

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4105087/2016**

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**Held in Glasgow on 9, 10, 15 & 16 August 2017 & 9,10,11 & 29 January 2018**

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<b>Employment Judge:</b>	<b>Frances Eccles</b>
<b>Members:</b>	<b>Gerry Coyle</b>
	<b>John Hughes</b>

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**Claimant**  
**Represented by:**  
**Ms C Freeland -**  
**Lay Representative**

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**South Lanarkshire Council**

**Respondents**  
**Represented by:**  
**Ms M C Lunny-**  
**Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 The **unanimous** Judgment of the Employment Tribunal is (i) the respondents did not know and could not reasonably have been expected to know that the claimant was disabled before June 2014; (ii) the respondents were not in breach of their duty to make reasonable adjustments under Section 20 of the Equality Act 2010; (iii) the respondents did not harass the claimant in terms of Section 26 of the Equality Act 35 2010 & (iv) the claimant was not constructively unfairly dismissed.

**REASONS**

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**BACKGROUND**

1. The claim was presented on 6 October 2016. The claimant complained of failure on the part of the respondents to make reasonable adjustments, harassment relating to his disability and constructive unfair dismissal. The **E.T. Z4 (WR)**

claim was resisted. The respondents did not dispute that the claimant is a disabled person for the purposes of the Equality Act 2010. They did not accept that they knew or could reasonably be expected to have known about the claimant's disability before June 2014. The respondents denied having  
5 discriminated against the claimant and that any conduct on their part entitled the claimant to resign and claim constructive dismissal.

2. At a Preliminary Hearing held on 9 December 2016 the claimant identified the requirement to desk share and undertake additional duties as the provision,  
10 criterion or practice which put him at a substantial disadvantage in comparison to others who are not disabled. He claimed that having to sit at a different desk presented difficulties for him and the additional duties often consisted of heavy work with which he struggled. It was the claimant's position that providing him with his own desk and support to carry out the additional duties  
15 would have been a reasonable adjustment. The respondents identified the preliminary issue of time bar on the grounds that the claimant did not dispute that he moved to a different job in March 2014 after which he had his own desk and different duties.

3. At the Preliminary Hearing held on 9 December 2016 the claimant identified  
20 the harassment about which he complained as the respondents providing false statements to the Department of Work & Pensions ("DWP") in July 2014 followed by an investigation, enquiries about his medical condition and his suspension. The claimant identified Jackie Lawson and Marie Moy as the persons involved in the harassment. The claimant confirmed that he would  
25 rely on the conduct of Jackie Wilson accusing him of benefit fraud as the final straw amounting to a breach of trust and confidence entitling him to resign and claim constructive dismissal.

4. The claim was listed for a full Hearing. At the Hearing the claimant was represented by Ms C Freeland, Lay Representative. The respondents were  
30 represented by Ms M C Lunny, Solicitor. The parties provided the Tribunal with a Joint Bundle which included medical evidence lodged by the claimant. The Tribunal heard evidence from the claimant. For the respondents the Tribunal heard evidence from Deidre Duncan, Area Services Manager; Marie White, Team Leader; Jackie Lawson, Services Coordinator; Marie Moy, Financial Officer; Michelle McConnachie, Social Work Service Manager &  
5 Elaine Maxwell, Personnel Adviser. The Tribunal met on 5 March & 25 April 2018 to deliberate. The Tribunal heard evidence from the claimant of a medical nature to which reference is made in the Judgment. The claimant made an application to be anonymised in the Judgment. The application was not opposed by the respondents. The Tribunal, having given full weight to the 10 principle of open justice and to the Convention right of freedom of expression, decided that in the circumstances it was appropriate in terms of Rule 50(3)(b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 to order that the identity of the claimant should not be disclosed to the public, by the use of anonymisation in any Judgment entered on the Register,  
15 the online database of Judgments or otherwise forming part of the public record.

## **FINDINGS IN FACT**

20 5. The Tribunal found the following material facts to be admitted or proved; the respondents are a large local authority. The claimant was employed by the respondents as a Housing Support Officer (Families Intensive) (P2.1) on a temporary basis from 18 June 2012. He was based in the respondents' Housing Department in Cambuslang. The claimant has psoriatic arthritis. The  
25 condition affects his joints which can become swollen, stiff and painful. The claimant takes medication which suppresses his immune system making him more

susceptible to colds and infections and which requires him to have regular blood tests. In his application for the post of Housing Support Officer (Families Intensive) (P1.1.5) the claimant stated that he did not consider  
30 himself to be disabled for the purposes of a guaranteed interview. Around the same time as applying for the post of Housing Support Officer the claimant also applied for a Welfare Rights post with the respondents' Money Matters Advice Service ("Money Matters"). The claimant was interviewed by Jackie Lawson for the post. The respondents withdrew an offer for the post when references disclosed discrepancies in the claimant's job application.

