EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107744/2019

Held in Glasgow on 16, 17, 18, 19, 22 and 24 November, 14 December 2021 and 14 January 2022 (Members' Meetings).

Employment Judge: Mrs M Kearns
Members: Mr T Jones
Mr A McFarlane

Mr G Campbell	**Claimant** **Represented by:** **Mr A Hardman** **Advocate**
South Lanarkshire Leisure and Culture Trust	**Respondent** **Represented by:** **Mr S Miller** **Solicitor Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON LIABILITY

The unanimous Judgment of the Employment Tribunal was that:-

(1) the claims under Sections 15, 20 and 21 Equality Act 2010 are well founded;

(2) the claim for unfair dismissal succeeds;

(3) the claim for breach of contract succeeds.

A hearing will be fixed to determine remedy.

REASONS

1. The claimant who is aged 59 years was employed by the respondent as its General Manager until his dismissal for alleged misconduct on 3 April 2019. On 17 July 2019, having complied with the early conciliation requirements, he presented an application to the Employment Tribunal in which he claimed discrimination arising from disability; discrimination by breach of a duty to make reasonable adjustments; unfair dismissal and notice pay.

Preliminary Matters

2. By an Order made under Rule 50 of the Tribunal Rules of Procedure on 28 April 2021 the employee who submitted the grievance to the respondent discussed below is referred to in this Judgment as Employee A ("A").

3. At the start of the hearing the Employment Judge advised those present that the Tribunal member, Mr McFarlane had acted as a trade union representative to the son of the respondent's witness, Councillor Gerry Convery in an internal union matter. Mr McFarlane did not know and had never met Cllr Convery himself. Mr McFarlane's representation of Cllr Convery's son had taken place earlier in 2021 and had come about following a game of golf Mr McFarlane had had with him as an acquaintance. The Tribunal adjourned for half an hour to enable Mr Hardman and Mr Miller to take instructions. When the hearing resumed, they both confirmed that they had no objection to the Tribunal hearing the case as presently constituted, with Mr McFarlane as a member.

Issues

4. By a Judgment sent to the parties on 25 January 2021, the Tribunal (EJ Wiseman) held that the claimant was at all relevant times a disabled person as defined by section 6 of the Equality Act 2010 ("EqA") by reason of stress and anxiety. It was agreed that the present hearing would determine liability only with

a separate hearing being fixed to consider remedy if required. The remaining issues for the Tribunal were agreed by the parties in the following terms:-

A) Unfair Dismissal (ss. 94 &98 ERA)

(i) With reference to section 98 ERA, was the claimant's dismissal by the respondent fair or unfair?

B) Discrimination Arising from Disability (s. 15 EqA)

(ii) Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability? (Stress and anxiety).

(iii) Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability?

(iv) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

C) Failure to Make Reasonable Adjustments (s.20 EqA)

(v) Did the respondent apply to the claimant any of the provisions, criteria or practices ("PCPs") set out in the amended ET1?

(vi) If so, did the PCP(s) put the claimant at a substantial disadvantage?

(vii) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability and was likely to be placed at the disadvantage referred to?

(viii) Did the respondent fail to take such steps as were reasonable to avoid the disadvantage?

D) Wrongful Dismissal/Breach of contract (ET Extension of Jurisdiction (Scotland) Order 1994)

(ix) Did the respondent wrongfully dismiss the claimant?

(x) If so, what is the claimant's contractual entitlement to notice if properly served?

Evidence

5. The parties lodged a joint inventory of productions ("J") and referred to them by page number. The respondent led evidence first and called the following witnesses: Councillor Gerry Convery, appointed to the respondent's Board on 26 October 2018 who chaired the Disciplinary Panel that dismissed the claimant; Mr Lindsay Freeland, then Chief Executive Officer of the respondent's client, South Lanarkshire Council ("SLC"), who was also a board member of the respondent and a member of the Disciplinary Panel; Mr Craig Cunningham, appointed to the respondent's Board on 3 October 2019, who sat on the claimant's Appeal Panel; Councillor Peter Craig, appointed to the respondent's Board on 26 October 2018, who chaired the Appeal Panel; and Ms Gail Robertson, SLC Investigating officer, who conducted the fact-finding investigation.

6. The claimant gave evidence on his own behalf and called his wife, Mrs Theresa Campbell. He also called Mrs Maureen Macfarlane, the respondent's Human Resources Manager, Ms Elouisa Crichton, solicitor and former employment law adviser to the respondent and Councillor David Watson, who resigned from the respondent's Board on 25 October 2018 and was the respondent's former Board Chair.

Findings in Fact

7. The following facts were admitted or found to be proved:-

8. The respondent is an 'Arms' Length External Organisation' or 'ALEO' in relation to South Lanarkshire Council ("SLC"). The respondent was created in 2001 and council employees transferred to it under TUPE in 2002 (leisure employees) and 2010 (culture employees). At the time of the events of this case, the respondent had a budget of £36 million per annum of which £19 million was a service fee

from SLC to provide leisure and cultural services on its behalf. The relationship between the respondent and SLC is underpinned by a number of legal documents such as a funding agreement, memorandum of understanding, transfer agreement, contract for services, leases and service level agreements. The respondent is a registered charity and thus able to benefit from a range of financial savings in rates for buildings as well as to potentially seek new sources of external funding. To maintain charitable status, an ALEO has to be able to demonstrate that it is truly independent and not simply a subsidiary of a local authority. The respondent has its own HR Function headed by Maureen Macfarlane. It also had a retainer arrangement with Shepherd and Wedderburn for legal advice. SLC has an HR Department headed by Kay McVeigh and its own solicitors. The claimant's period of continuous employment with the respondent began on 28 March 1999. At the date of his dismissal on 3 April 2019 he was the respondent's General Manager, having held that post since 2006.

9. In 2017 the claimant suffered a number of traumatic personal life events, including the terminal illness and death of his father, the life-threatening illness of his wife and serious concerns about his son. At around the time all this was happening, the claimant failed to spot an administrative error by one of his team in relation to the value of a contract with a company who provide membership services to leisure groups. An investigation was carried out by the respondent in September 2017 in relation to the matter. No action was taken against the claimant or his colleague.

10. On 3 October 2017 the claimant was diagnosed with stress and anxiety by his GP. The primary effect of this on his work was that he encountered difficulty in sleeping, concentrating, remembering things, performing tasks to his usual standard and low confidence. The claimant was prescribed Sertraline, an anti-depressant and referred to a counselling psychologist, Dr Millings. The claimant attended three sessions with Dr Millings over the period November and December 2017 and was given relaxation and Cognitive Behavioural Therapy techniques. The claimant had informed Maureen Macfarlane, the respondent's Head of HR in or about May 2016 that he was suffering from stress and anxiety.

Mrs Macfarlane took advice from Kate Faulds of Shepherd and Wedderburn, the respondent's employment law advisers (J165). She was advised to pass on her concerns about the claimant's health to Kay McVeigh, Head of Personnel Services at SLC.

11. At this time, in October 2017 the claimant also emailed Councillor David Watson, Chair of the respondent's Board, who was his line manager. He explained to Cllr Watson that he was suffering from stress and anxiety as a result of the contract investigation. He told Cllr Watson that he was seeking medical advice about his mental wellbeing and that his GP had advised professional counselling with a counsellor/psychologist. Around the same time the claimant informed Mrs Macfarlane, the respondent's Head of HR that he was on anti-depressants, was struggling and was having bad nosebleeds. Mrs Macfarlane also knew the claimant was seeing a psychologist.

12. On or about 28 November 2017 the claimant informed Irene Masterton of his health problems. Ms Masterton was the external consultant who carried out the contract investigation on behalf of the respondent. On 12 December 2017 (J166) the claimant emailed Ms McVeigh about the vein occlusion in his left eye. He told her that this had been diagnosed as a result of high blood pressure due to ongoing issues at work.

Employee A's Grievance

13. On or about 31 July 2018 Mrs Macfarlane received a letter from a solicitor on behalf of A, a member of the respondent's staff (J338 – 343). A was off sick at this time. The letter alleged that following the cancellation at short notice of some training, A's line manager had stopped engaging with her and was ignoring her. The letter suggested that the claimant could "*broker an informal resolution that would enable* [A] *to return to work"* from sick leave. An informal meeting involving A, her line manager and the claimant was proposed to that end. Mrs Macfarlane shared the letter with the claimant and also with Elouisa Crichton of Shepherd and Wedderburn, the respondent's solicitors. From that point, A's solicitors directed all correspondence through Ms Crichton and Ms Crichton communicated

principally with Mrs Macfarlane. Ms Crichton had a telephone call with A's solicitor on 2 August 2018 (J348) during which a process for resolving the issues possibly involving a series of meetings facilitated by the claimant was discussed. In the meantime, A was due to have an absence support meeting with the respondent on 3 August 2018 and it was agreed by her solicitor that this would go ahead.

14. On or about 3 August 2018 A attended an absence support meeting with Mrs Macfarlane and the claimant. Mrs Macfarlane kept a note (J451). The claimant was there in place of A's line manager. Mrs Macfarlane began the meeting by stating that its purpose was to discuss what help and support the respondent could give to A to assist her return to work. A said she thought they were there to discuss her solicitor's letter. Mrs Macfarlane reiterated that the purpose of the meeting was absence support but said that if A wished to discuss the letter they could do so. A then proceeded to summarise her position. The claimant told A that he had been disappointed with the content of her solicitor's letter and felt it was a very unfair, one-sided account of the last few months. He told A that she had manipulated the situation by not balancing the content of the letter with the support given to her. A expressed her own disappointment that the claimant had reacted this way to the letter and said it would probably be better if the meeting was wound up if that was his attitude to it. The claimant spoke over A at times and told her that there were difficult conversations that needed to be had and that she was ok when expressing her own perspective but was not so keen to listen to the other side when it got tough. At this point, A leaned in toward the claimant and became animated, using what he perceived as a threatening tone. She said: "*I will look you in the white of the eye and tell you I told my solicitor everything."* Mrs Macfarlane felt uncomfortable at the 'white of the eye' comment and the change in A's body language and she said A's name several times to try and intervene but A remained locked in eye contact with the claimant. The claimant asked: "*What do you mean everything?"* A replied: "*I mean everything"* emphasising the word 'everything'. The claimant again asked what 'everything' meant and A said she would not be drawn on that at this time. Mrs Macfarlane eventually had to slap the table to get A's attention and bring the meeting to a close.

15. On 7 August 2018 Ms Crichton sent Mrs Macfarlane an email she had received from A's solicitor (J358) attaching a letter of resignation from A addressed to the claimant (J359). The resignation letter (J360 – 363) was undated. It gave four weeks' notice of termination of employment. It was delivered to Ms Crichton on behalf of the respondent on 7 August. The date of termination of A's employment was therefore 4 September 2018. The email from A's solicitor stated that the letter of resignation and the contents of her solicitor's letter of 31 July 2018 should be treated as the substance of a grievance.

16. Between Wednesday 8 and Monday 13 August 2018, Mrs Macfarlane had several conversations with Ms Crichton about the process to be adopted in light of the fact that A's grievance was against those members of the respondent's senior management team who would normally operate the initial stages of the respondent's grievance procedure.

17. The respondent's grievance procedure (J122 – 129) involves several stages. Stage 1 is informal. Stage 2 is formal and once the grievance has been put in writing it requires the General Manager (or nominated officer) to arrange a meeting with the parties concerned and if requested, the appropriate trade union official. The grievance procedure does not specifically mention fact finding but the respondent's practice was that any fact finding required would normally be done at stage 2 by the General Manager (or nominated officer) and an outcome given at that stage. The claimant's understanding was that as he was criticised in A's resignation letter, it would not be appropriate for him (as General Manager) to become involved and a different approach would need to be put in place. Since A had escalated matters to a lawyer, the claimant and Mrs Macfarlane decided to take advice from Ms Crichton. The claimant also ensured that the Chair of the respondent's board, Cllr David Watson was aware of the situation. He met with him to brief him about the letter received and the fact that Ms Crichton was providing advice and support. Mrs Macfarlane was primarily responsible for liaising with Ms Crichton at this time in relation to the grievance.

18. The remainder of the respondent's grievance procedure provides for a final stage 3 and states at paragraph 5.3.1: "*Where an employee remains dissatisfied,* [with

the outcome letter at formal stage 2] *a written appeal may be submitted to the HR section through the trade union within 14 days of the date of the letter, requesting that the matter be heard by the Board Appeal Panel. The Board Appeal Panel will be held in accordance with the terms of reference. Prior to submission to Stage 3, it is imperative that both stages one and two have been heard within the work area."* There is a 'note' at the end of this section of the grievance procedure in the following terms: "*NB Prior to the appeal being heard by the Panel, a meeting of the parties concerned will be convened in an attempt to resolve the matter. This will be co-ordinated by SLC's Corporate Personnel. If it is not within the Appeal panel's powers to grant the resolution sought, or is contrary to existing Trust policies and/ or agreements, this will be deemed as the end of the internal process."* This 'note' is referred to by the respondent and SLC as 'Stage 3A'. SLC had no locus under the respondent's grievance procedure except in relation to stage 3A. It was not normal practice for SLC to be involved in handling the respondent's grievances except at stage 3A.

19. On 13 August 2018 Mrs Macfarlane had a call with Ms Crichton. The claimant was not present on the call. Put shortly, during the call, Ms Crichton said she was content for Mrs Macfarlane or the claimant to check the availability of board members to act as grievance hearers and that the claimant could also speak to SLC to determine what support they could offer around fact finding etc given that the claimant and A's line manager were named in the grievance. Ms Crichton kept an internal (to Shepherd and Wedderburn) file note of the call (J373 quoted below). This was not verbatim and was not seen by or available to either Mrs Macfarlane or the claimant at the time.

20. After her conversation with Ms Crichton on Monday 13 August, Mrs Macfarlane told the claimant that Ms Crichton had asked him to find out the availability of one, two or three board members to hear the grievance. She told the claimant that Ms Crichton had said it would be best to try and conclude the process as quickly as possible, before A's notice period expired and that if it was difficult to get a full panel together they could look at two members or even one would do it. The claimant said: "*Right ok, well let me see what I can do*." The claimant contacted

two board members he knew were usually available at short notice, Robert Craig and Johan Steele. He checked their availability for a grievance hearing on 24 August 2018. He did not mention anything to either board member about any aspect of the grievance or how they should deal with it. He only checked their availability and informed them that further contact would be made by someone from HR to explain the process and detailed arrangements. Mrs Macfarlane had also told the claimant that Ms Crichton had said that they would need to look to support the board and that he was to contact Kay McVeigh at SLC about support for the panel at the hearing. Mrs Macfarlane did not ask the claimant at any time to speak to SLC about conducting a fact finding (J322).

21. First thing on Tuesday 14 August 2018, Mrs Macfarlane called Elaine Maxwell, HR Business Partner at SLC and gave her a summary of the case, explaining that the respondent had received a grievance against the claimant, the company secretary and possibly herself and that as they did not have a procedure that covered those circumstances, their solicitor had suggested a board panel hear it. She asked Ms Maxwell whether she would have the time to support the case following the procedure Ms Crichton was advising.

22. The claimant had understood from his conversation with Mrs Macfarlane on 13 August that Ms Crichton had advised the respondent to ask SLC for support for the panel for the hearing. Accordingly, the claimant emailed Kay McVeigh, Head of Personnel Services at SLC at 15:00 hours on Tuesday 14 August 2018, copying in Mrs Macfarlane (J384). He explained the background to the grievance and that it was against himself, the company secretary and the HR Manager and stated: "*As the concerns are about the most senior SLLC staff, we have, on the advice of our solicitor, set up a panel of two Board members, to hear the grievance and respond accordingly.// If support can be provided via our existing relationship, that would be helpful, if not, Shepperds will help us appoint an independent HR officer to support the panel.// You can give myself or Maureen a call if you want more background information."*

23. At 16:19 the same day (14 August 2018) Ms McVeigh emailed a response (J384): "*Hi Gerry, I understand your concerns and Elaine is available to support the process. Given the nature of the grievance we can skip stages 1 and 2 of the procedure and go straight to stage 3A. I'll ask Elaine to contact Caroline Dibb to make suitable arrangements including the panel. Can you pass all the relevant info to Elaine in the meantime?"* Ms McVeigh's advice at this point was at odds with the advice of Ms Crichton. Ms Crichton had advised Mrs Macfarlane that an appropriate variation to the respondent's grievance procedure would be for a member or panel from the respondent's Board to hear the grievance at first instance (stage 2) instead of the claimant. This first instance decision would have to be preceded by a "fact finding". If A was unhappy with the determination at first instance (stage 2), she could then appeal to a differently constituted panel of the Board at stage 3. In contrast, Ms McVeigh was advising that the "fact finding" and first instance determination (stage 2) should be skipped and the procedure should move straight to stage 3A (in which SLC would speak to the person making the grievance and see if it could be resolved). If the grievance was not resolved at 3A, there would then be a stage 3 [appeal] hearing before a panel of the respondent's Board. The claimant and Ms McVeigh were accordingly at cross purposes.

