made in the second 2019 claim. They argue that we

should not decide the issues but enter judgment in the claimant's favour on claim 2. RWS1 para.86. The claimant argues that there should be a declaration that there was a breach of contract (CWS1 para.115) which is his primary case.

446. We have decided that we should determine what the sick pay terms were as between the claimant and the first respondent and make a declaration as to those terms and do so as set out in para.1 of the judgment. The first respondent breached those terms and/or made unauthorised deductions from wages by failing to pay the claimant sick pay in accordance with those terms. The amount of any such unauthorised deduction shall be considered at a remedy hearing in the absence of an agreement between the parties that it can be determined by the Tribunal in chambers on the papers. Separate case management orders are made in relation to the outstanding issues on the second 2019 claim.

Unfair dismissal

447. The claimant was dismissed for a pattern of absence which meant that his sickness related absences were at unacceptable levels. It was accepted that his sickness was genuine in the sense that he was genuinely unfit to work but SS accepted the medical evidence that "perceived issues within the employment relationship […] appear to be the principal barrier to work" (page 1392). This amounts to the potentially fair reason of capability, in our view because, whatever the cause of the claimant's illness, he was unfit to carry out his role for periods of weeks at a time and therefore unable to achieve the attendance required by the first respondent.

448. The claimant argues that dismissal was outside the range of reasonable responses. The reasoning is that SS misinterpreted this passage to mean that there is no reason for the claimant's sickness absence other than his views on the first respondent and that the reason for dismissal was therefore partly conduct for which no procedure was followed. We reject that because the respondents did not dispute that the claimant was genuinely unfit; they did not consider that he was malingering but that the triggers for his ill health were workplace issues which were unavoidable because of the claimant's fixed views.

449. It is further argued that insufficient account was taken of the claimant's disability (by not counting some or all of the sick days connected with disability) and that there was no real consideration given to the alternatives to dismissal suggested in Dr Ojha's report of 17 February 2020 of "some discussion between Mr Joseph and management perhaps facilitated through involvement of the HR team is likely to be helpful". At the time of the appointment with Dr Ojha, the claimant was waiting for an appointment for CBT. See the arguments set out in LOI issue 10.2(a) to (c) and expanded upon in CWS1 paras. 103 to 105.

450. Other arguments raised by the claimant are that the appeal was predetermined and insufficient account was taken of his long service.

451. The procedure followed by SS and MA applied the relevant policy of the first respondent. The coronavirus pandemic intervened in the middle of the process and originally the appeal was to be held online but was adjourned to be held in person at the claimant's request to ensure he was fully able to participate. He was fully consulted with and appropriate medical evidence was obtained. We agree with the position expressed by MA in his outcome at page 1486 that an independent OH report would not have been appropriate because the claimant expected that the doctor would review all his grievances. We are of the view that, overall, a fair process was followed.

452. We are satisfied that the oral and documentary evidence that the claimant's length of service had been taken into account (such as the statement on page 1487) are credible and reliable. This had to be set against the adjustments which had been made to support the claimant to remain in work and the lack of prospects for improved attendance in the future.

453. We do not think that it was unreasonable for SS to have taken into account all of the claimant's absences. The claimant was working on a shift pattern which met his disability related needs. He blamed managers for causing stress to him which he claimed led to mistakes which led to further absences when in reality the respondents were entitled to take action against him under the disciplinary policy. SS was reasonably entitled to consider that the internal grievance and disciplinary procedures had been carried out satisfactorily and that those internal processes ought not to be reopened. Since there were no reasonable grounds for the first respondent to reopen concluded processes, the claimant's view of the employment relationship meant that he was likely to become unfit for work in the future and this was a view SS reasonably reached on the information available to him.

454. In his rationale, SS set out (page 1418) various matters which he considered had been done by the first respondent to make the claimant's working environment more comfortable. He had before him evidence from which he could conclude that there had been assistance in the form of permitting the claimant longer breaks, for example, and letting the claimant go early when possible. He accurately recorded that the claimant's position was that it was solely up to management to improve the working relationship. We consider that to be a reasonably accurate conclusion to draw from the claimant's words recorded at para.272 above. There was also evidence available to SS from which he was entitled to conclude that the absences followed the highlighting of errors on the part of the claimant either of performance or by contradicting an assertion by the claimant in correspondence.

455. SS did not expressly articulate his view in the outcome letter on whether discussion between the claimant and management, potentially facilitated by HR

could be helpful in improving the relationship but did identify that the claimant's position was that it was solely management which needed to change. His statement evidence, which we accept, (SS para.78) was that "it did not appear to me that these matters could be substantively resolved without some active positive engagement from Anton himself". Although the claimant told us in his oral evidence that he had been willing to change, that is not how he presented to SS in the final absence hearing. He did in oral evidence say that HR led mediation should have been tried but it is clear from his evidence as a whole that he still has firm, indeed entrenched, adverse views about management. As MA put it when asked whether he had considered the OH opinion that the reasons for absence were multifactorial,

"There was a disconnect with how many times things would be reviewed. As much as HR mediation was recommended, that was part of that. No value in this because no prospect […] as the claimant fundamental in his view … his view was facts and non-negotiable".

456. We take this evidence to mean that MA considered the recommendation for HR medication and considered that it had no prospect of success because the claimant's views about the rights of what had happened were non-negotiable. This was a conclusion which was open to him. It was not put to either SS or MA in cross-examination that they should have waited until the claimant had started or completed CBT. We accept MA's evidence that he took into account both the mental and physical impairments which amount to disabilities under the EQA: both were expressed as likely to fall under the EQA by Dr Ojha. SS candidly said that he had not taken into account that the claimant's mental health was a disability because it was, he said, not something he was aware of. Despite that, he accurately assessed the medical evidence about whether there was unlikely to be a medical resolution that would assist the claimant in avoiding sickness absences. In all the circumstances, taking the final absence hearing and appeal as a whole, we are of the view that there was sufficient consideration given to the impact of the claimant's disabilities. The claimant drew attention to the specific direction in the Aviance contract (para.54.b above) to managers to consider the EOP and equality legislation. Although this was not directly applicable and the first respondent's policy contains little express reference to the EQA, we are satisfied that the respondents complied with the spirit of the policy. In particular, they considered what adjustments could be made to improve the claimant's attendance and reasonably concluded that there were none.

457. We reject the argument that the dismissal or the appeal outcome were predetermined. We are satisfied that each of SS and MA considered their decisions independently and based upon the information available to them.

458. In all the above circumstances, we are of the view that the decision to dismiss the claimant for capability was fair. We do not think that the first respondent could reasonably have been expected to tolerate further absences which it

could do nothing to prevent and which the claimant believed to be the fault of the management. The unfair dismissal claim is dismissed.

459. As a result of our finding on the claim of unfair dismissal, we do not need to go on to consider whether, had the claimant succeeded, there should be a deduction from any compensation to take account of the likelihood that the claimant would be unfairly dismissed in any event.

I confirm that this is our Reserved Judgment with reasons in case number 3318948/2019, 3328234/2019 & 3306526/2020 and that I have approved the Judgment for promulgation.

_____
Employment Judge George

Date: …10 January 2022 ……..

Sent to the parties on:

10 January 2022

L TAYLOR-HIBBERD

For the Tribunal Office