5 6. Patricia Douglas was the claimant's Team Leader while he was employed as a Housing Support Officer (Families Intensive). The claimant was allocated a desk and allowed to use his own car for work purposes. On 10 October 2012 the claimant completed an assessment form of his PC screen, keyboard, desk and chair (P30). The claimant did not suggest any remedial action was 10 required to the above equipment (P30).

7. The claimant was granted authorised absence to attend medical appointments. On or around 26 November 2012 the claimant attended an appointment with a Consultant Rheumatologist. The Consultant  
15 Rheumatologist reported to the claimant's GP (P22A) that the claimant complained of pain affecting his neck and back and of "*more bad days than good days*". He also reported (P22A) that the claimant complained of intermittent swelling affecting his left knee and of experiencing stiffness lasting about thirty minutes in the morning. The Consultant Rheumatologist did not  
20 report any concerns on the part of the claimant about his work place. The Consultant Rheumatologist's report (P22A) was not copied to the respondents.

8. In September 2012 the claimant applied for a permanent post of Housing Support Officer (Homelessness) (P5). In his application for the above post the

25 claimant stated that he did not consider himself to be disabled for the purposes of a guaranteed interview. He was offered the post and started on 10 December 2012 (P6). The claimant remained in Cambuslang but was moved to an upstairs floor of the respondents' Housing Office. His Team Leader was Myra Stevenson. The post of Housing Support Officer

30 (Homelessness) required the claimant to spend most of his working day outside the office assisting clients with housing issues. The claimant and other Housing Officers appointed around the same time as the claimant were not allocated their own desks by Myra Stevenson. The office operated a desk sharing policy. Housing Officers, including the claimant, were instructed to use a pool car for work purposes. There was general unhappiness about the above arrangements amongst the Housing Officers and complaints were

5 made to Myra Stevenson at regular intervals about the inconvenience caused by desk sharing and use of pool cars. The claimant and other Housing Officers were also concerned when Myra Stevenson asked them to deliver food and household items such as a microwave or vacuum cleaner to clients' homes. On one occasion the claimant was asked by Myra Stevenson to help clean

10 the home of a client with mental health issues. The client's house was very dirty and in a poor condition. The claimant raised concerns about the possibility of infection. The claimant refused to help clean the client's home. Myra Stevenson did not insist that the claimant undertake the above task. The claimant was not asked to lift furniture or other heavy items.

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9. In January 2013 the claimant attended an appointment with a Consultant Rheumatologist & Physician (P24) at which he complained of "*very significant pain and stiffness in the lumbar region*". He was referred for an MRI scan. The Consultant Rheumatologist's report (P24) was not copied to the respondents.

20 In or around April 2013 the claimant informed Myra Stevenson that he had neck and lower back pain and that his GP had diagnosed a "*bulging disc*". On 29 April 2013 Myra Stevenson referred the claimant to Occupational Health (P31). The Occupational Physiotherapist who examined the claimant noted that he had psoriatic arthritis (P32) and

work related “*mechanical back and neck pain*”. The claimant identified “*different desks and driving different cars*” as aggravating factors and that “*pain and discomfort relate to changes at work*”. The Occupational Physiotherapist recommended that the claimant continue home exercises and improve his postural awareness. No recommendations were made to the respondents. The claimant attended

30           around four sessions with Occupational Health. The claimant consented to Occupational Health sharing information with the respondents’ HR (P33). The claimant’s Occupational Health records (P32) were not copied to the respondents. Arrangements were made with Patricia Douglas for the claimant to sit at the desk he had used while employed as a Housing Support Officer (Families Intensive).

10. The claimant and other Housing Officers were concerned that they had not been provided with a mobile telephone for use at work. The claimant  
5 complained to Myra Stevenson. On one occasion in June 2013 the claimant raised his voice and behaved aggressively towards Myra Stevenson. He subsequently apologised for his behaviour.