24. The claimant replied at 16:28 (J383): "*Thanks Kay, appreciate the quick response, panel already sorted and arranged for 11am on Friday 24th August. I have informed the panel that once I had an HR contact that I would let them know. Will ask Tracy to do the linking on this one with Elaine and the panel."*

25. At 17:11 on 14 August 2018, Mrs Macfarlane sent an email to the claimant (J377) stating: "*Before we do this Gerry I would like to run the offer of a stage 3a past Elouisa? This is not in line with her advice. If you agree to hold off just now I'll update you tomorrow."* The claimant emailed back a minute later to say he agreed.

26. Ms McVeigh replied to the claimant at 08:02 the following morning 15 August 2018 (J383). She was under the mistaken impression that the panel hearing referred to by the claimant as arranged for 24 August was a stage 3 hearing,

whereas in fact it was a stage 2: "*Morning Gerry Given the subject of this grievance it is really important that proper procedure is followed and yourself, Paul and Maureen are independent of the process, both in reality and appearance. Otherwise the process is wrong from the start and any proceedings after that will start with a procedural flaw which will be impossible to recover from. Given you already have lawyer's letters it's reasonable to anticipate further proceedings. The current approach is wrong for a number of reasons. The norm would be for 3 panel members and someone independent (Elaine) should organise this. Two is quorum, but that is on the basis that you may have a last minute withdrawal by a member. The process also calls for a stage 3a first. If your concern is about timescales we've dealt with this before. Elaine would ensure the stage 3a takes place asap and would try to keep to the 24th as a date. If the 24th is not possible the process continues even though the employee has left. Subjects of a grievance should never be involved in the process of decision-making and that would include panel set up. We'll also need to look at how this grievance appeal is presented and resource that. I obviously haven't seen the grievance but it may be I need to identify a presenter for SLLC as everyone else works for you.// This process will ensure the organisation and yourselves are kept right. In pointing this out I'm not suggesting for a minute you are trying to influence an outcome. I've assumed you are just trying to expedite the hearing ahead of the employee's departure. Can you give me a call this morning to discuss?"* On receipt of this message, the claimant forwarded the correspondence to Ms Crichton and Mrs Macfarlane and a call was set up with Ms Crichton for later that afternoon.

27. The claimant responded to Ms McVeigh at 12:16 (J382): "*Afternoon Kay I am very confused by this. SLLC taking legal advice, first point of which was to get the panel set up, I am also led to believe that the approach/ process we are following has been… agreed with the legal representatives of the staff member who has raised the grievance and with our own legal advisors, if that's case then what's the problem. Surely if we try to insist on another procedure we could run into the issues/ problems that you refer to? Given that it will be our legal advisors who will ultimately represent SLLC in any ongoing dispute (the hope is we don't get to that*

point) then how can we ignore the legal advice we are being given. The help I am looking for at this stage is the HR support for my two board members, again having agreed with Shepperds that it demonstrates impartiality, if this is provided by SLC or by an independent source. I am around later today if you want to discuss this any further."

28. The claimant and Mrs Macfarlane spoke to Ms Crichton on the afternoon of 15 August 2018. Again, Ms Crichton ("ELC") kept an internal (to Shepherd and Wedderburn) file entry (J375) which was not verbatim and was not available to Mrs Macfarlane or the claimant at the time. The claimant reported to Ms Crichton that Ms McVeigh had said they should skip stages 1 and 2 and go straight to 3A. Ms Crichton asked whether Ms McVeigh had mentioned doing a fact finding and the claimant said she had not as she had mentioned stage 3A. Ms Crichton asked how 3A worked and Mrs Macfarlane explained that before a grievance appeal went to the respondent's Board, SLC would speak to the person raising the grievance and try and see why they weren't happy with the grievance outcome and what solutions there might be and whether what they were looking for was within the gift of the board. Ms Crichton asked if SLC spoke to the decision-maker too. Mrs Macfarlane explained that 3A was just SLC speaking to the employee raising the grievance. In this case, A was looking for compensation and that was not within the gift of the board. Ms Crichton said that it sounded as though 3A normally happened after a fact finding and first instance decision and that the board could not determine the grievance without understanding the facts from both sides. She said that if SLC could not help with fact finding in the time scale then HR consultants could be considered and she would canvass availability with her firm's contacts. The claimant told Ms Crichton that there were directors available to hear the grievance on 24 August. Ms Crichton said that was good because it was prior to A's termination date. The claimant then said that Ms McVeigh had said he should have no involvement in the process. Ms Crichton said he should not be a decision maker or have a role in the process and it was agreed that he should now step back. Ms Crichton told Mrs Macfarlane and the claimant that she would speak to Ms McVeigh about fact finding. [ELC witness statement paragraph 37].

29. Shortly after this call, Ms Crichton spoke with Kay McVeigh. Ms McVeigh's position was exactly as the claimant had reported it in the earlier call: that SLC got involved at 3A, not fact finding and that Ms McVeigh's expectation was that matters were jumping to stage 3A. What Ms McVeigh said to Ms Crichton matched what the claimant reported Ms McVeigh had told him (a focus on 3A) and that was in the context of Ms Crichton specifically asking Ms McVeigh about fact finding. Ms McVeigh was very strong in her view and Ms Crichton found it difficult to push. Ms Crichton did not get agreement from Ms McVeigh that SLC could offer fact finding at that time. (They did subsequently offer it later). [ELC witness statement paragraph 38].

30. At 17:02 on 15 August 2018 the claimant emailed Ms McVeigh (J381). He told her that he had had a conference call with Shepherd and Wedderburn that afternoon and that they would be appointing an external HR consultant to investigate the grievance and provide a report to the respondent's panel members. He told her: "*I have taken this decision because in asking for your staff to fulfil the same role it may have been problematic for SLC, given your view of following a different approach and this may have led to conflict at a further stage in the process. The process to be followed will be put to the solicitors who are representing our employee and they will be given an opportunity to comment. S&W are advising, that because the employee resigned and then instigated the grievance procedure, there is no need to consider using stage 3A….."*

31. Thereafter, the claimant had no further involvement in the grievance process. He emailed the respondent's Board Chair, Councillor David Watson on 15 August 2018 to tell him that all further correspondence in relation to A's grievance should be with Cllr Watson. From that point on, communication regarding the grievance was between Cllr Watson and Ms Crichton. As General Manager, the claimant was kept informed by Cllr Watson and Mrs Macfarlane of developments. Ms Crichton was attempting to have a fact finding conducted by an independent consultant and the grievance heard before A left but A and her solicitor

considered the arrangements unacceptable and insisted the grievance be heard by SLC.

32. During a conversation on 17 August 2018 with Ronnie Smith (one of the respondent's Board members) and in a further conversation in late September/early October 2018 Mr Smith noticed that the claimant was showing signs of stress and anxiety (J584).

33. With effect from 23 August 2018, pressure was applied to Councillor Watson by SLC (J170 and DW WS 2&8) to allow SLC to take control of the A grievance process. This was against the advice of Shepherd and Wedderburn (J171) who advised Cllr Watson that there was no requirement to outsource the hearing of a grievance to a third party. Ms Crichton expressed concern that SLC did not seem to understand the legal implications of a grievance outcome where the facts that led to the grievance (and not the handling of the grievance itself) were the basis for a constructive unfair dismissal claim [because A had already resigned and the grievance process therefore post-dated and could not be a reason for her resignation]. In these circumstances Ms Crichton's concern was that the grievance outcome might be used by A to assist her in a claim for constructive unfair dismissal. On 27 August 2018, Ms Crichton wrote an email to Ms McVeigh asking to set up a telephone call to discuss A's grievance (J1084). During that call, Ms McVeigh offered SLC's assistance with fact finding and supporting the grievance panel. A proposed draft response to A's solicitor was discussed. However, Ms Crichton did not get sign off for it.

34. A left the respondent's employment on or around 4 September 2018. A and her solicitor had refused a grievance process that did not have SLC as decision-maker (EL Crichton ("ELC") witness statement ("WS") para 49 c i). Put shortly, Ms Crichton's advice - as expressed to Cllr Watson - was that as A had left having repeatedly been offered and refused a fair grievance process during employment, it was no longer proportionate to continue seeking to hear her grievance. (ELC WS para 46).

35. On 4 September 2018, A's solicitor wrote to SLC's CEO, Mr Freeland (J175). In the letter the solicitor referred to A's grievance and stated: "*We have explained in various emails to SLLC and its solicitors that it is wholly inappropriate for any board members to hear our client's grievance as doing so gives rise to a real risk of bias. That is because all other board members have standing relationships with Gerry Campbell and Paul Barton. Irrespective of whether these two board members act impartially or not, the simple fact of their involvement at all gives rise to a real risk of bias and renders the process null on the grounds of a breach of natural justice.// Despite explaining all of the above to SLLC it refuses to acknowledge the fundamental defect and refuses to answer basic questions as to who proposed this process and why. In light of SLLC's failure to answer those simple questions, it is difficult not to draw the conclusion that Mr Campbell is the architect of and/or remains involved in a grievance process that is intended to investigate his own conduct."*

36. Mr Freeland referred A's solicitor's letter to Ms McVeigh and asked her to investigate it. Against Ms Crichton's advice to the respondent, Ms McVeigh was focussed on progressing with the grievance. She insisted both that the grievance should proceed and that SLC should be involved. At some point between 4 and 17 September 2018 - without any locus for doing so - she personally met with A and her solicitor "*to try and resolve the complaint*". On 17 September 2018 she emailed Councillor Watson (J167) stating: "*I am contacting you in your role as Chair of the SLLC Board. Rather than incur additional cost by corresponding through Shepherd and Wedderburn (S&W) I thought it may be useful to set out the current position."* In the email she stated: "*The aggrieved employee complains to SLC about SLLC's handling of the grievance. A meeting was arranged with the former employee and her representative to try and resolve the complaint. A resolution being that the grievance is heard. The meeting discussed process only and to be helpful I explored what that process may look like.."* The "process" Ms McVeigh was suggesting following her meeting with A and her solicitor was set out at the foot of her email. Her proposal now was that: "*SLC carry out their normal support role but in addition provide the fact finding process..".* She went on: "…*After discussion I am suggesting the following//1. A fact finding is carried*

out by South Lanarkshire Council Personnel Services and is presented by the fact finder to the grievance hearing …// 2. The grievance process is supported by South Lanarkshire Council Personnel Services…" She concluded: *"In summary the adjustments to the normal grievance process would be as follows:*

- *Given the subject of the grievance, this process starts at Board level.*
- *SLC Personnel Services will carry out a fact finding exercise and present a report to the Grievance Hearing – this is in lieu of a manager explaining the decision making at a previous stage.*
- *SLC will support the panel as normal but will jointly select members – giving reassurance around conscious/unconscious bias.*
- *A second group of members be prepared to hear an appeal of that decision.*

I think this is a good way forward and the adjustments to give reassurance around a fair process are reasonable and straight forward."

37. On 19 September 2018, Ms McVeigh sent an internal SLC briefing note entitled "*South Lanarkshire Leisure and Culture – Grievance"* (J554 - 6) to SLC's Chief Executive, Lindsay Freeland and the Council Leader, John Ross. In the briefing note, Ms McVeigh stated that SLC provided a personnel service to the respondent as detailed within their SLA. She did not make clear that the respondent also had its own HR team and legal advice and that SLC did not normally manage or get involved in the respondent's grievances. Ms McVeigh implied in the note that the respondent was obliged to notify internal grievances to SLC and that it was normal practice for SLC to handle them. The respondent's legal advice was that neither was correct. By this stage the matter was being handled by Cllr Watson and the claimant had already stepped back. The note failed to make this clear and gave the impression that the claimant was still involved. Paragraph 4 is entitled 'Current Position'. Paragraph 4.4 states (without making clear that the conference call was not with the claimant): "*Through a conference call today it is evidence that there is strong resistance to this issue*

being looked at by SLC and it is not unreasonable to infer that this originates with the subject(s) of the complaint". It was Ms Crichton's advice (J171 and 516 – 8) that the respondent should remain in control of the management of the grievance process and be the decision-maker in relation to a grievance against them. Around 15 August 2018, Ms Crichton had asked Ms McVeigh if SLC would do the fact finding but Ms McVeigh had said no. A had refused a grievance process that did not have SLC as decision-maker but the respondent did not agree to this. A had therefore left having still not agreed on a grievance process and the respondent, on Ms Crichton's advice had been minded to draw a line under matters in relation to A's grievance. However, Ms McVeigh then decided SLC would offer their assistance with a fact finding. SLC were keen to continue with the grievance. (ELC WS para 49 c i). The inference at paragraph 4.4 of Ms McVeigh's briefing note was prejudicial to the claimant. This ultimately became a serious matter because Mr Freeland - to whom the briefing was addressed – was later appointed to the claimant's disciplinary panel.

38. The respondent's legal advisers Shepherd and Wedderburn advised Councillor Watson that:

(i) the respondent was an independent organisation and that if it did not act independently there would be charity law/OSCR concerns.

(ii) The respondent's Service Level Agreement with SLC contained no expectation that SLC would conduct a grievance fact finding or liaise with the respondent's employees or ex-employees.

(iii) As SLC were not the employer or associated employer of A or of the grievance subjects, SLC had no standing to determine the process.

(iv) The respondent's grievance procedure did not provide for SLC to carry out a fact finding. While the respondent could decide to vary the procedure, that would normally only be done with the agreement of those involved. If a process is varied without agreement, it can result in employee relations issues. The employees named in the grievance would have an expectation that the respondent will follow the process. If it is varied to

accommodate the ex-employee, the variation would need to be reasonable and not breach GDPR or it could result in challenges from affected employees.

(v) The personal privacy notice provided to the respondent's employees reflected the personal data sharing between the respondent and SLC envisaged in the Service Level Agreement and what was now proposed exceeded that notice. To hand over the process to SLC to run the investigation and take control of everything would involve the sharing of personal data which may raise GDPR and other issues.

(vi) The respondent had been ready and willing to hear A's grievance and had offered an independent fact find and a first instance decision from a panel from the board. Since A had unreasonably rejected these offers, it was therefore reasonable to draw a line under A's grievance and leave it there.

[Summary of advice provided at J459 – 461]

39. In or about August/September 2018 Cllr Watson noticed verbal communication and physical signs about the claimant's health. The claimant had bloodshot eyes and problems with his blood pressure. Cllr Watson had day to day discussions with the claimant in 2018, talking to him about the stress of everything that was going on and he was sufficiently concerned that he contacted Lynne Basch, an HR officer with the respondent about getting support for the claimant. On 27 September 2018 Cllr Watson received an email (J1045) from Lynne Basch, in which she reported to him that the claimant was struggling with his mental health and well-being. She stated that the claimant had taken up her offer of support.

40. Councillor Watson was put under pressure by SLC to ignore the advice from Shepherd and Wedderburn, hand over the A grievance investigation to SLC and let them take control of everything. However, he was mindful of his Councillors' Code of Conduct training that when acting on behalf of a charity or ALEO, in the

interests of that organisation you must 'take your councillor's hat off'. He therefore resisted the pressure from SLC.

41. The political executive of SLC includes the Council Leader, John Ross, the Deputy Leader, Maureen Chalmers and Cllr Peter Craig (PC WS 1). On or about 5 October 2018 the political executive of SLC informed Cllr Watson that he had been removed from the respondent's Board and was no longer a director or Chair.

42. On 10 October 2018 Michelle Milne, HR Business Partner with SLC began investigating A's grievance. On that date, she interviewed A.

43. On 11 October 2018 Shepherd and Wedderburn produced a succinct summary of all the legal advice they had provided to the respondent up to that date in relation to the matter of A's grievance (J459 – 461) so the respondent would have this information for a board meeting. (See paragraph 38 above).