11. In August 2013 the claimant completed paperwork (P9) for purposes of lone working (“LWPS”) in which he recorded that he had psoriatic arthritis and was  
10 taking Leflunomide. Around the same time Myra Stevenson moved to another post. The claimant had not informed Myra Stevenson of his arthritic condition before her move to another post. Jacqueline Fernie became the claimant’s Team Leader for a short period. During a Return to Work interview the claimant informed Jacqueline Fernie that he was taking medication which  
15 weakened his immune system. He complained about having to use a desk situated in another office. The claimant did not inform Jacqueline Fernie of his arthritic condition. In or around September 2013 Blair Millar replaced

Jacqueline Fernie as the claimant’s Team Leader. On 27 December 2013, the claimant attended a review appointment (P25A) with the Consultant  
20 Rheumatologist at which he complained that apart from his knee swelling for

a few weeks he was “*keeping fairly well*”. He was noted as having a “*full range of movement in his knees*” and that his joints were “*fairly well controlled*” by medication. The Consultant Rheumatologist did not note any concerns on the part of the claimant about his work place. The Consultant Rheumatologist’s 25 report (P25A) was sent to the claimant’s GP. It was not copied to the respondents. The claimant informed Blair Millar that he had a weakened immune system. He complained about desk sharing and food parcels being stored in the office. The claimant did not inform Blair Miller of his arthritic condition.

30 12. In December 2013 the claimant applied for the post of Welfare Rights Officer with Money Matters (P10). Money Matters is part of the respondents’ Social Work Services. In his application for the above post (P10) the claimant stated that he did not consider himself to be disabled for the purposes of a guaranteed interview. The claimant was offered the post on a temporary basis from 11 February 2014 (P11). Jackie Lawson was the Services Coordinator  
5 for Money Matters. Marie White was the claimant’s line Manager. The claimant started working in Money Matters on 3 March 2014. He was provided with a copy of the respondents’ Code of Conduct and Code of Practice (P12).

13. The duties of the claimant’s post with Money Matters involved providing advice to the public on welfare issues and their entitlement to claim benefits  
10 including Disability Living Allowance (“DLA”). The claimant moved to the respondents’ Social Work offices in Hamilton where he was allocated a desk and chair.

14. In April 2014 the claimant was informed of an investigation by the Department of Work & Pensions (“DWP”) into his entitlement to DLA. The claimant was in  
15 receipt of DLA for higher rate mobility and lower rate personal care needs. In or around June 2014 the claimant informed Marie White and Jackie Lawson that he was being investigated in relation to an alleged overpayment of DLA dating from 2007. Jackie Lawson and the claimant were both aware from their knowledge of welfare benefits that given the potential size of the alleged

20 overpayment it was likely that criminal charges would be brought against the claimant. Marie White and Jackie Lawson told the claimant that he should keep them informed. Jackie Lawson instructed the claimant that if any charges were brought against him that he should notify her immediately. She referred him to the respondents' Code of Conduct (P12). She offered the 25 claimant support and the assistance of an experienced Welfare Rights Officer. Marie White and Jackie Lawson both asked the claimant at regular intervals for any update in relation to the DWP investigation.

15. Myra Stevenson, Jacqueline Fernie and Blair Millar were contacted by the DWP as part of the above investigation. They were asked to provide 30 statements. They were asked a number of questions about the claimant's health and in particular his mobility. Blair Millar provided a statement on 27

June 2014 (P37.1). Myra Stevenson provided a statement on 15 July 2014 (P38.1). Jacqueline Fernie provided a statement on 1 August 2014 (P39.1). In his statement (P37.1) Blair Millar referred to the claimant disclosing a health issue relating to his immune system. He described physical tasks undertaken 5 by the claimant. He confirmed that no workplace adjustments had been made for the claimant. In her statement (P38.1) Myra Stevenson stated that she had never witnessed the claimant requiring any assistance to undertake his work and was unaware of him having any disability issues. In her statement (P39.1)

Jacqueline Fernie stated that she was unaware of the claimant being 10 disabled. She referred to the claimant advising her at a Return to Work Interview about having "immune system deficiencies". She confirmed that no adjustments had been made to the claimant's workstation.

16. On being informed by the claimant that he was in receipt of DLA Marie White authorised an assessment of his workstation. On 30 July 2014 the claimant 15 completed an assessment form (P82). On this occasion he suggested remedial action including a gel mouse mat, wrist rest, foot/leg rest and adjustable chair. The claimant was provided with the above equipment from August 2014 onwards.

17. On 15 September 2014 the claimant received a benefit overpayment notice



20 from the DWP. The claimant notified Marie White and Jackie Lawson of the notice. The claimant informed Marie White and Jackie Lawson that he had stopped claiming DLA and intended to appeal against the notice. Marie White and Jackie Lawson were concerned for the claimant and offered him support and the continued assistance of an experienced Welfare Rights Officer.

25 18. The claimant was aware that Blair Millar, Jacqueline Fernie and Myra Stevenson had provided statements to the DWP. He was concerned that they may be called to give evidence in court proceedings against him. He contacted Jacqueline Fernie by e mail on 22 September 2014 (P35) in which he expressed concern about the content of the statements provided to the 30 DWP. He challenged the accuracy of the statements. He sought a meeting with Jacqueline Fernie or HR to discuss how the statements might be amended. Jacqueline Fernie replied by e mail dated 24 September 2014 (P35). She declined to meet with the claimant. She confirmed that she gave her statement based on her own recollection of events and to the best of her knowledge. She confirmed that she was not conducting an investigation and 5 was unable to intervene in the statements provided by other employees. She offered to pass on his comments to Myra Stevenson and Blair Millar.

19. During November 2014 the claimant successfully appealed against an overpayment. The DWP notified the claimant that they intended to appeal  
10 against the above decision. The claimant was stressed and anxious about the DWP's decision to continue proceedings against him. On 14 November 2014 he collapsed at work. An ambulance was called. Jackie Lawson arranged for the claimant to wait in her office until the paramedics arrived. She recognised that he was unwell and would be absent from work. She made a light hearted  
15 remark about his workload. The claimant was diagnosed with supraventricular tachycardia. He was absent from work.

20. During November 2014 the claimant made a request for flexible working. He passed his request to Marie White. He informed Marie White that he was considering flexible working for child care reasons. Marie White did not have

20 authority to grant the claimant's request for flexible working. She passed the  
request to Jackie Lawson. The claimant's request for flexible working was not  
processed. It was overlooked. The claimant did not hear back from the  
respondents about his request. He did not make any enquiries about whether  
it had been granted.

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21. The claimant returned to work on 15 December 2014. He remained anxious  
about the DWP proceedings. He was concerned about how the statements  
provided to the DWP by Myra Stevenson, Blair Millar and Jacqueline Fernie  
might affect his prospects of avoiding prosecution. In December 2014 he  
30 lodged a formal complaint (P44) with the respondents in terms of their Dignity  
at Work Policy (P43) as supplemented by the respondents' Grievance  
Procedures (P43). The claimant complained about failure on the part of his  
Managers while employed in Housing to make reasonable adjustments;  
failure by management to address negative and inappropriate behaviour  
towards him by colleagues and the accuracy of the statements provided to  
the DWP by Myra Stevenson, Blair Millar and Jacqueline Fernie.

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22. The claimant's complaint (P44) was referred to Deirdre Duncan, Area Service  
Manager in the Housing Department to investigate. Deirdre Duncan arranged  
to meet with the claimant on 26 February 2015. She had been unable to  
arrange a meeting with a claimant before then due to pressure of work and  
10 other work commitments. As part of her investigation Dierdre Duncan interviewed the  
claimant (P46A), Myra Stevenson (P46B), Pat Douglas (P46C), Jacqueline  
Fernie (P46D) and Blair Millar (P46E). Interviews were conducted during  
February and March 2015. At their meeting on 26 February  
2015, Deidre Duncan informed the claimant that she was unable to investigate  
15 his concerns about the statements provided as part of a separate DWP investigation  
over which the respondents had no control. During his interview (P46A), the claimant  
referred to a conversation with Myra Stevenson about his medical condition, treatment  
and requirement to attend hospital appointments and take special leave. The claimant

explained that he would usually carry out his own risk assessment when starting a new job and put in place his own adjustments. He described being asked to undertake physical tasks such as moving furniture and using the pool car to transport furniture which he found difficult because of his disability. He referred to a client with

“hoarding issues” and his reluctance to help clean the client’s home due to health concerns. Dierdre Duncan questioned the claimant about his understanding of how referrals to an Occupational Physiotherapist were followed up by the respondents and in particular whether he understood that reports were not automatically referred to the employee’s line Manager. When questioned about the timing of his complaint relating to a failure to make adjustments, the claimant explained that it was not an issue until the DWP investigation and his line Managers had provided statements to the DWP. The claimant did not identify occasions when he had requested that an adjustment was made because of his health and refused by management. He explained that he was raising the issue of failure to make adjustments now due to the DWP investigation. The claimant refused to identify the officers against whom he was making his complaints of inappropriate behaviour. Dierdre Duncan explained that she would be unable to investigate specific incidents without this information. The claimant referred to a particular incident involving a colleague refusing him a lift in the pool car and suggesting that he use his own car.