44. On 25 October 2018 Cllr Watson stood down as Chair and resigned from the respondent's Board under pressure from SLC (DW WS2). Cllr Peter Craig of SLC's political executive put himself forward to the respondent's Board with a request to be Chair. At a meeting of the respondent's Board on 26 October, he was appointed to the Board and made interim Chair in place of Cllr Watson. On the same date, Cllr Gerry Convery of SLC was also appointed to the respondent's Board.

45. On Friday 26 October 2018 Ms McVeigh called the claimant and informed him that Cllr Peter Craig, the new interim chair of the respondent's Board had instructed her to instigate a fact finding investigation into the handling of A's grievance, all aspects of which would be managed and controlled by SLC.

46. On 30 October 2018 the claimant, along with Paul Barton and Maureen Macfarlane sent a joint letter to Cllr Craig (J421) with the subject heading "Working under Protest". They stated in the letter: "*As the Interim Chair of SLLC we feel it is important that you understand the very serious detrimental impact this*

whole process has had on us, the above noted, and Friday's events has added to the stress and anxiety we are currently experiencing and have been experiencing for many weeks now. You should, therefore, note that we are currently working under protest and believe that there has been a fundamental breach in trust and confidence between us and our employer, South Lanarkshire Leisure and Culture, as well as a breach in policy and procedure without our agreement."

47. On 5 November 2018, Kay McVeigh, Head of Personnel Services at SLC sent another briefing note entitled "*South Lanarkshire Leisure and Culture – Grievance"* (J178 - 181) to SLC's Chief Executive, Lindsay Freeland, the Council Leader, John Ross and this time also to the SLC Group Leaders. The briefing note was largely a repetition of the note Ms McVeigh had sent out in September but she had beefed up paragraph 3.2 to state: "*The documents listed at 3.1 taken together with the SLA mean SLLC must use Personnel Services for the identified activity within the SLA".* The clear implications contained in the briefing note were that the claimant ought to have used SLC's personnel service for A's grievance (J178 para 3.2) and ought to have passed it to SLC sooner than 14 August (para 4.1). The briefing note does not make clear that the respondent - as an independent organisation (and data controller) - has its own HR function and legal advisers and that it was not required to and did not normally pass grievances to SLC to deal with. Ms McVeigh stated in the note that the first SLC had heard of the grievance was an email on 14 August 2018 saying that a two-member panel had been set up to support a grievance appeal [This was a misunderstanding by Ms McVeigh. In fact it was a first instance hearing and not a grievance appeal.] and that "*SLC could support the panel, or that SLLC would get an HR consultant to support that role."* The briefing note went on: "*There were a number of issues with this position which were pointed out at the time. These included: -*

- *not following proper process to try and resolve the grievance;*
- *not following the agreed procedure to hear the grievance; and*
- *not ensuring a proper distance between those complained about and the process itself.*"

48. The incorrect implication was that the respondent was required to alert SLC to a grievance. In the note, Ms McVeigh went on to say that the respondent had made SLC aware that they had sought legal advice from their solicitors about how to handle the grievance. She stated that this would not be normal practice. She repeated (at paragraph 4.3) the statement in the previous briefing note she had sent (J554); *"It appeared there was strong resistance to this issue being looked at by SLC and it could be inferred that this originated with the subject(s) of the complaint as there was no other apparent reason".* In a new beefed up paragraph 6.1 she stated: "*It is the professional opinion of the Head of Personnel Services that this grievance, complaining about senior officers of SLLC, should have been handed to SLC to deal with to provide an appropriate level of independence and assurance. The provision of professional advice is stated within the SLA. In the opinion of SLC this issue was not being properly addressed. // SLLC pay SLC Personnel Services to carry out work on their behalf and it is concerning that the first time this has not happened is around this complaint which centres on senior managers."* Mr Freeland received Ms McVeigh's briefing paper on or around 5 November 2018 (J178) and took the statements it contained at face value.

49. On 6 November 2018, Cllr Peter Craig emailed Elouisa Crichton asking her to provide him with a summary document, detailing what advice was sought by whom and when in respect of A's grievance (J1080). An overview/timeline was provided to Cllr Craig by Ms Crichton on 7 November 2018.

50. On 13 November 2018 the claimant was interviewed by Ms Milne as part of the fact finding process into A's grievance. Johanna Baxter from Unison accompanied the claimant to the interview.

51. On the evening of Monday 19 November 2018, a week after SLC's fact finding interview into A's grievance, the claimant received a text from Ms McVeigh advising that she required to see him very urgently. The claimant asked what it was about as he was taking his wife to an appointment at the transplant unit in Edinburgh. Ms McVeigh replied that it was essential and requested a time to speak to him the following morning. The claimant called her on 20 November at

7.45am. Ms McVeigh then read out a series of allegations of misconduct to him and asked for his response. The claimant had told Ms McVeigh about the seriousness of the situation with his wife's health. She had been in hospital for four weeks with sepsis and they had an appointment with the liver specialist that morning. After the discussion with the consultant, Mrs Campbell was away getting bloods taken and the claimant had checked his phone. There were two emails from Ms McVeigh, one of which contained an attachment for the claimant to read and respond to her. The other email instructed him to meet the Chair of the respondent's Board as soon as he was back from taking his wife to the hospital and stated that it was about a 'meeting of the Assessment Group'. The attachment to the email was a letter from Cllr Peter Craig (J215) informing the claimant that he was suspended and that an investigation was to be carried out into a series of allegations against him in respect of his role as General Manager. The allegations were as follows:

1. "*That you did not follow legal advice from Shepherd & Wedderburn regarding the handling of an employee issue;*

2. *That you misrepresented the position of Shepherd & Wedderburn and the Council in communication with both organisations;*

3. *That you canvassed Board Members directly and indirectly about an employee issue;* [This was amended at the Disciplinary Hearing (J591) to: "*That you attempted to influence Board Members about an employee issue".*]

4. *That you attempted to direct the progress of a grievance in which you are a subject;*

5. *That you attempting* [sic] *to frustrate the fair handling of an employee issue;*

6. *That you canvassed Board Members with a view to securing a Board Chair other than the Chair who had instructed progressing the handling of the employee issue; And*

7. *That you failed to act in the best interests of SLLC, substituting your own interests for those of your employer."*

52. On the same date, 20 November 2018, Ms Milne, an SLC HR Business Partner completed her report into A's grievance (J182 – 214) and issued it to Cllr Peter Craig.

53. On 26 November 2018 Ms McVeigh emailed the claimant proposing that one of her SLC personnel advisers, Gail Robertson be appointed as fact finder in relation to his [disciplinary] case. On 28 November 2018 the claimant responded in the following terms (J217): "*I am faced with a very difficult decision to make. I don't believe I can properly focus on helping my wife to recover from her multiple health issues whilst I experience significant stress and anxiety with this investigation. On that basis, and provided I can be given assurances about confidentiality and complete independence, I intend to proceed with Gail Robertson being appointed as the investigating officer. I would ask you to note this is a decision being made against a backdrop of other factors which continued to have a major impact upon my own mental health. The text I sent you and Peter Craig last night outlines further concerns and the ongoing and totally unfounded speculation as to the circumstances surrounding my suspension. This has only added to my personal stress*." On 27 November 2018 the claimant had become aware that unfounded rumours were circulating among colleagues that his suspension was due to financial irregularities and issues with tenders. The claimant was very distressed about this and had asked Cllr Craig by text (J219) to issue a statement setting the record straight. In the text he stated that this situation was only adding to his stress and anxiety.

54. A's grievance hearing took place on 29 November 2018 before SLC's Grievance and Disputes Panel. The hearing was chaired by Cllr Peter Craig. The hearing was attended by A along with her solicitor. A addressed the hearing at length. No one was present to represent the grievance subjects. The hearing was accordingly entirely one-sided. After an adjournment at the end of the hearing, the Chair, Cllr Craig announced that the grievance was upheld in full. Shortly after the

grievance hearing Ms McVeigh informed Mrs Macfarlane and Mr Barton of the outcome. She did not inform the claimant. A was subsequently offered a full time permanent position with SLC. [DW cross examination].

55. On 3 December 2018, Johanna Baxter, the claimant's trade union representative wrote an email to Ms McVeigh (J249) in which she stated: "*Press & Speculation Gerry contacted you last week notifying you of the widespread speculation with regards to his suspension and his concerns about some of the inaccurate reporting of it. Further to that the suspension itself was run as a news piece by the Sunday Herald on 2nd December 2018. I am sure I do not need to state how unhelpful this is to an ongoing investigation or to the levels of stress that my member is currently suffering. I expect the council to do everything within its power to ensure that it finds out who leaked this information to the press and to deal with them appropriately. This media interest does nothing to reassure Gerry that the investigation to which he is subject is being conducted with due confidentiality or impartiality."* A senior member of SLC was quoted in the article.

56. In the same email Ms Baxter stated that she understood that the grievance by A had been upheld. She requested confirmation of the rationale for this and the implications it had for the claimant. Ms McVeigh replied that she would pick this up with Cllr Craig, the Panel Chair with regard to the specific points of feedback to the claimant.

57. On 11 December 2018 Ms Robertson emailed Board Member Robert Craig and asked him whether the claimant had mentioned anything to him at any time about an employee issue/grievance involving Employee A, and if so, could he indicate the detail of that conversation (J469). Mr Craig responded that the case was mentioned but that the claimant had not gone into any detail or mentioned any specific names. In a later email (J474) he told Ms Robertson he had no memory of any conversation relating to a grievance hearing and the name of Employee A.

58. Ms McVeigh directed Ms Robertson's investigation into the claimant's handling of A's grievance on behalf of the Assessment Group. By letter dated 17 December 2018 Ms Robertson informed the claimant that he was to be investigated in

relation to the seven allegations set out in his suspension letter (J215) above and requested him to attend a fact finding meeting with her on 21 December 2018. No further specification of the allegations was provided to the claimant. Ms McVeigh had obtained from Cllr Peter Craig a copy of Ms Crichton's timeline relevant to the claimant (J332 – 3) and copies of her internal S&W file notes of the telephone calls on 13 and 15 August 2018 (J373 &375). Ms McVeigh gave these documents to Ms Robertson. The claimant had not seen these documents at any time. The claimant had not been present on the 13 August call which was between Mrs Macfarlane and Ms Crichton. So far as relevant for context, Ms Crichton's file note of 13 August states:

"*ELC discussing process for grievance given DWF email. Maureen explaining that A had already had an apology for the issues she was complaining about and it was not within the gift of SLLC board to offer compensation. As such, should they explain that using 3A? ELC explaining that A would probably not agree with that assessment or feel satisfied with that result.*

ELC advising that an appropriate variation to process would be to move up a stage in the procedure, with a member or panel from the SLLC board making the first instance decision, and if required, a separately constituted panel from the board being available for appeal. A fact finding stage was still required and we could consider how best to facilitate that independently. Normally this is just done by SLLC. Due to time scales if three board members were not available for the first instance decision, SLLC could offer to proceed with a smaller number.

Gerry to speak to SLC to determine what support they could offer around fact finding etc given that he and Paul are named in the grievance so cannot be involved.

Maureen explaining the Council's role as being involved in advising the board on appeals and 'Stage 3A'. Stage 3A does not appear in writing in the SLLC grievance procedure. As such, ELC asking Maureen about this. Maureen explaining stage 3A and that it is effectively stage between a first instance

decision and an appeal in which the Council's HR team speak to the aggrieved employee, find out what they are still not happy with following the grievance outcome and try and think about possible solutions. ELC understood this to be effectively a 'gateway to the appeal' stage. Maureen asking whether this should just be stage 3A. ELC advising that we have not yet had a fact find or a first instance decision and those are important steps.

ELC asking about availability of board members and it was agreed that Gerry could also check availability as he could not be the grievance hearer.

ELC noting that we are now on notice of a potential constructive unfair dismissal claim."

59. Ms Crichton's file note of her call with the claimant and Mrs Macfarlane on 15 August stated:

"*ELC call with Maureen and Gerry// Gerry relays content of call with Kay. ELC asking if the council would do a fact finding. Gerry explaining that Kay's view was that the Council got involved at 3A not fact finding. // ELC asking about how 3A worked? Maureen explaining it normally worked that before a grievance appeal went to the board the council spoke to the person raising the grievance and tried to see why they weren't happy with the grievance outcome and what solutions there might be (and whether what they were looking for was within the gift of the board). ELC asking if the Council spoke to the decision maker too? Maureen explaining 3A was just the Council speaking to the employee raising the grievance. In this case A was looking for compensation and that is not within the gift of the board.*

ELC explaining that it sounded like 3A normally happened after a fact finding and a first instance decision. In this case we haven't had either. ELC advises that it will not be possible for the board to make a determination of the grievance without understanding the facts from both sides. As such, if SLC cannot assist with a fact finding in the timescales, independent HR consultant

can be considered and ELC agrees to canvas availability from a range of SW contacts.

Gerry explaining that in terms of availability to hear a panel there were directors available to hear it on 24 August in Hamilton. ELC noting this and saying that was good because it was prior to the termination date.
Gerry explaining that Kay had said he should have no involvement at all in the process. ELC explaining that as they had discussed he should not be a decision maker or have a role in the process. However, to keep everything right and looking right, he could step back. ELC agrees that Gerry should not have any further involvement in the process. Gerry agrees to step back in line with SLC and SW recommendation."

60. The first two misconduct allegations against the claimant were that he had not followed legal advice from Shepherd and Wedderburn and had misrepresented the position of Shepherd & Wedderburn and SLC in communication with both organisations. Despite the complexity of the facts and the need to interpret statements and advice in context, Ms Robertson did not, at any stage interview either Ms Crichton or (officially) Ms McVeigh. These two witnesses were the principal people in the respective organisations with whom the claimant communicated and whose respective positions he was alleged to have misrepresented. Had Ms Robertson interviewed Ms Crichton, she would have discovered that Ms McVeigh had misunderstood the advice Ms Crichton had given to the claimant during his brief involvement between 13 and 15 August 2018 and that Ms McVeigh and the claimant were accordingly at cross purposes in their email correspondence. The claimant and Ms Crichton were talking about stage 2 (first instance) of the respondent's grievance procedure and Ms McVeigh thought they were talking about stage 3 (final stage appeal). The formal stage 2 of the respondent's grievance procedure (J126) requires that the General Manager or nominated officer should arrange a meeting with the grievance parties and make a 'first instance determination'. The claimant was the respondent's General Manager and also a grievance subject so he could not do the stage 2 meeting and determination himself, nor could he nominate an officer to do so, because he

was the respondent's most senior employee, so any nominated officer would be junior to him. On 13 August 2018 Ms Crichton advised Mrs Macfarlane that in these circumstances, an appropriate variation to the procedure would be for a member or panel from the respondent's board to make the first instance decision at stage 2 and if required, a separately constituted panel from the board could later hear any appeal. Ms Crichton advised that if three board members were not available for the first instance decision, the respondent could proceed with a smaller number.

61. Had Ms Robertson interviewed Ms Crichton, she would also have discovered that Ms McVeigh confirmed to Ms Crichton after the call on 15 August 2018 that SLC got involved in 3A, not fact finding and that Ms McVeigh's expectation at that time was that the process would jump to 3A and miss out the fact finding and stage 2 (first instance) determination, exactly as the claimant had told Ms Crichton and Ms Crichton had noted on 15 August 2018 and consistently with Ms McVeigh's email correspondence with the claimant (J384) which did not specifically mention fact finding and proposed skipping stage 2. Had Ms Robertson interviewed Ms Crichton, she would have discovered that Ms McVeigh had subsequently changed her position regarding SLC and fact finding a short time later. Any differences between the accounts of Ms McVeigh and Ms Crichton could have been explored and an informed view taken. No reasonable employer would have omitted to interview Ms Crichton and Ms McVeigh in the circumstances, especially given the level of factual complexity and the need for interpretation of the records of which they were the authors. The failure to interview Ms Crichton and to properly and transparently interview Ms McVeigh resulted in serious errors in the fact finding report, which were carried through to the disciplinary and appeal stages of the claimant's case.