23. When interviewed by Dierdre Duncan (P46C), Pat Douglas confirmed that she did not make any adjustments for the claimant as she was unaware of any disability issues. She recalled the claimant going to hospital with a skin complaint. She was unaware of the claimant having any health issues at the time of his transfer to Housing. Blair Millar confirmed (P46E) that nothing had come up in relation to disability or adjustments when he managed the claimant. He recalled that during a return to work interview following a “*respiratory absence*” the claimant had advised him of an “*underlying health issue*” which affected his immune system and made him “*more prone to colds etc*”. He did not recall the claimant mentioning arthritis. He had not observed

anything in terms of the claimant's ability to undertake his tasks and had no recollection of the claimant raising anything with him in connection with desk

20 sharing. When questioned about the claimant's ability to undertake physical tasks, he described the claimant as having "*coped well with everything*" and stated that had he noticed anything he would have discussed it with the claimant. He could not identify any issues between the claimant and his colleagues other than concerns over the claimant's tone in emails. When 25 interviewed by Deirdre Duncan, Jacqueline Fernie (D46D) confirmed that she

was aware of the claimant's auto immune condition which made him susceptible to colds but not that he required any adjustments to be made. Otherwise, she did not recall the claimant saying anything about his health and ability to do tasks. She did not recall the claimant mentioning arthritis or 30 of any connection being made with his auto immune condition. Jacqueline Fernie confirmed that the claimant had not raised any issue about suffering pain because of desk sharing. Other than an incident involving a complaint

from another employee about the claimant's tone in emails, she was unaware of any inappropriate behaviour involving the claimant.

24. When interviewed, Myra Stevenson (P46B) did not recall any discussion with the claimant about disability. She thought that she would have recalled any 5 discussion about adjustments given that they had been made for other employees. She did not recall specifically referring the claimant to Physiotherapy. She explained that given issues of confidentiality she would not have enquired about the claimant's appointments but would have made the referral and approved any additional appointments as necessary. She 10 confirmed that there was nothing in the claimant's demeanour or the way he walked or moved which made her think that she should "dig deeper" in relation to the possibility that adjustments might be appropriate. She described an incident involving the claimant during which he had been aggressive and caused her to become upset and frightened. She described the incident as 15 "*horrible and probably one of the worst incidents she was ever involved in at*

work". She had not made a formal complaint about the claimant's behavior. Jacqueline Fernie provided Dierdre Duncan with a file note dated 8 July 2013 (P46F) in relation to the above incident.

25. Jackie Lawson was concerned for the claimant. She was concerned about the 20 DWP investigation and how it was affecting the claimant's wellbeing. She sought to support him. She continued to make enquiries about whether he had heard anything further from the DWP about charges being brought against him. On one occasion in January 2015, the claimant said to Jackie

Lawson in response to such an enquiry "*with all due respect this is the third 25 occasion in which you have asked me that.*" Jackie Lawson replied that she was entitled to make such enquiries and that she had a professional interest and obligation to do so. The conversation took place in the respondents' Lanark office where the claimant was located on a temporary basis due to unrelated staffing issues.

30 26. The claimant received a citation on 14 February 2015. He was charged with an offence contrary to the Social Security Administration Act 1992. This caused the claimant stress. He was absent from work. Attempts were made to contact the claimant at regular intervals to discuss his absence in accordance with the respondents' Maximising Attendance Policy & Procedures (P81). By e mail (P64A) dated 25 February 2015 the claimant 5 contacted Lesley Stirton who was assisting him with his DWP Appeal. He advised Lesley Stirton that he had lodged his Appeal and had asked for a "*short notice hearing as court proceedings are starting*". He did not mention having received a citation. Marie White attempted to contact the claimant by telephone on 27 March 2015. She was contacted by the claimant's partner 10 later that day to be advised that the claimant did not wish to speak to anyone at work as he was stressed due to the DWP investigation. The claimant's partner confirmed that the claimant's stress related to his personal life. On 30 March 2015 Marie White informed HR in a request for early absence intervention (P83) that the claimant was reporting stress caused by personal

15 issues. While absent from work on sick leave the claimant visited family in America. He placed photographs of his visit on Facebook.

27. Marie White was concerned about the claimant's continued absence from work. She spoke to the claimant by telephone on 14 April 2015. The claimant confirmed that he had an outstanding four-week Fit Note. The claimant  
20 attended work the following day. Marie White was surprised to see him in the office given their conversation the day before. She asked him whether he had heard anything about his case. He referred to only having received a submission from the DWP which he described in derogatory terms. Marie White suggested that he wait at his desk until Jackie Lawson was available.