62. Ms Robertson interviewed Mrs Macfarlane on 18 December 2018, three days before her interview with the claimant. She questioned Mrs Macfarlane about her call with Elouisa Crichton on 13 August 2018 in the following way (J322): "***27.1 Gail read from conference call information. Gail asked Maureen if she spoke to Gerry about the advice and specifically regarding the comment about Kay***

McVeigh regarding a fact finding, Gail said that's she did not see anything regarding SLC carrying out or not carrying out a fact finding. *Maureen said that she never spoke to GC at anytime about SLC conducting a fact finding and she does not know if GC had had that discussion with Kay McVeigh…"*

63. The claimant attended his own fact finding interview with Ms Robertson on 21 December 2018, accompanied by his union representative, Ms Baxter. At the start of the meeting Ms Robertson handed the claimant a letter. She said she did not know what the letter was about but that Kay McVeigh had requested that it be handed to him at the start of the meeting. The claimant opened the letter and tried to read the contents but he found it difficult to concentrate on it as his mind was racing with what was ahead of him. The letter was from Councillor Peter Craig. It was dated 17 December 2018 and headed: "*Learning Points – Grievance"*. The letter informed the claimant that employee A's grievance had been upheld and the charges against him had been substantiated. Put shortly, the learning points were: (i) that the claimant should have facilitated a discussion between A and Mr Barton to have resolved matters and (ii) that A's attendance support meeting had not been carried out in the supportive manner expected. The delivery of the letter at the start of the interview seriously upset and unsettled the claimant. Ms Robertson then proceeded to ask the claimant 134 questions she had prepared in advance and to read out documents and emails to him, which she then questioned him about. The meeting lasted approximately four hours.

64. At the time of his fact finding with Ms Robertson on 21 December 2018 the respondent knew that the claimant had had a diagnosis of stress and anxiety and had been on the antidepressant Sertraline for over a year. They knew that he had been referred to a psychologist. The claimant's impairment was found to amount to a disability by Employment Judge Wiseman in a judgment dated 25 January 2021 (J40 – 57). The effects of the claimant's disability included being unable to sleep uninterrupted; problems concentrating, focussing on what is being said and comprehending what is being said; difficulty remembering facts and events; low self-esteem; and inability to make decisions.

65. At the end of the claimant's fact finding interview with Ms Robertson on 21 December 2018 (J308) the claimant told Ms Robertson that in the summer he had been prescribed anti-depressants and had undergone professional counselling and advice. He told Ms Robertson that he remained on them at this time. He described his wife's serious health issues and described how his suspension had come in the middle of a health crisis for his wife. He went on to say that the personal stress and pressure he had been under had been immense and he could not stress enough how difficult it had been.

66. The respondent's practice is to suspend access to emails and electronic diaries when an employee is suspended from his or her post. As a result of his disability, the claimant experienced difficulty with recall, so this practice placed him at a substantial disadvantage in comparison with persons who are not disabled, when he was asked questions at his fact finding interview about facts, dates and events that had happened several months earlier. If the claimant had not been suffering from poor recall and low confidence as a result of his disability, he would have been able to answer Ms Robertson's questions more precisely and accurately, particularly in relation to the events of 13 to 15 August 2018.

67. The respondent's practice is to provide a non-verbatim record of fact finding interviews. The claimant was experiencing difficulties with recall and comprehension as a consequence of his disability and so was at a substantial disadvantage in comparison with non-disabled persons when it came to reviewing the notes of the meeting and checking whether "*any of the information had not been recorded correctly*". The respondent's practice is to permit the interviewee to request amendments if the information is not accurate and an interviewee who had confidence in their ability to recall statements would be in a position to contest inaccuracies. However the claimant's recollection of the interview was impacted by his disability and he was therefore placed at a substantial disadvantage by not receiving a verbatim copy of the record.

68. The respondent's practice is not to supply an interviewee with a list of questions prior to a fact finding interview. The claimant's symptoms resulting from his

disability included difficulty in processing information given verbally and on paper, recalling facts, events and dates and concentrating over periods of time. Therefore the respondent's practice of not supplying questions ahead of the interview placed the claimant at a disadvantage in the following ways:

(i) The respondent's practice is not to allow the interviewee to add or remove any information recorded in the note of the fact-finding interview if it was not discussed at the meeting. The claimant struggled to recall facts and formulate responses. There were details that he was not able to provide at the interview but which would have helped clarify responses and establish the facts. It would have been a reasonable adjustment for the claimant to have been given the questions beforehand with time to check dates and details of events.

(ii) During the fact-finding interview the investigator read from communications and asked for comment. The claimant's difficulties with concentration and comprehension as a result of his disability placed him at a disadvantage as he struggled to take in what was being read to him. A reasonable adjustment would have been to provide the claimant with copies of these documents along with the questions in advance of the interview and to have given him time to digest and make sense of what he was reading.

(iii) The interviewer prepared a set of 134 questions for the interview. It was a lengthy interview lasting around 4 hours. The claimant's problems with poor concentration, recall and reduced ability to process and organise information as a result of his disability rendered this interview especially stressful and exacerbated his symptoms. The claimant was told at the start of the interview that he could ask for a short break if he needed it. However, the claimant's low confidence meant he did not feel capable of stopping the interview. He was anxious to get the interview over and was not able to judge at any stage how much longer the interview would take. If the claimant and his union representative had been given the questions prior to the fact finding interview, it would have been clear that this was going to be a lengthy

session. Knowing this, they could have raised the importance of scheduling a break part way through the interview or to have requested the interview be completed over two days. The respondent was aware of the extent of the list of questions and it would have been a reasonable adjustment for the respondent to have taken cognisance of the length of the interview and provided the claimant with copies of these documents along with the questions so he could plan necessary breaks.

69. During the interview Ms Robertson read extracts from documents she had obtained including Elouisa Crichton's ("ELC") timeline (J332) and the internal Shepherd and Wedderburn file notes (J373 & 5). The claimant had not seen either the file notes or the timeline. The timeline stated so far as relevant that in relation to her call with Mrs Macfarlane on 13 August 2018: "*ELC content for Maureen/Gerry to obtain availability of board members to act as grievance hearers. ELC advising that Gerry could also speak to SLC to determine what support they could offer."* With regard to Ms Crichton's call with Mrs Macfarlane and the claimant on 15 August 2018, the timeline stated: "G*erry also explains he has placed call to Kay McVeigh at SLC to ask if they are able to assist with the grievance process given that the standard process is not appropriate due to it providing for Gerry to make the first instance decision. Gerry explained that Kay McVeigh explained that SLC could speak to [A] only and then advise an SLLC appeal board in accordance with the standard grievance process. ELC understands that Gerry explained to Kay that this was not a usual appeal stage, but rather the first instance decision being taken by the SLLC board instead of by him due to his involvement. As such, the fact finding stage which would normally have occurred before SLC was involved had not yet happened. ELC understands from Gerry that the Council offered to provide the usual 3A service only and would not provide a fact finding. ELC was told that Kay had advised that Gerry should not have any further involvement in the grievance.// ELC notes this and advises that it will not be possible for the board to make a determination of the grievance without understanding the facts from both sides. As such, if SLC cannot assist with a fact finding in the timescales, independent HR consultant can be considered…"* Because of his disability, the claimant struggled to take in and

process the information contained in the documents Ms Robertson read out to him; to recall facts, dates and events and to formulate accurate and precise answers. There were details he was not able to provide at the interview which would have helped clarify his responses and establish the facts.

70. Ms Robertson had accessed the claimant's emails in preparation for the interview. The claimant had had no access to his emails or electronic diaries since being suspended on 20 November 2018. He had not had sight of the S&W timeline or file notes prior to the fact finding meeting. The claimant had not been able to refresh his memory about the details of what had happened or the sequence of events. No account was being taken of his personal difficulties or health problems and the claimant began to feel overwhelmed. During the course of the interview, Ms Robertson read from specific emails or notes she wished the claimant to comment on and she showed them to him. They were not necessarily in context. One particularly unfair passage of questioning related to Shepherd and Wedderburn's file note of the telephone call Ms Crichton had had with Mrs Macfarlane on 13 August 2018 (J373 and Appendix 10 of Ms Robertson's report). The claimant had not seen this file note before and he had not, in fact, been present on the call the file note records. Ms Robertson questioned the claimant in the following way:

> "***24 Gail reminded Gerry that S&W gave advice to Maureen on a conference call on 13th August 2018 (See S&W notes). Gail read the notes of the call and asked Gerry if he was at that conference call.*** *Gerry said that he does not remember it. Gerry stated that he remembered making the call to the Board Members on the availability of the panel members.*
>
> ***24.1 Gail said to Gerry that Maureen must have relayed this to him.*** *Gerry said that yes she did.* [The file note contains six paragraphs and records a number of points. When Ms Robertson referred to "this" it was unclear what she meant. No reasonable employer would have asked a crucial question in such a vague and general way and then relied on the answer to import specific acceptance in spite of the claimant's denial in his answer to 25.3 below.]

25 Gail stated that Elouisa advised Gerry to "speak with SLC re a fact finding and also to check availability of board members". It doesn't say to set up the panel as a "fact finding" is still required. Gail asked Gerry for his comments. *Gerry said that it was important that his take on the role of SLC would be potentially supporting the Board as in previous instances.*

25.1 Gail asked Gerry about the fact finding element of the advice from Elouisa. *Gerry said that his recollection was that the early advice from Maureen was that a fact finding would be done externally. Gerry said that he interpreted it as getting someone from SLC to sit on the panel and support on receipt of a report.*

25.2 Gail asked Gerry if he did not appreciate that a fact finding had to be done. *Gerry said that Elouisa was clear that it had to be done by SLLC or others and would best done by an HR consultant.*

25.3 Gail said to Gerry that the advice was clear on 13/8 that he was to contact SLC for support to carry out a fact finding. *Gerry said that he disagreed with this."*

71. Ms Robertson's conclusion of fact on this point is at paragraph 4.47 of her findings: "*Ms Crichton has a conference call on 13th August (Appendix 10) with Ms Macfarlane. No one is clear if Mr Campbell was also there, however he confirms he was aware of the advice given by Ms Crichton and it must have been through Ms Macfarlane.*

4.48 Ms Crichton advises that perhaps a 3A could be heard, however Ms Macfarlane indicates that this is not appropriate in her view. Ms Crichton states that a panel of board members could hear the grievance, however also indicates that a fact finding stage was required. It is agreed Mr Campbell will speak to SLC (Kay McVeigh) to determine what support they could offer around fact findings, etc. Mr Campbell is also asked to check the availability of 3 board members in the first instance, and that SLLC could proceed with a smaller number given the time scales." These conclusions seriously misrepresented the evidence Ms Robertson had gathered on a key point in the following respects: (i) As is clear from

paragraph 25.3 of his interview with Ms Robertson, the claimant did not confirm that Mrs Macfarlane told him to contact SLC for support to carry out a fact finding. He specifically refuted this. (ii) At paragraph 27.1 of her interview with Ms Robertson, Mrs Macfarlane told Ms Robertson in terms that she had not told the claimant to speak to SLC about fact finding: "*Maureen said that she never spoke to GC at anytime about SLC conducting a fact finding...*" The general question and answer at 24.1: "***Gail said to Gerry that Maureen must have relayed this to him.*** *Gerry said that yes she did"* do not support Ms Robertson's key conclusions at 4.47 and 4.48 of her report given the specific denials by both the claimant and Mrs Macfarlane. No reasonable investigator would have misrepresented the evidence in this way.

72. In her interview of the claimant, Ms Robertson gave her interpretation of items of correspondence and made a series of assumptions. For example (J301 – 2):

> "***35.3 Gail said to Gerry that the reason for that was he had told Elouisa that SLC could not do a fact finding but he had never asked SLC for support to carry out a fact finding.*** *Gerry said absolutely not and that S&W clearly said to the Chairman that there was no role or purpose for SLC to be involved.*
>
> ***35.4 Gail informed Gerry that the legal advice completely contradicts what he was saying.*** *Gerry said that SLC were asked to provide support to the Board and asked Gail to show him where it is written down what SLC's involvement should be in this instance."*

73. A few hours into the interview the claimant had to go to the car park to top up his parking charges. On his way across the car park he bumped into an elected member of SLC who asked him how the interview was going. The claimant was shocked that SLC had not kept the details of the interview confidential. Towards the end of the interview the claimant informed Ms Robertson of the mental health issues he was experiencing and that he had been prescribed anti-depressants and was following medical advice.

74. The claimant received a copy of the notes of his fact finding interview from Ms Robertson around the end of December 2018. He identified a need to add further detail, explanation and clarity but his wife was ill so he asked for additional time. The text of the questions and his answers as noted were in the notes but he still did not have access to the emails or documents upon which the questions had been based. Ms Robertson did not wait for the claimant's amendments but finalised the report without them and sent it to the Chair of the disciplinary panel on the morning of Friday 11 January 2019 (1046). The claimant's amendments/additional notes in relation to his interview (J1047 – 56) were sent to Ms Robertson later that day but she had already filed the report. The claimant's amendments/additional notes were prepared without access to the emails and file notes and this - combined with the effects of his disability - prevented him from giving a full and informed explanation. He was having to rely upon his recall, which was affected by his disability. (For example his note on Question 25.1 on J1049). If the respondent had made the adjustment of providing him with the questions and associated documents in advance of the fact finding, this disadvantage would have been alleviated in time for the claimant's informed position to have been incorporated into the fact finding report.

75. Ms Robertson's Fact Finding report (J262 – 561) was issued to the claimant on 1 February 2019. The report (including appendices) was long. It was also confusing, difficult to comprehend in relation to the allegations and lacking in objectivity. The key findings are at 4.47 to 4.75 of the report (though it is not made clear to the reader that these are the key findings). These paragraphs contain commentary and inaccurate summaries (examples above) interspersed with other threads of comment and irrelevant fact. The relevant appendices are not in chronological order. The failure to interview the two key witnesses, Ms Crichton and Ms McVeigh resulted in the report containing serious misrepresentations of the claimant's actions, all as set out above. The key alleged evidence of misconduct which the report placed before the disciplinary and appeal panels was the sequence of emails and telephone calls between Ms Crichton and Mrs Macfarlane and between the claimant and Ms McVeigh, all between 13 and 15

August 2018. These were misunderstood and accordingly misrepresented in the report.

76. On a number of key points, Ms Robertson went well beyond her remit of fact finding and strayed into interpreting facts and recording her own opinions as fact. Ms Robertson had a particular interpretation of events and her questions proceeded on the basis of a number of assumptions, some of which were wrong. For example, as explained above, she assumed the claimant had been asked by Mrs Macfarlane on 13 August to request SLC to conduct a fact finding when Mrs Macfarlane had told her she did not ask the claimant to do this at any time. She did not interview Ms Crichton, so she was unaware that after the call Ms Crichton had with the claimant and Mrs Macfarlane on 15 August, Ms Crichton had called Ms McVeigh and asked [ELC WS 38] for SLC assistance with fact finding and that Ms McVeigh had refused at that time, insisting on jumping to stage 3A. It was only later that Ms McVeigh changed her mind and offered SLC assistance with fact finding.

77. At paragraph 4.64 of her fact finding report, Ms Robertson quoted a conversation she appeared to have had with Ms McVeigh: "*Ms McVeigh has stated she had no such telephone discussion with Mr Campbell and that Mr Campbell did not ask her for fact finding support."* However, there was no statement from Ms McVeigh or anything to indicate she had been interviewed as a witness. She was simply allowed to comment in the conclusion.

78. By letter from Kay McVeigh dated 7 February 2019 (J565), the claimant was invited to a disciplinary hearing on 4 March 2019. Despite her involvement in the events complained of, Ms McVeigh was adviser to the panel. The first panel proposed by SLC/ Ms McVeigh for the claimant's disciplinary hearing included Robert Craig, a board member who had provided a statement that was being used as evidence against him and also Johan Steele, who had been on the panel for A's grievance hearing. The claimant's union representative Johanna Baxter protested to Ms McVeigh about Mr Craig's inclusion on the panel. Ms McVeigh then substituted Lindsay Freeland, CEO of SLC for Mr Craig, initially on the basis

that he had "*had no involvement*" (J575) and thereafter on the basis of Ms McVeigh's understanding that "*of the Board Members he had least knowledge and involvement in the issues*". The claimant was concerned because Mr Freeland had seen the correspondence from A's solicitors DWF and had received the two briefing papers prepared by Ms McVeigh on 19 September and 5 November 2018 which outlined in detail Ms McVeigh's view of the issues in the case and contained prejudicial statements and opinions discrediting the claimant in relation to the matter. Ironically, despite having expressed views on the claimant's case, Ms McVeigh continued to act as HR support person, including advising on the make-up of the disciplinary panel.

79. The respondent has a practice that a suspended employee is permitted to access emails through a session supervised by a member of the respondent's HR team sitting beside the employee in close proximity so they can both see the same computer screen. The claimant asked for permission to review his emails ahead of the disciplinary hearing. The claimant's wife required to accompany him as the claimant was struggling to concentrate and needed her to keep him focused. On or about 22 March 2019, Gail Robertson met the claimant and his wife at reception and showed them into a room with a computer and a printer. There were two chairs at the computer and the claimant assumed his wife would be able to sit with him to assist him with the emails. However, Ms Robertson said she needed to sit beside him and directed his wife to sit across the room. The respondent's practice put the claimant at a substantial disadvantage in comparison with non-disabled persons because the proximity of Ms Robertson looking at the same screen as the claimant, working the computer mouse and leaning across him heightened his anxiety and caused him to panic and freeze. It also exacerbated his problems with processing information, organising his thoughts and keeping focused on the task such that on the first occasion the claimant was unable to complete the session or use it to remind himself of the events and communications or explore the evidence fully. The claimant visibly faltered and moved back in his seat when Ms Robertson leaned across him. The claimant attempted to focus and asked for some emails to be printed but they were emails he already had. He became tense and hesitant in his communication

with Ms Robertson. It was evident from his voice and demeanour that he was not thinking or communicating clearly. Mrs Campbell sensed the claimant's anxiety and discomfort and she stood up and told Ms Robertson that she felt it was not working and that they needed to leave and the session was terminated. Ms Robertson was aware of the claimant's stress and anxiety. Given the terms of Ms Robertson's fact finding report and her involvement in the case to that point, it should have been obvious that for her to supervise the claimant in close proximity could heighten his anxiety. Ms Robertson did not follow up to see if another approach could have been used.

80. The disciplinary hearing was initially set for 4 March 2019. However, the claimant was signed off sick. He attended an occupational health ("OH") assessment on 21 March 2019. The claimant's GP provided the OH doctor with a short letter (J533) confirming that the claimant was "*currently suffering from anxiety, depression, anhedonia and poor concentration".* The letter stated that the claimant was on Sertraline medication and his dose had recently been increased to 100 mg. The letter from the claimant's GP was incorporated into the fact finding report as 'Appendix 36' and was thus placed before the Disciplinary and Appeal Panels. In a report dated 22 March 2019 which was also part of Appendix 36 to the fact finding report before the disciplinary and appeal panels, SLC's OH doctor referred to the claimant's "*mental health problems*" in the following terms: "*He has had a number of significant stresses in his personal life including serious health worries concerning his wife and he has of course found the period of suspension quite traumatic emotionally as well. I can advise you that this has been appropriately dealt with by his GP. // As we might expect someone who has experienced a high level of distress in their personal life he has exhibited features of low mood including impaired cognition, confidence, motivation disturbed sleep and reasoning may have been affected to some extent as well*." The report stated that the claimant's medical problems including his mental health problems were "*currently adequately controlled to allow a resumption of work engagement in duty*" (J536).

81. The disciplinary hearing invite letter dated 7 February 2019 (J565 -6) had listed the Hearing Panel members as Cllr Gerry Convery (Chair), Robert Craig and Johan Steele and stated that Ms McVeigh would be advising them. Mr Freeland was then substituted for Robert Craig. On 22 March 2019 Johanna Baxter emailed Cllr Convery (585 – 9) with her concerns about the inclusion of Mr Freeland on the Panel and the fact of Ms McVeigh's appointment of herself as HR Adviser to them: "*We are in possession of two documents - both authored by Kay McVeigh - which outline in great detail, and pass judgement on, the central issues in contention at this hearing. The first of these is a document issued to the Chief Executive and Council Leader dated 19th September 2018. The second is a document issued to the Chief Executive, Council Leader and Group Leaders dated 5th November 2018. This later document was then circulated by email to a number of others by the Chief Executive on the 8th November 2018. It is unfathomable to think that the Chief Executive would forward on a document with which he disagreed*…." It was pointed out that at least four other board members could replace Mr Freeland on the panel. Cllr Convery agreed to replace Ms McVeigh as HR Adviser to the Panel, though initially indicated she would now appear as a management witness. He refused to replace Mr Freeland.

82. The claimant attended the disciplinary hearing on 1 and 2 April 2019 along with his representative, Ms Baxter. The Panel were: Cllr Gerry Convery (Chair); Lindsay Freeland and Johan Steele. Ms Maxwell was in attendance to advise the Panel. A Note was taken (J591 - 639). Ms Robertson presented the case for the respondent and called Robert Craig as a witness. The claimant gave evidence on his own behalf and called Mrs Macfarlane, Cllr Watson, Angela Beggan, Alex Allison and Lynne Nailon as witnesses. Ms Robertson's presentation to the disciplinary panel contained the same serious errors as her fact finding report. For example, (i) Ms Robertson repeatedly stated and/or implied to the Panel (J594, 595 - paragraphs 1 and 8, 632, 633) that in August 2018 the claimant had been advised by Ms Crichton through Mrs Macfarlane to ask SLC for fact finding support. Ms Robertson knew or ought to have known, both from her fact finding interview with Mrs Macfarlane and from her questioning of her at the disciplinary hearing (J621 paragraph 9) that Mrs Macfarlane had specifically denied that she

had asked the claimant to contact SLC about fact finding. (ii) Ms Robertson referred Mrs Macfarlane (J621) to the claimant's email correspondence with Ms McVeigh and suggested to her that there was an email where "*Kay offers support with fact finding for 3A and advised that Gerry should not be involved".* This question was misleading. Ms McVeigh did not specifically offer support with fact finding in her email correspondence with the claimant (J377 – 384). (iii) Ms Robertson implied at the hearing that it had been improper for the claimant not to have given the grievance paperwork to SLC in August 2018. She failed to refer to the GDPR and contractual issues this would present which had been flagged by Shepherd and Wedderburn. (iv) Ms Robertson told the disciplinary panel (J596): "*Ms McVeigh stated that Mr Campbell did not ask for any fact finding support, despite her advice for this information gathering requiring to have taken place prior to the stage 3 Board".* Ms McVeigh was not called as a witness to the disciplinary hearing, nor was she interviewed for the fact finding report. This commentary from Ms McVeigh was obtained and placed before the disciplinary panel without transparency. (v) Because she failed to interview Ms Crichton, Ms Robertson did not spot McVeigh's initial misunderstanding of Ms Crichton's advice. Ms Crichton was not advising a 'stage 3 Board'. She was advising a stage 2 Board. (vi) Because she failed to interview Ms Crichton, Ms Robertson was unaware that Ms Crichton's position was that she had specifically asked Ms McVeigh about fact finding shortly after the call on 15 August 2018 and that Ms McVeigh did not agree that SLC would offer fact finding at that time. Ms McVeigh's view at that time was that the stage 2 fact finding would be skipped and the matter would proceed straight to 3A with SLC getting involved at that stage as she states in her email (J384). (vii) Ms Robertson expressed the view to the claimant at the disciplinary hearing that because the grievance was against the respondent's most senior employees, stages 1 and 2 of the procedure were not appropriate and the case should have gone straight to 3A/ Board appeal. This view (initially espoused by Ms McVeigh), if implemented, would have deprived the parties of an initial fact finding and decision stages and was not in line with either the respondent's grievance procedure or natural justice.

83. Because of the effects of his disability and the absence of reasonable adjustments, the claimant had failed to fully answer Ms Robertson at his fact finding interview and a number of mistakes and misrepresentations were incorporated into her report as set out above. Once the report was issued and as a result of his disability, the claimant was unable to interrogate the report and to provide proper instructions about the facts and events to Ms Baxter. The provision to him of Ms Robertson's 134 fact finding questions together with the documents relied upon in advance of the fact finding interview may well have enabled the claimant (with the help of his wife and Ms Baxter) to understand the case against him and to accurately recall the complex sequence of events in a less stressful environment in order to identify and highlight the errors. Without that adjustment, the claimant and his union representative were unable to articulate his overarching defence or explain to the disciplinary panel the respects in which Ms Robertson's conclusions were wrong. (G Convery WS12 and 21 – 23.]

84. During the disciplinary hearing on 1 and 2 April 2019 the claimant stated (J606) that he had sought professional counselling for stress and was on medication. He stated that during the time of the A grievance matter his wife underwent life-saving surgery which had led to sepsis. The claimant told the panel that it had been difficult to keep focus professionally. At the disciplinary hearing, as a result of his disability, the claimant was unable to respond with clarity and confidence to the allegations against him. Cllr Convery noticed during the hearing that the claimant's body language was 'like he was defeated'. Cllr Convery had been a shop steward and he knew how the claimant's union representation should work. He felt Ms Baxter did not put up much of a case to protect him. Cllr Convery felt that there had been times during the whole thing when it could have been sorted but that the claimant's skill set had not come through. He felt that the claimant had sat there for the two days of the disciplinary hearing and Cllr Convery had been waiting for the big robust denial but it never came. Cllr Convery thought that this was not the Gerry Campbell he had dealt with over the years, who would say if he had an opinion. Cllr Convery was waiting for the punchline from the claimant and his representative but nothing came. He considered "there was no overarching defence from [the claimant] side". Cllr Convery considered that it was

for the claimant to prove to him that he was not guilty of the allegations narrated against him (GC WS 27) and that he had failed to do so and on that basis, Cllr Convery decided he should be dismissed. The third panel member concurred.

85. Mr Freeland was also on the disciplinary panel. He had received the letter from A's solicitor on 4 September 2018 and Ms McVeigh's briefing notes of 19 September 2018 and 5 November 2018 in the terms set out above and these had primed Mr Freeland against the claimant so that he was unable to consider the case impartially. When Mr Freeland had received Ms McVeigh's briefing paper in November 2018 (J178) he had taken at face value her statement at 5.1 that normal grievance processes were underway. The note implied that it would be normal for the respondent to pass its grievances to SLC; that the claimant ought to have used SLC's personnel service for A's grievance under the SLA (J178 para 3.2); that he ought to have handed it over it to SLC to deal with straight away (para 4.1) and that in failing to do so he was somehow resisting the proper (SLC) process, defying SLC and serving his own interests. These assertions were controversial and were not ultimately supported by evidence in Ms Robertson's report. Against the background of these representations having been made to him already, Mr Freeland concluded (LF WS 23c) that: "*having read the background papers, considered the fact-finding outcomes, and having had the opportunity to question Gerry Campbell during the hearing, the information provided confirmed he did not follow the advice provided from S&W."* Mr Freeland was unclear why. He considered that the claimant: "*was unable to provide a satisfactory answer both at the fact finding and at the actual hearing itself…"* He chose to dismiss the claimant on the basis of his belief that the claimant's judgment, actions and behaviour throughout the process had eroded all trust and confidence in his ability to continue in the post. The claimant's lack of clarity and confidence on the facts of the case and his inability to rebut Ms Robertson's conclusions during the disciplinary process arose in consequence of his disability

86. By letter dated 3 April 2019 Cllr Convery wrote to the claimant (J640) to tell him that six of the seven allegations against him had been upheld. Allegation number 6 (that the claimant had canvassed Board Members to secure a different Board

Chair) was not upheld. The letter informed the claimant that he had been dismissed for gross misconduct with immediate effect without notice. The letter advised the claimant of his right of appeal. Attached to the letter was the "full disposal". This states in relation to Allegation 1 at page J648: "*It is clear from the information provided that G Campbell was asked to discuss with the Council how best it could support the grievance, this included not only supporting the board but also regarding the fact finding. This was not done."* In relation to allegation 2, the disposal states: "*The panel believe G Campbell was advised to contact the Council in relation to a fact finding*." There is no explanation as to why the panel rejected both the claimant's and Mrs Macfarlane's specific evidence that the claimant was not asked by Mrs Macfarlane to contact the Council to ask them for support with the fact finding. The determination is based on obvious inconsistencies, errors and wrong assumptions which no reasonable employer would have made. The evidence put forward in respect of the remaining allegations was so flimsy that no reasonable employer would have found that it supported the allegations. Even their summary of the decision (J651) contained inconsistencies. It stated on the one hand: "*In coming to the unanimous decision the panel noted that G Campbell did not dispute the allegations as presented by the fact finder…"* and in the same summary: *"In coming to this decision the panel were of the view that during the course of the hearing G Campbell did not accept his actions with the exception of those indicated already."* There were no reasonable grounds for the panel's belief that the claimant was guilty of gross misconduct. His summary dismissal was accordingly also a repudiatory breach by the respondent of his contract of employment.

87. The claimant appealed against the decision and provided detailed grounds (J659). He received a letter from Cllr Peter Craig, advising that he would be Chair of the Appeal Panel. The claimant's solicitor objected to this (J691 – 9) stating that Cllr Craig was compromised by having served on the panel that upheld Employee A's grievance and having reviewed the fact finding report in the claimant's case prior to it being issued to the assessment panel contrary to the correct procedure. Despite the claimant's objections, Cllr Craig was not removed. The appeal hearing finally took place on 10 October and 13 November 2019. The

appeal panel did not consider it was their role to reach an independent view on dismissal. They decided that all the evidence heard by the disciplinary panel was properly heard and conducted in a fair manner. It was not a rehearing. The involvement of Cllr Craig in upholding A's grievance and in earlier stages of the claimant's case meant that the appeal panel was not impartial.

Observations on the Evidence

88. Where there was a conflict in the evidence between the claimant and the respondent's witnesses we preferred the evidence of the claimant. He gave his evidence carefully and was honest when he could not remember. His evidence was supported by Ms Crichton's and was consistent with the documentary records.

89. We found Ms Crichton to be a credible and reliable witness. She made appropriate concessions but was somewhat hampered by not having access to her full file. At paragraph 54 of his written submissions, Mr Miller refers to what he calls an uncharacteristic but egregious error at paragraph 38 of Ms Crichton's witness statement in which she asserted that she had called Ms McVeigh shortly after her call with the claimant and Mrs Macfarlane on 15 August 2018 and that Ms McVeigh had provided her with "*exactly the same message*" as the claimant had done earlier – 'that SLC got involved in 3A, not fact finding and an expectation that we were jumping to that stage'. Mr Miller stated in his written submissions (paragraph 54): "*As the witness accepted in cross examination – and reinforced in re-examination – that is diametrically the opposite of what Mrs McVeigh had told her during a call on 27 August 2018 (1082 – 1084). This most probably arose inadvertently but it betrays a partisan position even so".* We agreed that Ms Crichton's evidence that SLC were not offering assistance with fact finding on 15 August 2018 was diametrically the opposite of what Ms McVeigh was saying to Ms Crichton on 27 August, but Ms Crichton's explanation for this was that Ms McVeigh's position changed between 15 and 27 August. Ms Crichton testified that she has moved firm since the events of August 2018 and that she had not therefore been able to check her file notes and records from that

time. She conceded that it looked from the email chain at 1082 - 1084 as though she had spoken to Ms McVeigh for the first time on 27 August 2018, but she also said her memory was that she had spoken to her earlier. In any event, whether she spoke to Ms McVeigh on or about 15 August or later, the totality of her evidence (despite skilful questioning from Mr Miller) was that Ms McVeigh had initially adopted a position that 'SLC got involved at stage 3A, not [stage 2] fact finding and that stage 2 should be skipped' around 15 August and had subsequently changed her position by 27 August to saying there *should* be a stage 2 fact finding and SLC should do it. That evidence from Ms Crichton is consistent with Ms McVeigh's email to the claimant on 14 August 2018 (J384) and the different position she adopted in the email chain on 27 - 28 August (J1082). Ms McVeigh was not called by the respondent to clarify matters. The Tribunal has therefore done its best on the material before it.