25 Jackie Lawson met with the claimant. She asked him whether he was aware of any charges being brought against him. The claimant appeared agitated. He informed Jackie Lawson that he had received a citation. She requested a copy. She asked the claimant when he had received the citation. The claimant  
30 disappointed and angry that the claimant had failed to notify her of the citation before then. She expressed concern about the delay and how seriously his failure to notify her of the citation might be viewed by the respondents. The claimant sought to explain that he understood it was only necessary to inform her of a conviction. Jackie Lawson rejected his explanation. She was concerned for the claimant. She referred to the photographs that he had placed on Facebook of his trip to America and how they might be viewed by his colleagues. The claimant became agitated. Jackie Lawson instructed the  
5 claimant to remain off work until his Fit Note had expired. Around the same time, with his agreement, Marie White referred the claimant for cognitive behavioural therapy (P84).

28. Part 3 of the respondents' Code of Conduct (P54), under "Personal Conduct" provides that; "*Any employee charged with, or convicted of a criminal offence*  
10 *must advise his/her Executive Director immediately*". The claimant was aware of the above obligation.

29. Jackie Lawson contacted Marie Moy by e-mail dated 21 April 2015 (P61A) to report that the claimant had failed to inform her until 15 April 2015 of a citation he had received in February 2015 charging him with an offence contrary to 15 the Social Security Administration Act 1992. Jackie Lawson informed Marie Moy that the claimant had delayed advising her of the charge and had said that this was because he believed he only had to report if he had been convicted. Jackie Lawson summarised the charge against the claimant as making false claims for DLA from 2007 and of failing to report a change in

20 circumstances which would indicate a reduction in his mobility needs. Jackie Lawson confirmed that the claimant had appealed against the DWP decision and that a court date had been postponed pending the outcome of his Appeal. Jackie Lawson informed Marie Moy that the claimant has psoriatic arthritis and that more recently he was diagnosed with heart disease which she 25 described as a common symptom for people with psoriatic arthritis. She

informed Marie Moy that the claimant's DLA award was based on his application form and an independent medical examination commissioned by the DWP. She advised Marie Moy that; "*Whilst I cannot predict the outcome of the appeal hearing, I believe that he has a reasonable case*". She identified 30 the stress caused by the DWP proceedings as one of the main reasons for his absence from work on sick leave. She confirmed that the claimant would be "*taken off the front line and given other duties, possibly preparing training materials and research*".

30. Jackie Lawson contacted the claimant to confirm that there would be a factfinding investigation into his delay in notifying the respondents about the 5 citation. The claimant returned to work on 11 May 2015. Marie White, on instructions from Jackie Lawson, advised the claimant that he should not contact clients while the DWP proceedings were outstanding. On 26 May 2015 the claimant was informed by Marie White that he would be suspended from his normal duties until the outcome of the fact finding investigation. This

10 included answering the telephone and providing advice to the public. The

claimant's suspension from his normal duties was confirmed by Marie White in writing on 2 June 2015 (P56) as follows:-

***“Changes to duties on full pay during investigation***

15 *In terms of the Disciplinary Procedures, I have to advise you that you will be temporarily placed on restricted duties where you will have no client contact with effect from 21 April 2015 until the Fact Finding Investigation has been concluded.*

*The reasons for this workplace change is to enable an investigation to be*  
20 *carried out concerning your failure to report that you had been charged with offences contrary to the Social Security Administration Act 1992 Section 111A(1)A or C in February 2015 but did not tell us until 15 April 2015.*

*This is a temporary measure which will not be recorded on your personal*  
25 *record, consequently you have no right of appeal.*

*You will be kept informed as to the progress of the investigation and in due course advised of the outcome and of any further proceedings which the Council may wish to instigate”.*

31. The claimant attended a Hearing on 14 May 2015 in relation to the overpayment notice. His Appeal was allowed with a reduced payment. The claimant informed Marie White and Jackie Lawson of the above outcome. Jackie Lawson was delighted for the claimant. She was anxious that he be  
5 allowed to return to his normal duties as soon as possible. She asked the claimant whether she could provide HR with a copy of the Appeal decision and a medical report from the DWP case papers to support a request that he be allowed to return to normal duties. The claimant provided Jackie Lawson with documents as requested without objection. HR advised his Managers 10 that, given the nature of the charges against him and his role as a Welfare Rights Officer, the claimant should not return to his normal duties until the conclusion of any criminal proceedings.



32. In terms of the respondents' Dignity at Work Policy (P43); "A timetable should  
15 be set for the conclusion of the investigation and if this is not met, an interim  
report submitted outlining progress to date and estimated date of completion".  
In terms of Stage 2 of the respondents' Grievance Procedure (P43) "a meeting  
will be arranged (but not necessarily take place) within 5 working days, and a  
written reply will be made as soon as possible, but in any event, within 5  
working days of such a meeting taking place". Dierdre Duncan completed her  
20 report (P46) on 19 May 2015. She had hoped to complete her report (P46) before then  
but was delayed due to pressure of work and other work commitments.

33. In her report (P46) Dierdre Duncan made the following conclusions:-

1            *In relation to the first complaint, under the Equalities Act 2010, a*  
25 *duty is placed on employers to make reasonable adjustments in the workplace where*  
*they know, or could reasonably be expected to know, that a*  
*disabled person is substantially disadvantaged because of their*  
*disability.*

2            *X advised that he did not specifically request any reasonable*  
30 *adjustments due to his disability and I have found that there was no specific*  
*circumstances where an adjustment was requested for health reasons and refused.*

3            *I have found no conclusive evidence that management could*  
*reasonably have known that X had a disability which required 5 adjustments and therefore,*  
*I have concluded that there is no evidence that management did fail in this respect.*

4            *In relation to the second complaint, I have considered the allegation*  
*that management failed to deal with inappropriate / negative behaviour from colleagues*  
*towards X; however, since I 10 have been unable to speak directly with the other persons*  
*involved*

*I have been unable to obtain the full picture.*

5            *My conclusion on this matter was that the line managers involved*  
*seemed completely unaware of any pattern of negative or inappropriate behaviour*



I would note that you were dissatisfied with the information provided by  
15 your previous manager(s) to the DWP as part of their recent investigation, which you  
did not consider to be factually correct. However, I clarified at our meeting  
that my investigation and considerations would not include the DWP  
investigation or the statements provided by SLC staff as part of that  
investigation.

20 Following our meeting, I carried out a thorough investigation into your concerns, which  
included speaking with the managers referred to within your complaint.  
After full consideration of the information provided by all parties  
interviewed I would conclude as follows.

**Allegation 1:**

25 In relation to the first part of your complaint, that there was a failure by management to  
make reasonable adjustments for you in terms of the requirements of the  
Equalities Act 2010:

Under the Equalities Act 2010, a duty is placed on employers to make  
reasonable adjustments in the workplace where they know, or could  
reasonably be expected to know, that a disabled person is substantially  
disadvantaged because of their disability.

In my findings, I considered evidence relating to the meetings and  
discussions you had with managers as well as descriptions from yourself 5 and your  
managers of how you coped in the workplace with the full range of tasks. I have also  
taken into account that management did show an awareness of their responsibilities in  
this respect, as adjustments were in place for at least one other staff member.

You have stated that management should have known, and reasonable  
10 adjustments should have been made. I considered that at our meeting, you highlighted  
you were used to making your own risk assessment when starting a new  
job and would always put in place your own adjustments where you could.  
I also considered that whilst employed in your role as

Support Officer (Homelessness), you did not specifically ask your line  
15 manager(s) to make reasonable adjustments due to your health condition and I found  
that there was no specific circumstance where an adjustment was  
requested for health reasons but refused.

I focused my considerations on whether your line manager(s) knew or  
could have reasonably been expected to know that you had a disability 20 and required  
such reasonable adjustment(s). I conclude that I can find no evidence that management  
could reasonably have known that you had a disability which required adjustments, but  
that they failed to make these adjustments. Accordingly, in relation to the first part of your  
complaint, whilst I regret that you now feel you needed adjustments, your managers 25  
were unaware of these needs and consequently they could not be taken into account at  
the time. I am therefore unable to uphold your complaint as I have found no conclusive  
evidence that management did fail in this respect.

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**Allegation 2:**

In relation to the second part of your complaint, that there was a failure  
by management to address negative / inappropriate behaviour towards  
you from colleagues:

5 I have reviewed all the information you provided in your complaint and at our meeting,  
but note that you were not willing to provide details about the individual Officers whom  
you state acted inappropriately or made negative comments to you. Therefore, whilst I  
have investigated the incidents, I have been unable to speak directly with the other  
persons 10 involved regarding their recollections on this matter to obtain the full picture.