90. On balance, we accepted Ms Crichton's evidence at paragraph 38 of her witness statement that she had had a call about fact finding with Ms McVeigh earlier than 27 August 2018 for the following reasons: (i) There was no primary evidence from Ms McVeigh on the email chain from 1082 to 1084 and its context, nor was there any evidence from her denying an earlier call had taken place; (ii) Ms Crichton, (despite her concession on what the terms of the email at 1084 "looked like") said that her memory was that she spoke to Ms McVeigh earlier than 27 August; (iii) in the same paragraph 38 of her witness statement Ms Crichton remembered other details of the call which were not challenged – that she had asked Ms McVeigh specifically about fact finding and that Ms McVeigh was very strong in her view; and that Ms Crichton had found it difficult to push her and did not get agreement that SLC could offer fact finding; (iv) it seemed to us that Ms Crichton's 27 August email at J1084 incorporates the sort of formula a solicitor uses on the first occasion they write to someone formally, especially if they may have separate legal representation. It would not necessarily preclude an earlier call to check whether or not SLC's assistance could be offered.

91. In light of the evidence Ms Robertson gathered from the claimant (J297 Q25.3) and Mrs Macfarlane (J322 Q27.1) that Ms Crichton's suggestion on 14 August

"*Gerry to speak to SLC to determine what support they could offer around fact finding"* (J373) was not in fact communicated to the claimant, the point is less important. The fact remains that what Ms Crichton noted the claimant saying to her on 15 August: "*Gerry explaining that Kay's view was that the Council got involved at 3A not fact finding"* (J375) was consistent with Ms McVeigh's email to him on 14 August (J384) where she said: "*Given the nature of the grievance we can skip stages 1 and 2 of the procedure and go straight to stage 3A".*

92. Mrs Macfarlane was rather vague in paragraph 11 of her witness statement where she states that she can't remember what she told the claimant about fact finding following the 13 August call with Ms Crichton. She gave her witness statement for this Tribunal on 4 November 2021, three years after the events. Mrs Macfarlane was interviewed by Ms Robertson on 18 December 2018 and we considered her response to question 27.1 (J322), (to the extent that she did not take issue with it in her proposed amendments) was the best evidence on that point given that it was closer in time to the events in question. We accordingly found that Mrs Macfarlane did not ask the claimant at any time to speak to SLC about conducting a fact finding (J322).

Applicable Law

Disability Discrimination claim – failure to make reasonable adjustments

93. Section 20 Equality Act 2010 provides so far as relevant:-

> *"(2) the duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

94. Section 21 Equality Act 2010 provides:-

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

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

95. Schedule 8 to the Equality Act 2010 concerns the duty to make reasonable adjustments at work. Part 3 concerns limitations on that duty. Paragraph 20 of Schedule 8 deals with lack of knowledge of disability. It states:

*"**20 Lack of knowledge of disability, etc***

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

(a) ……

(b) …that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Discrimination arising from disability claim

96. Section 15 EqA provides:

"***15 Discrimination arising from disability***

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

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

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

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

Discussion and Decision

Failure to Make Reasonable Adjustments (s.20 EqA)

(i) Did the respondent apply to the claimant any of the provisions, criteria or practices ("PCPs") set out in the amended ET1?

(ii) If so, did the PCP(s) put the claimant at a substantial disadvantage?

(iii) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability and was likely to be placed at the disadvantage referred to?

(iv) Did the respondent fail to take such steps as were reasonable to avoid the disadvantage?

97. Mr Miller's first argument in relation to the claimant's disability claims related to whether the respondent had the requisite knowledge of disability. As he noted, in relation to the section 20 claim of failure to make reasonable adjustments, knowledge of the impacts of the disability is also necessary. Before addressing the issue of knowledge, it is necessary for the Tribunal to consider whether the respondent applied a provision, criterion or practice to the claimant and if so, whether this put the claimant at a substantial disadvantage in comparison with persons who are not disabled. It is necessary to determine what the disadvantage was before we can assess whether the respondent knew or could reasonably have been expected to know about it.

98. With that in mind (and reserving the question of knowledge to determine below) we considered the adjustments contended for:

(i) To have provided the claimant with the 134 fact finding questions and copies of the documents they referred to in advance of the fact finding interview.

99. In relation to this adjustment, the claimant's case was that the respondent's practices (PCPs) were:

    (a) to suspend access to an employee's emails and electronic diary when an employee is suspended from his post;

    (b) not to supply an interviewee with a list of questions and the documents they refer to in advance of a fact finding interview;

    (c) not to allow an interviewee to add or remove any information recorded in the note of the fact finding interview if it was not discussed at the meeting.

100. With regard to these PCPs, it was averred in the ET1 and did not appear to be in dispute that these were practices of the respondent. (In the experience of this tribunal they are common practices.) We consider they meet the test for PCPs in which a "practice" involves some form of continuum in the sense that it is the way in which things generally are or will be done. That (a) was applied to the claimant is clear from the penultimate paragraph of J288. It is clear from the documentary and witness evidence that (b) and (c) were also applied to him.

101. The claimant was disabled as a result of anxiety and stress. He was on medication during the relevant period. We accepted his evidence, confirmed in his psychological report (J1033 – 43) and the Judgment of EJ Wiseman that his disability gave rise to poor recall in relation to facts, events and dates; difficulty in processing and organising information given verbally and on paper; low confidence and difficulty in concentrating over long periods of time. EJ Wiseman also held that the adverse effect of the impairment would have been more substantial without medication.

PCP (a)

102. Having accepted that PCP (a) was a practice of the respondent, applied to the claimant, we considered whether it put the claimant at a substantial disadvantage

in comparison with persons who are not disabled. This is a question of fact assessed objectively and measured by comparison with what the position would be for non-disabled people. We concluded that the claimant was placed at a substantial disadvantage in that: not having had access to his emails and electronic diary to assist his poor recall, when he was asked questions at the fact finding interview on 21 December 2018 that referred to facts, dates and events that had happened between February and August 2018, he was not able as a result of poor recall to answer the questions precisely and accurately. Inaccurate and erroneous assumptions and conclusions were then made against him by the fact finder in the resulting report. (See findings in fact above). Even though the claimant was given access to his emails and diary prior to the disciplinary hearing, this did not alleviate the disadvantage because (i) adjustments were not made for the access session on 22 March 2019 and (ii) the panel regarded the fact finding report as having effectively created a presumption of guilt, which it was for the claimant to rebut. [G Convery WS 27 "*he had not proven to me that he was not guilty of the allegations which were narrated against him."*] As a result of his disability, the claimant was unable to unpick the errors and assumptions underpinning Ms Robertson's conclusions and ultimately unable to reverse her conclusions to the satisfaction of the disciplinary panel. A non-disabled person would have been able to answer the questions accurately and confidently and to have corrected the erroneous assumptions they contained.

103. Subject to the issue of knowledge below, we would have considered that this proposed adjustment would have been reasonable to make for the reasons also set out below.

PCP (b)

104. The Tribunal separately accepted that PCP (b) also put the claimant at a substantial disadvantage in comparison with persons who are not disabled. We accepted that as a result of his disability, the claimant struggled to process information given verbally and on paper, to recall facts and details, to concentrate over periods of time and to formulate responses. There were accordingly details

he was not able to provide at the interview but which would have helped clarify responses and establish the facts. We did not agree with Mr Miller's submission that the claimant had not made good in evidence the averments made on his behalf at 52.3 and 52.4 of the ET1. The nature and content of the claimant's answers to the questions from Ms Robertson on the key points strongly suggest he was struggling during his interview to understand the questions, provide detail and respond. We consider that the claimant's answers to questions 25 to 25.3 are a case in point.

105. During the fact finding interview the investigator read from communications, specifically emails and Ms Crichton's timeline and file notes and asked for the claimant's comments. The claimant's difficulties with concentration and comprehension placed him at a substantial disadvantage as he struggled to take in what was being read to him and to process and organise the information. Question 24.1 is a particularly egregious example of a question in which the claimant is being asked by Ms Robertson to agree that the whole content of a multifaceted note from S&W (a note which he had not seen but which had presumably been read to him) must have been relayed to him by Mrs Macfarlane on 13 August. His general answer is inconsistent with his specific denial at 25.3. A non-disabled person would have been able to understand and assimilate the documents read out to them; to understand the questions; to answer them accurately and robustly and to have corrected the erroneous premises and assumptions some of them contained.

106. The interviewer read from a list of 134 questions. It was a lengthy, approximately 4 hour interview. The claimant's problems with poor concentration, recall and reduced ability to process and organise information rendered this interview especially stressful and this in turn exacerbated his symptoms. Again, a non-disabled person would have been able to answer the questions accurately and robustly and to have corrected the erroneous assumptions they contained.

107. For the reasons set out below and subject to the issue of knowledge, we concluded that it would have been a reasonable adjustment to provide the

claimant with copies of these documents along with the questions and to have given him time to digest and make sense of them before the fact finding interview.

PCP (c)

108. With regard to PCP (c) - not to allow an interviewee to add or remove any information recorded in the note of the fact finding interview if it was not discussed at the meeting – the Tribunal accepted that this was a practice of the respondent and that it put the claimant at a substantial disadvantage in that because of his poor recall there were details he was not able to provide at the interview which would have helped clarify responses and establish the facts.

109. We considered Mr Miller's submissions on the issue of whether these PCPs put the claimant at a substantial disadvantage. We considered the argument at paragraph 12 of his written submissions, that the claimant believed he had given an accurate account to Ms Milne in her (separate) fact finding investigation into A's grievance (C WS 62). We considered that the details of A's grievance so far as they were said to relate specifically to the claimant (J182) were: "*The manner in which the Attendance Support Meeting on 3 August was conducted by Maureen Macfarlane and Gerry Campbell".* There did not appear to have been any reference to documents the claimant had not seen or of chains of email correspondence being read out at the A grievance interview. We did not consider the two interviews to be comparable. There was a material difference in the scale and complexity of the respective interviews and in their importance to the claimant.

110. In paragraph 13 of Mr Miller's submissions he disputes that there was any evidence that being given the questions in advance would have been a reasonable adjustment. (This is also applicable to the issue of the reasonableness of the proposed adjustments below.) We did not accept this submission for the following reasons. We considered that it was clear from the fact finding report that some of Ms Robertson's conclusions were based on generalised, vague and inaccurate answers by the claimant (e.g. paragraph 4.47

on J271). Once these found their way into the final report, the claimant faced an uphill struggle. On page J283 at para 5.15 it is implied that the claimant agreed that he was aware of the totality of the advice given by Ms Crichton to Mrs Macfarlane on 13 August 2018 (presumably as recorded in her file note which the claimant had not seen but which was read out to him at the interview). Paragraphs 5.19 and 5.20 are based on misunderstandings by both the claimant and Ms Robertson. Ms Robertson's conclusion at 5.1 (J281) is that Ms Crichton did not speak directly to the claimant on 13 August but that her advice was relayed to him by Mrs Macfarlane. However, Mrs Macfarlane had specifically told Ms Robertson in her own interview that she had not asked the claimant at any time to request SLC's assistance with fact finding. Nevertheless, at 5.19 and 5.20 and 5.30 Ms Robertson implies that on 13 August Ms Crichton asked the claimant to ascertain [*sic*] fact finding support from SLC. There is an unfair implication that the claimant is being disingenuous. The conclusions of the report depended heavily on Mrs Macfarlane having asked the claimant on 13 August to speak to SLC about fact finding, yet the evidence Ms Robertson had gathered was that she did not. Ms Robertson's conclusions were in turn relied upon by the disciplinary and appeal panels. If the claimant had had the questions and documents in advance he would have been able to read and assimilate the content of Ms Crichton's file note of her call with Mrs Macfarlane on 13 August 2018 and to indicate to Ms Robertson precisely which parts of J373 were relayed to him by Mrs Macfarlane and which were not. That might well have been an end of the matter.

111. Mr Miller states that an alternative (to the proposed adjustment of giving the claimant the questions in advance) which was actually used was to allow the claimant to present a statement augmenting and/or correcting the Robertson record. We considered this carefully. The claimant's additional notes (J1047 – 56) were sent to Ms Robertson on 11 January 2019 but she had already completed and sent off the report earlier that day. Furthermore, the claimant's additional notes were prepared without access to the emails and file notes and this prevented him from giving a full and informed explanation. He was having to rely upon his recall, which was affected by his disability. (For example his note on

Question 25.1 on J 1049). The Tribunal concluded that because the claimant's statement was simply added as an appendix and not used in the conclusions; and because, when the claimant wrote the statement he did not have access to the emails and file notes on which the questions had been based, but was having to rely on his recall which was affected by his disability, this 'alternative' did not begin to address the disadvantage. If the respondent had made the adjustment of providing him with the questions and associated documents in advance of the fact finding, this disadvantage would have been alleviated in time for the claimant's informed position to have been incorporated into the fact finding report.

PCPs (a), (b) and (c) - Would the adjustment have been reasonable?

112. The duty, once triggered, is *"to take such steps as it is reasonable to have to take to avoid the disadvantage."* The Tribunal must look at whether the adjustment proposed by the claimant is itself reasonable. The sorts of factors which a Tribunal might consider in making that assessment are listed in paragraph 6.28 of the EHRC Code. We concluded that the step of providing the 134 questions and copies of the documents they referred to in advance of the fact finding interview would have been effective in preventing the substantial disadvantage by enabling the claimant to remind himself - by reference to the contemporaneous correspondence and file notes - of the complex sequence of events and to offer his properly informed and considered responses to Ms Robertson's questions. We concluded that the step/adjustment would have been practicable. Ms Robertson had prepared the questions and obtained the documents in advance of the hearing. It would have been a simple matter to have shared them with the claimant. The respondent may consider that the element of surprise stops an employee from crafting explanations in advance. However, the evidence led by Ms Robertson against the claimant in this case was primarily documentary. It was incumbent upon her to ensure that she had understood them correctly and that she had given the claimant a fair opportunity to answer the case against him. Because of the failure to make reasonable adjustments, and the other problems with the way the fact finding was conducted, the case was flawed from the start. No issue arises in relation to the cost or resources of the respondent.

(i) To have given the claimant a second interview as outlined in R's Disciplinary Procedures: A Handbook for Managers.

113. The claimant submitted that the respondent could have given him a second interview which would have enabled him to digest the questions and documents and access the information he could not recall at the first interview and thus to present his evidence accurately. It appeared to the Tribunal that this adjustment had been put forward as an alternative to (i) above. Since (i) succeeded, we did not address this.

(ii) To have provided the claimant with a transcript of a recorded interview.

114. It was argued by the claimant that the PCP applied to him in relation to this adjustment claim was the respondent's practice of providing a non-verbatim record of fact finding interviews. It was said that this practice put him at a substantial disadvantage compared to non-disabled persons in that the claimant was experiencing difficulties with recall and comprehension as a result of his disability and so was at a disadvantage when it came to reviewing the notes of the meeting and checking if any of the information had not been recorded correctly. It was stated that the respondent's practice is to permit the interviewee to request amendments if the information is not accurate and an interviewee who had confidence in their ability to recall statements would be in a position to contest inaccuracies. As the claimant's recollection of the interview was impacted by his disability, he was therefore placed at a disadvantage by not receiving a verbatim copy of the records. The claimant argues that it would have been a reasonable adjustment for him to have been provided with a transcript of a recorded interview in this instance. We considered paragraph 14 of Mr Miller's submissions. We did not agree with him that the sense of paragraph 85 of the claimant's witness statement was that he was able to ascertain what he needed to add. The claimant states only that he knew that he needed to add further detail, explanation and clarity to what was recorded. Because the claimant did not have copies of the documents Ms Robertson had referred to in the interview, his

comments were limited to his recall in any event. We concluded that this practice was applied to the claimant and did put him at the disadvantage. However, he would not have been at the disadvantage in question if he had been given the questions and associated documents in advance of the fact finding. We would therefore see this as a less effective alternative to (i) above since, with regard to the documents, it would only record extracts Ms Robertson had chosen to read out. Again, since the claimant has succeeded in arguing (i) we have not addressed this further.

(iii) At the email access sessions on 22 March and 23 August 2019 to have provided a separate screen in another part of the room to enable the supervisor to watch what the claimant was doing at a distance or password access to only the claimant's emails when giving the claimant access to his emails.

115. The claimant requested access to his emails to prepare for the disciplinary and appeal hearings. He was given access once prior to the disciplinary hearing and once before the appeal. He argues that reasonable adjustments ought to have been made to these sessions. The claimant submits that the PCP applied to him by the respondent during this access was their practice for a suspended employee to access emails through a session supervised by a member of the respondent's HR team sitting beside the employee in close proximity so they can both see the same computer screen. We accepted that this was a practice for the purposes of section 20 EqA and that it put the claimant at a substantial disadvantage in comparison with non-disabled persons because the proximity of Ms Robertson looking at the same screen as the claimant heightened his anxiety and exacerbated his problems with processing information, organising his thoughts and keeping focused on the task, such that on the first occasion the claimant was unable to complete the session or use it to remind himself of the events and communications/ explore the evidence fully. We accepted Mrs Campbell's unchallenged evidence about what happened at the first session, that it was prematurely terminated and that Ms Robertson did not follow up to see if another approach could have been used. We found above that the respondent

had knowledge of the claimant's disability and indeed, the claimant had brought this to Ms Robertson's own attention at the end of the fact finding interview. With regard to knowledge of the disadvantage, Mrs Campbell testified that it was evident to her from the claimant's voice and demeanour that he was not thinking or communicating clearly. She stated that she expected Ms Robertson to check the claimant was ok and that when she failed to do so, Mrs Campbell told Ms Robertson it was not working and they needed to leave and terminated the session. Given the terms of Ms Robertson's fact finding report and her involvement in the case to that point, it should have been obvious that to supervise the claimant in close proximity in the manner described by Mrs Campbell could heighten his anxiety.

116. With regard to the issue of whether this would have been a reasonable adjustment, we concluded that providing a separate screen for Ms Robertson to enable her to observe the claimant's actions from a distance would have been a relatively simple and practicable step. It would have been likely to have relieved the disadvantage caused to the claimant by the proximity of Ms Robertson in the circumstances. We find that it would have been a reasonable adjustment which the respondent failed to make. The same applies to the session on 23 August 2019.

Knowledge of Disability and Disadvantage

Did the respondent know and could it reasonably have been expected to know that the claimant was disabled and likely to be placed at the disadvantage?

117. In terms of the EqA Schedule 8, paragraph 20 the respondent is not subject to a duty to make reasonable adjustments if the respondent did not know and could not reasonably have been expected to know that the claimant had a disability and was likely to be placed at the disadvantage referred to. Both Mr Miller and Mr Hardman referred the Tribunal to paragraph 17 of the Judgment of the EAT in Secretary of State for Work and Pensions v Alam [2010] ICR 665 in which the test in relation to whether the 'lack of knowledge exemption' applies is set out in the

following way: "*17… two questions arise. They are: (1) did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question; namely (2) ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? 18 If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments."*

118. We considered the facts of the present case.

(a) On or about 13 May 2016 Mrs Macfarlane, the respondent's Head of HR took advice from Kate Faulds of S&W regarding her concerns for the claimant's health. She kept a note of the conversation (J165) which refers to the claimant's stress and anxiety. She was advised to speak to Ms McVeigh to relay her concerns.

(b) On 3 October 2017 the claimant was diagnosed with stress and anxiety by his GP, prescribed Sertraline (an antidepressant) and referred to Dr Millings, a counselling psychologist. The same month, he emailed Cllr David Watson, Chair of the respondent's Board, who was his line manager and explained to him that he was suffering from stress and anxiety and that he was seeking medical advice about his mental wellbeing. He informed Cllr Watson that his GP had advised professional counselling with a counsellor/psychologist.

(c) Around the same time the claimant informed Mrs Macfarlane, the respondent's Head of HR that he was on anti-depressants, was struggling and was having bad nosebleeds. Mrs Macfarlane also knew the claimant was seeing a psychologist.

(d) In December 2017 (J166) the claimant emailed Ms McVeigh about the vein occlusion in his left eye. He told her that this had been diagnosed as a result of high blood pressure due to ongoing issues at work.

(e) During a conversation on 17 August 2018 with Ronnie Smith (one of the respondent's Board members) and in a further conversation in late September/early October 2018 Mr Smith noticed that the claimant was showing signs of stress and anxiety (J584).

(f) Cllr Watson testified that in 2018 he noticed verbal communication and physical signs about the claimant's health. He had day to day discussions with the claimant in 2018, talking to him about the stress of everything that was going on and Cllr Watson was sufficiently concerned that he contacted Lynne Basch, an HR officer with the respondent about getting support for the claimant. Ms Basch emailed Cllr Watson on 27 September 2018 (J1045) and reported to him that the claimant was struggling with his mental health and well-being. The claimant took up Ms Basch's offer of support.

(g) On 27 November 2018 the claimant informed Cllr Craig of his stress and anxiety in a text (J219).

(h) By email dated 28 November 2018 the claimant told Ms McVeigh that he was experiencing stress and anxiety and that the appointment of Ms Robertson was against a backdrop of other factors which continued to have a major impact upon his own mental health. He stated that the unfounded speculation about his suspension had added to his personal stress.

(i) At the end of the claimant's fact finding interview with Ms Robertson on 21 December 2018 (J308) the claimant told Ms Robertson that in the summer he had been prescribed anti-depressants and had undergone professional counselling and advice. He told Ms Robertson that he remained on them at that time. He described his wife's serious health issues and how his suspension had come in the middle of a health crisis for his wife. He went on to say that the personal stress and pressure he had been under had been immense and he could not stress enough how difficult it had been.

(j) The respondent's OH report (J534 – 6) and the claimant's GP letter both post-date the fact finding interview but pre-date and were made available to the disciplinary hearing. They probably pre-date the first access session on 22 March 2019. The GP letter dated 21 March 2019 (J533) confirms the claimant's anxiety, depression and poor concentration. The OH report does not specifically address the issue of disability status but refers to the claimant's mental health problems and refers to the claimant having exhibited features of low mood including impaired cognition, confidence, motivation and disturbed sleep. It also states that his reasoning may have been affected.

(k) In relation to the disciplinary hearing on 1 and 2 April 2019, Mr Freeland conceded in his witness statement (paragraph 26) that he was aware that the claimant was suffering from stress and anxiety. He goes on: "*The letter from Ronnie Smith alludes to this and his representative stated this to be the case at the hearing."* He stated that Ms Baxter had, however, made no issue of the claimant not having the opportunity to participate fully in the process and did not ask for adjustments to the fact finding or disciplinary process. Mr Freeland stated that he did not witness the claimant display any behaviour at the hearing that suggested he was affected by any mental health problems. However, Cllr Convery testified (GC WS 23): "*He sat there over the two days and I was waiting for the big robust denial, but it never came. This was not the guy I dealt with over the years. If Gerry had an opinion, he would say it. I was waiting for the punchline from him and his representative but nothing came. Where was the defence? It was like he was going through the motions, item by item."* Cllr Convery agreed in Cross examination that he had seen the claimant's GP letter which is at Appendix 36 to the fact finding report.

119. We asked ourselves first whether the respondent knew or could reasonably have been expected to know that the claimant had a physical or mental impairment at the relevant time(s) (specifically on 21 December 2018; 22 March 2019; 1,2 and 3

April 2019 (section 15 claim) and 23 August 2019). The impairment held to be a disability by EJ Wiseman (J51 Paragraph 53) was stress and anxiety. The claimant had informed the respondent he was suffering from this impairment on a number of occasions by 21 December 2018. Clearly the respondent knew about it.

120. We next considered whether they knew and/or could reasonably have been expected to know that the impairment had a substantial (i.e. not minor or trivial) and long term adverse effect on his ability to carry out normal day to day activities. Regarding whether they knew the impairment was substantial and long-term, the claimant had told his line manager, Cllr David Watson, Chair of the respondent's Board in October 2017 that he was suffering from stress and anxiety; that he was seeking medical advice about his mental wellbeing; and that his GP had advised professional counselling with a counsellor/psychologist. Around the same time the claimant informed Mrs Macfarlane, the respondent's Head of HR that he was on anti-depressants, was struggling and was having bad nosebleeds. Mrs Macfarlane also knew the claimant was seeing a psychologist. We were satisfied that the respondent knew and/or could reasonably have been expected to know by December 2018 that the claimant's mental impairment was substantial and long-term such that Cllr Watson had noticed verbal communication and physical signs and contacted Lynne Basch to obtain support for him. We inferred from the evidence of Cllr Watson and Mrs Macfarlane that the claimant had discussed with them the adverse effect his mental impairment was having on his normal day to day activities. They also knew that the claimant was on anti-depressant medication and they could reasonably have been expected to know that the effect of the impairment was likely to have been more substantial if he had not been on medication.

121. We considered whether the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage(s) in question - we reminded ourselves that in relation to PCP (a) the substantial disadvantage was that at the fact finding interview on 21 December 2018 the claimant was not able as a result of poor recall to answer Ms Robertson's 134

questions precisely and accurately. Inaccurate and erroneous assumptions and conclusions were then made against him in the resulting report. In relation to PCPs (b) and (c), the substantial disadvantage at which the claimant was put in comparison with non-disabled persons was - put shortly - that at the same interview on 21 December 2018 the claimant struggled to process and organise the information presented to him, take in what was read out to him, recall facts and details and formulate responses, especially in relation to emails and previously unseen file notes. He also struggled to concentrate and to correct the erroneous premises and assumptions in some of the questions. Whereas a non-disabled person would have been able to answer the questions accurately and robustly and to have corrected the erroneous assumptions they contained.

122. The question of whether an employer could reasonably be expected to know of a person's disability and likelihood of being placed at the disadvantage is a question of fact for the Tribunal. With regard to whether the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed by the PCPs at the substantial disadvantage(s) in question, we concluded that they could reasonably have been expected to know this by 21 December 2018 for the following reasons: By that stage, the claimant had told Mrs Macfarlane, Cllr Watson, Ms McVeigh and Cllr Craig that he was suffering from stress and anxiety. He had discussed the effects of this on his day to day activities with Cllr Watson, his line manager. Mr Smith and Cllr Watson had also observed signs of stress and anxiety when speaking to him. In an email sent to Ms McVeigh on 28 November 2018 the claimant had referred again to his stress and anxiety and to other factors continuing to have a major impact on his own mental health. According to Ms Robertson's evidence in cross examination, Ms McVeigh, (SLC's Head of HR) was directing the fact finding investigation. One might have expected that this email would have led an experienced and senior HR professional to consider whether adjustments to a nearly four hour fact finding interview might be required. Similarly when the claimant drew attention to his impairment at the end of the fact finding interview, one might have expected Ms Robertson to ask herself the same question. The Tribunal inferred from the written record of the interview (per examples in the findings in fact above) that the claimant was clearly

struggling. A prudent employer who knows an employee has a mental impairment would act as though that impairment may qualify as a disability, or satisfy themselves that this is unlikely by seeking medical or occupational health advice before embarking on a four hour interview of the sort conducted by Ms Robertson.

123. The OH report and GP letter post-dated the fact finding interview. The GP letter dated 21 March 2019 (J533) confirms the claimant's anxiety, depression and poor concentration. The OH report does not specifically address the issue of disability status but refers to the claimant's mental health problems and to his having exhibited features of low mood including impaired cognition, confidence, motivation and disturbed sleep. The report states that his reasoning may have been affected to some extent as well. We accepted the claimant's evidence that these were longstanding symptoms. To the extent that these observations were available to the OH doctor at his consultation and adopting the relevant facts found by EJ Wiseman, we infer that the low mood, impaired cognition and confidence and issues with reasoning would have been apparent to Ms Robertson at the nearly four hour, very testing fact finding interview. We consider that they are apparent from the notes of the claimant's interview and from Ms Robertson's findings where she refers on a number of occasions to the claimant being unable to recall things and says several times: "fact finder reminded Mr Campbell"; "Mr Campbell was reminded".

124. Paragraph 20(1)(b) of Schedule 8 to the Equality Act 2010 is framed in the negative. It states that A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. For the foregoing reasons, we have concluded that the respondent in this case knew and/or could reasonably be expected to know that the claimant had a disability and that he was likely to be placed at the disadvantage referred to in the first requirement.

Discrimination Arising from Disability (s. 15 EqA)

(i) Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability? (Stress and anxiety).

(ii) Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability?

(iii) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

125. Section 15(1) EqA does not apply if the respondent shows that they did not know, and could not reasonably have been expected to know that the claimant had the disability. Since the unfavourable treatment complained of is the claimant's dismissal, the relevant date is 3 April 2019. On the basis of the facts summarised at paragraph 118 (a) to (k) and for the reasons set out in paragraphs 119 and 120 above, we concluded that the respondent knew and could reasonably have been expected to know that the claimant had the disability at that stage.

126. Section 15 Equality Act provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability; and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Mr Hardman referred to the judgment of the EAT in Pnaisner v NHS England [2016] IRLR 174 at paragraph 31 in which Mrs Justice Simler (as she then was) summarised the authorities and set out the proper approach to section 15.

(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."* In this case the unfavourable treatment relied on by the claimant was his dismissal by the disciplinary panel.

(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…"* There may be more than one reason. "*The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it 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*." This stage is the subjective "because of stage" involving A's explanation for the treatment and the conscious or unconscious reasons for it. (Pnaisner paragraph 31(g)).

(c) "*Motives are irrelevant. The focus in this part of the enquiry is on the reason or cause of the impugned treatment…."*

(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'…the causal link between the something that causes the 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."* This stage is the 'something arising in consequence' stage which was held to be objective – whether as a matter of fact rather than belief the 'something' was a consequence of the disability. (Pnaisner Paragraphs 31(f) to (h)).

(e) An example of a case in which the causal chain between the 'something' that causes the unfavourable treatment and the disability included more than one link was Land Registry v Houghton [2015] All ER (D) 284 in which a bonus payment was refused by A because B had a warning. The warning had been given by a different manager for absence. The absence arose from disability. It was held that the statutory test was met.

127. Mr Hardman also referred to the case of Sheikholslami v University of Edinburgh [2018] IRLR 1097 in which Simler J said this (paragraph 62): "*On causation, the approach to section 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision 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? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the something was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

128. In this case, Mr Hardman submits that the unfavourable treatment was the claimant's dismissal. Applying the two stage test set out in Pnaisner and Sheikholslami we first asked whether the dismissal was because of the claimant's inability to respond to the allegations made against him with clarity. The first question is: Did the claimant's inability to respond with clarity to the allegations have a significant or more than trivial influence on the decision by the disciplinary panel to dismiss him? That question involves a consideration of the reasons why each relevant decision-maker acted as they did in treating the claimant unfavourably (deciding to dismiss him). Mr Hardman referred to paragraphs 21 - 23 of Cllr Convery's witness statement in which he submitted that Cllr Convery had confirmed that the claimant was unable to respond to the allegations made against him. (See paragraphs 84 and 85 above.) Cllr Convery testified that he had noticed during the hearing that the claimant's body language was like he was defeated. Cllr Convery said that he had been waiting for the punchline from the claimant and his representative but nothing came. He considered that the claimant had not proven to him that he was not guilty of the allegations which were narrated against him and we found that it was on that basis that he decided to dismiss him.

129. Quoting paragraph 25 of Mr Freeland's witness statement, where he states: "*The panel chose to dismiss the Claimant as his judgment, actions and behaviour evidenced throughout the process had eroded all trust and confidence in his ability to continue in the post…"* Mr Hardman submitted that stated in those terms, this must be considered a significant factor in Mr Freeland's decision to dismiss the claimant. Mr Hardman argues that it had at least a significant (or more than trivial) influence on the unfavourable treatment (his dismissal), and so amounted to an effective reason for or cause of it. We accept that submission.

130. The second question is whether on the objective facts, the 'something' (the claimant's inability to respond with clarity to the allegations) arose in consequence of the claimant's disability of stress and anxiety. Mr Hardman stated that the claimant's confusion and lack of clarity on the facts during the disciplinary hearing were set out in his witness statement at paragraphs 101 – 103; that this was a characteristic of his disability and was 'something' which had a significant influence on the claimant's "*judgment, actions and behaviour evidenced throughout the* [disciplinary] *process.."* Cllr Convery's observations of the claimant's demeanour and body language in paragraphs 21 to 23 of his witness statement are also relevant here. Furthermore, the medical evidence in the GP letter and OH report were in point. The claimant was assessed by the OH doctor on 21 March 2019, just over a week prior to the disciplinary hearing. The doctor stated: "*He has exhibited features of low mood including impaired cognition, confidence, motivation, disturbed sleep and reasoning may have been affected to some extent as well."* We also refer to the findings in fact at paragraphs 84 and 85. We concluded on the facts before us that the claimant's inability to respond with clarity to the allegations during the disciplinary hearing was 'something' arising in consequence of his disability.

131. With regard to the issue of whether the claimant's dismissal was a proportionate means of achieving the legitimate aim of "responding to genuine and substantial concerns about the claimant's conduct", Mr Hardman submits that this was an unfair and wrongful dismissal and as such, it cannot be justified. He argues that it is clear there was no legitimate aim to be pursued. We agree with that

submission. We find below that there were no reasonable grounds for the panel's belief in the claimant's misconduct. Ordinarily, it would be a legitimate aim to investigate concerns about an employee's conduct through disciplinary proceedings and to dismiss the employee if found guilty. Even if we are wrong and the respondent had a legitimate aim in this case, the claimant's dismissal was not a proportionate means of achieving it. They failed to carry out a reasonable investigation and used a procedure that was manifestly biased. The respondent failed to make reasonable adjustments. As paragraph 5.21 of the EHRC Employment Code states: *"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."*

Unfair Dismissal (ss. 94 &98 ERA)

(i) With reference to sections 94 & 98 ERA, was the claimant's dismissal by the respondent fair or unfair?

132. Section 98 of the Employment Rights Act 1996 indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. The case put forward by the respondent was that the reason was conduct. A reason relating to the conduct of the employee would be a potentially fair reason under Section 98(2).

133. To establish that a dismissal was on the grounds of conduct, the employer must show that (in this case) the panel that made the decision to dismiss the claimant believed that he was guilty of misconduct. Thereafter the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing/appeal officers reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The onus is neutral in relation to the grounds for the respondent's belief and the sufficiency of the investigation.

134. If the tribunal finds the reason for dismissal established, it must move on to the second stage and apply Section 98(4) to determine whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissal. In applying that section the Tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used and whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question. The Employment Tribunal is not permitted to substitute its view on any of these issues for that of the employer. Instead it must consider whether the process and decisions of the respondent fell within the range of a reasonable employer.

Reason for dismissal

135. With regard to the reason for dismissal, the Tribunal accepted with some hesitation that the respondent's disciplinary panel believed that the claimant was guilty of serious/gross misconduct.

Reason/Reasonableness

136. Mr Hardman referred us to Lord Bridge's well known dictum from Polkey v A E Dayton Services Ltd [1982] ICR at 162: "*But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, …… in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation...*"

137. Although we accepted (with some misgivings) the panel's belief in the claimant's misconduct, we concluded that there were not reasonable grounds for that belief in that no reasonable employer could have concluded the claimant was guilty of serious misconduct on the evidence gathered by Ms Robertson at the fact finding stage. Our reasons for this conclusion are based on the facts summarised in paragraph 82 above. The evidence presented in the appendices to the report manifestly did not support the report's conclusions, nor did it support those of the disciplinary panel. Indeed, the evidence at its highest showed that the claimant's involvement in the arrangements for A's grievance was minimal. It began on 13 August 2018 when Mrs Macfarlane relayed to him part of her understanding of a call with Ms Crichton and it ended on 15 August 2018 when he stepped back from the process. It amounted to little more than checking the availability of two board members to hear a first instance grievance. On the evidence Ms Robertson gathered there was clearly no substance to the charges that the claimant had not followed Ms Crichton's advice or that he had misrepresented the position of S&W and SLC in communication with both organisations.

138. Following the claimant's disciplinary hearing on 1 and 2 April 2019, Cllr Convery considered that it was for the claimant to prove to him that he was not guilty of the allegations narrated against him (GC WS 27) and that he had failed to do so. He considered "there was no overarching defence from [the claimant] side".

139. With regard to the question whether the respondent's investigation was within the band of reasonable investigations a reasonable employer might have conducted in the circumstances we were strongly of the view that it was not within that band for the following reasons:

    (i) The first two allegations against the claimant were that he had not followed legal advice from Shepherd and Wedderburn and had misrepresented the position of Shepherd & Wedderburn and SLC in communication with both organisations. Despite the complexity of the facts and the need to interpret statements and advice in context, Ms Robertson did not, at any stage interview either Ms Crichton or (officially) Ms McVeigh. These two

witnesses were the principal people in the respective organisations with whom the claimant (briefly) communicated and whose respective positions he was alleged to have misrepresented. No reasonable employer would have omitted to interview these witnesses given the nature of allegations 1 and 2 against the claimant and the need for interpretation of the records of which they were the authors.

(ii) Despite the fact that on the charges she was a key witness, the Fact Finding investigation into the claimant's handling of A's grievance process by SLC was carried out under Ms McVeigh's direction by one of her Personnel Advisers, Gail Robertson. As stated in the previous paragraph, inexplicably, given the nature of allegations 1 and 2, Ms McVeigh was not questioned as a witness in the investigation. Despite this, Ms Robertson permitted Ms McVeigh to comment in the final report at paragraph 4.64 (J274).

(iii) The investigation and fact finding report were partisan and inadequate for all the reasons set out above (particularly paragraphs 60 – 62 and 69 - 77). The report appeared to be oriented toward confirming Ms McVeigh's suspicions of misconduct, as communicated to Mr Freeland and others in her briefing notes.

(iv) The confusing nature of the fact finding report and appendices and the incorporation of lengthy background material made it difficult for the claimant and the members of the disciplinary panel to engage with. As Mr Hardman submitted, key to understanding the allegations and whether or not Ms McVeigh's suspicions had substance were the sequence of emails and telephone calls between Ms Crichton and Mrs Macfarlane and between the claimant and Ms McVeigh all between 13 and 15 August 2018. We agreed with Mr Hardman that the evidence of those interactions is not presented in a logical manner. The relevant findings do not appear until paragraphs 4.47 to 4.75 of the report and the supporting documents are not easy to find in the appendices.

(v) Some of Ms Robertson's key conclusions do not fairly represent the evidence she had gathered, especially from the claimant and Mrs Macfarlane. Mrs Macfarlane told Ms Robertson she had not spoken to the claimant about SLC conducting a fact finding. The claimant also said this. Ms Robertson fails to acknowledge this in the report and makes a key conclusion at odds with this evidence without explanation. No reasonable employer would proceed in that manner.

(vi) As Mr Hardman submits, the criticised conduct of the claimant was minimal. His report that Ms McVeigh discussed only 3A and not fact finding could have been confirmed by Ms Crichton but despite being a key witness she was not interviewed. Otherwise, the claimant contacted two members of the respondent's board to ascertain their availability for a first instance grievance hearing. There was no evidence he gave them any details of the grievance. The claimant was then advised to step back and he did so. We agree with Mr Hardman that the paucity of any evidence of culpability was not explained in the report nor could it be understood from it without unscrambling the appendices.

(vii) The respondent was on notice that the claimant was suffering from stress and anxiety. The respondent failed in its duty to make reasonable adjustments to the investigation procedure.

140. The Tribunal concluded that the above matters in combination took the investigation carried out by the respondent outside the band of reasonable investigations a reasonable employer might have conducted in the circumstances.

141. The Tribunal also concluded that the procedure adopted by the respondent was biased and well outside the band of reasonable procedures a reasonable employer might have used for the following reasons:

(i) The respondent is an ALEO. To maintain charitable status, an ALEO has to be able to demonstrate that it is truly independent and not simply a subsidiary of a local authority. The respondent had its own HR

Function headed by Maureen Macfarlane and a retainer arrangement with Shepherd and Wedderburn for legal advice. Nevertheless, Ms McVeigh - SLC's Head of Personnel Services - who was not employed by the respondent and had no locus in relation to A's grievance (unless the respondent, the grievance maker and grievance subjects all agreed to vary the respondent's process to allow a third party to step in (stage 3A excepted)) insisted on becoming involved in it. This was against the advice of the respondent's solicitors (J171) who advised the Chair of the respondent's Board, Cllr Watson that there was no requirement to outsource the grievance to a third party. Ms McVeigh was also an essential witness in the case, given the nature of the first and second allegations and it was inappropriate for her to provide HR advice and handle the case.

(ii) The respondent's employment law adviser, Ms Crichton had given the respondent sound advice that it was not necessary (or a good idea) - given that A's grievance was post-resignation - to continue with it once A had refused the offer of a reasonable process by her employer. (A's employer was the respondent not SLC). Despite this, Ms McVeigh insisted both that the grievance should proceed and that SLC should be involved. At some point between 4 and 17 September 2018 she personally met with A and her solicitor "*to try and resolve the complaint*" and only informed Cllr Watson about the meeting (by email dated 17 September 2018 (J167)) after it had taken place (bypassing Shepherd and Wedderburn in the process). She informed Cllr Watson that the resolution she had agreed with A and her solicitor was: "…*that the grievance is heard".*

(iii) On 19 September 2018, more than a month after the claimant had already stepped back from the grievance process, Ms McVeigh sent an internal SLC briefing note (J554) to SLC's CEO, Mr Freeland and SLC's Council leader in which she implied that the claimant's actions had been suspicious and/or improper and that he was still inappropriately involved in A's grievance process as set out at paragraph 37 above. Having

briefed Mr Freeland as described in paragraph 37, Ms McVeigh later had him appointed to the claimant's disciplinary panel.

(iv) Cllr Watson was then put under pressure by SLC to ignore the advice from Shepherd and Wedderburn, hand over the investigation of A's grievance to SLC and let them take control of it. He resisted. On or about 5 October 2018 SLC informed Cllr Watson that he had been removed from the respondent's Board and was no longer a director or Chair. On 10 October 2018 Michelle Milne, HR Business Partner with SLC began investigating A's grievance.

(v) On 25 October 2018 Cllr Peter Craig of SLC's political executive put himself forward to be a director of the respondent's board with a request to be Chair. At a meeting of the respondent's Board on 26 October, he was appointed a director and interim Chair in place of Cllr Watson. At the same time, Cllr Gerry Convery of SLC was also appointed to the respondent's Board. The same day, Friday 26 October 2018 Ms McVeigh informed the claimant that Cllr Peter Craig, the new interim chair of the respondent's Board had instructed her to instigate a fact finding investigation into the handling of A's grievance, all aspects of which would be managed and controlled by SLC. The Tribunal inferred from the foregoing facts and their timing that certain people within SLC were intent on disciplinary proceedings against the claimant and when they couldn't get Cllr Watson to cooperate, they made changes to the respondent's Board to that end. We were struck by the fact that Cllr Watson was removed/pressed to resign from the Board after he resisted pressure from SLC to ignore S&W's advice and hand control of the investigation of A's grievance to SLC. We noted that as soon as he became interim Chair, Cllr Craig immediately instructed a fact finding investigation by SLC into the claimant's handling of A's grievance. It was he who then suspended the claimant on 20 November. Cllr Craig chaired A's grievance hearing on 29 November 2018 and ultimately chaired the panel hearing the claimant's appeal against dismissal. We also noted that Cllr Convery was appointed to the Board on the same

date as Cllr Craig and then chaired the claimant's disciplinary panel. Thus, the chairs of the claimant's disciplinary and appeal panels were both appointed on 26 October 2018 amid the circumstances of Cllr Watson's removal and Ms McVeigh's ongoing actions.

(vi) On 5 November 2018 Ms McVeigh sent another SLC internal briefing paper to Mr Freeland and others in which she repeated and added to the prejudicial statements about the claimant in her 19 September briefing as set out in paragraphs 47 and 48 above. The clear implications contained in this briefing note were that the claimant ought to have used SLC's personnel service for A's grievance (J178 para 3.2) and ought to have passed it to SLC sooner than 14 August (para 4.1). The briefing note does not make clear that the respondent - as an independent organisation (and data controller) - has its own HR function and legal advisers and that it does not normally pass grievances to SLC to deal with.

(vii) On 6 November 2018, Cllr Peter Craig (who went on, despite objections, to chair the claimant's appeal against dismissal) asked Elouisa Crichton to provide him with a summary document, detailing what advice was sought by whom and when in respect of A's grievance (J1080). An overview/timeline was provided to Cllr Craig by Ms Crichton on 7 November 2018 and he passed it to Ms McVeigh.

(viii) On 13 November 2018 the claimant was interviewed by Ms Milne as part of the fact finding process into A's grievance. A week later, on Tuesday 20 November 2018, Ms McVeigh read out a series of misconduct allegations to the claimant in the midst of his wife's health crisis. She followed this up with two emails, one of which referred to a 'meeting of the Assessment Group' (to which Group Ms McVeigh had appointed herself adviser). The other attached a letter under Ms McVeigh's reference and signed by Cllr Peter Craig (J215) informing the claimant that he was suspended and that an investigation was to be carried out into a series of allegations against him in respect of his role as General Manager.

(ix) A's grievance hearing on 29 November 2018 was chaired by Cllr Peter Craig. The hearing was one-sided with A being permitted to address the hearing at length and no response on behalf of the grievance subjects. The grievance was upheld in full.

(x) Ms McVeigh directed Ms Robertson's fact finding investigation into the claimant. As discussed above, she was an essential witness given the terms of allegations 1 and 2 but she was not interviewed. She was nevertheless allowed to contribute but not transparently. It was Ms McVeigh who then sent the claimant his disciplinary hearing invite letter dated 7 February 2019 (J565). Despite her involvement in the events complained of, Ms McVeigh had once again appointed herself adviser, this time to the disciplinary panel. The panel for the claimant's disciplinary hearing included Robert Craig, a board member who was also a witness against the claimant and Johan Steele, who had been on the panel for A's grievance hearing. Cllr Convery then substituted Lindsay Freeland, CEO of SLC for Robert Craig. The claimant's union representative Ms Baxter emailed Cllr Convery and objected to the inclusion of Mr Freeland on the Panel and Ms McVeigh's appointment as HR Adviser to the Panel because of the prejudicial briefing notes Ms McVeigh had sent to Mr Freeland and others on 19 September and 5 November 2018. In relation to the briefing note of 5 November, Ms Baxter stated: "*This later document was then circulated by email to a number of others by the Chief Executive on the 8th November 2018. It is unfathomable to think that the Chief Executive would forward on a document with which he disagreed*…." It was pointed out that at least four other board members could replace Mr Freeland on the panel. Cllr Convery agreed to replace Ms McVeigh as HR Adviser to the Panel but refused to replace Mr Freeland. The Tribunal members were surprised by the proposed involvement of Mr Freeland in the disciplinary panel in light of the content of the briefing notes. It was difficult to see how he could possibly be expected to approach the matter impartially.

(xi) The appeal hearing did nothing to rectify the procedural injustice up to that point. As Mr Hardman submitted, both Cllr Craig and Mr Cunningham asserted that they did not consider their role was to reach an independent view on dismissal. They simply concluded that "*all the evidence heard by the Disciplinary Panel was properly heard and conducted in a fair manner"* (Cllr Craig WS 21). "*Margaret Cooper in fact said to Peter Craig the Chair that we should not need to re-hear anything, but what if anything was flawed about the original process"* (Craig Cunningham WS 8). Furthermore, the appeal panel was chaired by Cllr Craig who had ordered the fact finding investigation into the claimant's handling of A's grievance and had been involved in chairing A's grievance hearing.

142. For the reasons set out above and having reminded ourselves that we are not permitted to substitute our view on the issues above for those of the respondent, we concluded that the procedure used by the respondent was biased against the claimant and that it was well outside the band of reasonable procedures a reasonable employer might have used. It follows that the respondent acted unreasonably in treating the reason as sufficient for dismissal and that the claimant was unfairly dismissed.

Wrongful Dismissal/Breach of contract (ET Extension of Jurisdiction (Scotland) Order 1994)

(i) Did the respondent wrongfully dismiss the claimant?

(ii) If so, what is the claimant's contractual entitlement to notice if properly served?

143. In this case, the claimant also claims damages for breach of contract. It is his position that his summary dismissal was in breach of his contract of employment. The respondent states that the claimant was guilty of gross misconduct and that he was therefore in repudiatory breach of the contract entitling the respondent to dismiss him with immediate effect. The Tribunal's task is to decide on a balance

of probabilities who is correct as a matter of fact. The Tribunal accepted the submission of Mr Hardman that the claimant was not in repudiatory breach of the contract of employment. It follows that his claim for notice pay succeeds. (Question (x) is a matter for the remedy hearing).

144. It remains for us to thank Mr Hardman and Mr Miller for their excellent presentation of their respective cases.

Employment Judge: **M Kearns**
Date of Judgment: **20 January 2022**
Entered in register: **26 January 2022**
and copied to parties

I confirm that this is the Judgment in the case of Mr G Campbell v South Lanarkshire Leisure and Culture Trust 4107744/2019 and that I have signed the Judgment by electronic signature. Employment Judge M Kearns.