My conclusions on this matter are that the line manager(s) involved  
seemed completely unaware of any pattern of negative or inappropriate  
behaviour towards you. In addition, they could recall no such issues

15 *being highlighted by you to them at the time. Therefore, based on the information and evidence I have reviewed, I cannot uphold this part of the complaint that management failed to act, as I am not satisfied that management had any knowledge of such behaviours or incidents in order that they may have investigated these and take appropriate action.*

20 *I understand that you may find my conclusions disappointing, and should you wish to discuss these further, please do not hesitate to contact me. At this point, I would also suggest that workplace mediation may have been appropriate as a way of moving forward for all parties. However, I am aware that you have a job within Social Work Resources therefore I 25 no longer consider this to be appropriate.*

*Whilst I have considered the DWP investigation and the statements given by staff as part of that process as being out with my jurisdiction when reviewing your complaint; I would note that you were clear that it is only as result of that investigation and these statements that you raised this complaint in order to prove that staff had failed to provide factual information to the DWP.”.*

The claimant was informed of his right to appeal against Dierdre Duncan's decision.

5 35. On 26 May 2015 the claimant appealed against Deirdre Duncan's decision (P49) in accordance with Stage 3 of the respondents' Grievance Procedure (P43.5). In his Appeal (P49) the claimant challenged Dierdre Duncan's findings about his Managers' knowledge of his disability; he challenged Deirdre Duncan's findings that his Managers were unaware of inappropriate  
10 behaviour towards him. He complained about arrangements for the meeting on 26 February 2015. He challenged the accuracy of the statements provided by his Managers to the DWP. He complained of a reluctance on the part of the respondents to provide him with information; delays in acknowledging and holding his Grievance Hearing and of hostile questioning at the Grievance  
15 Hearing which he claimed was to discredit him. He claimed that reluctance on

the part of his Managers to change their statements was due to the “*potentially serious consequences for the individuals concerned*”. He referred to a deterioration in his health and of being admitted to hospital with heart problems. He requested that “*this decision is looked at again based on the 20 evidence provided and I’m treated as a witness of truth. I would like training offered to the individuals concerned and all staff within this department. I would still wish a further amended statement from the individuals concerned for any pending court case*”.

36. The claimant’s Appeal was referred to Elaine Maxwell, Personnel Adviser who 25 acknowledged receipt by letter dated 2 June 2015 (P50).

37. In terms of the respondents’ Managing Stress at Work Policy (P102) Managers and Supervisors are responsible for:

- *Minimising and managing work related stress risks through effective service planning and employee communication and consultation*
- *Ensuring appropriate job related information, instruction and training is provided to employees*
- *Establishing and agreeing clear roles and responsibilities with employees*
- 5 • *Monitoring and managing employees’ workloads responsibly*
- *Understanding and identifying the signs and symptoms of work related stress*
- *Directly supporting employees who may be experiencing work related stress and facilitating further support through the Employee Support*  
10 *Team where required*
- *Maintaining their awareness of and understanding of the employee supports available and promoting the use of Employee Assistance Programme*

15

- *Managing poor performance and attendance in line with the Council's policies and procedures*
- *Routinely monitor and review work related stress through effective risk assessment*

38. The claimant felt awkward and worried about what other colleagues would think about him while suspended from his normal duties. He complained of being bored. Jackie Lawson and Marie White wished to minimise the stress caused to the claimant while suspended from his normal duties. They recognised that it was awkward for the claimant to be removed from his normal duties. They were keen to find him alternative work that was relevant to his normal duties. This was difficult as his normal duties and the role of Money Matters were principally to provide advice to clients about their entitlement to welfare benefits. In addition to administrative tasks the claimant was asked to help with training. This involved research and the delivery of training to Welfare Rights Officers and Social Workers on changes to welfare benefits including the introduction of Universal Credit. On 17 July 2015 Jackie Lawson and Marie White informed the claimant of a complaint made against him in relation to training. They sought to reassure the claimant about his ability to deliver training. The claimant became agitated and aggressive. He used derogatory language. Jackie Lawson was taken aback. She sought to lighten the atmosphere. She referred to the claimant being the "*most evenly balanced person she knew as he has a chip on both shoulders*". It was agreed that the claimant should spend more time observing others before he delivered training. There were no further complaints about the claimant's ability to deliver training.

39. The claimant met with Elaine Maxwell on 15 July 2015 to discuss his Appeal. The purpose of the meeting was to discuss with the claimant and his representative

outstanding issues in relation to the claimant's Grievance and 15 to allow Elaine Maxwell to assess whether it was appropriate to refer the

Grievance to the respondents' Appeal Panel. The claimant provided Elaine Maxwell with medical evidence. He was accompanied by Stephen Smellie, his trade union representative. The claimant complained about the failure of Dierdre Duncan to address his concerns over the statements provided by his 20 Managers to the DWP. He asked that the Managers be required to attend training on how to respond appropriately to requests for information from the DWP and for their statements be amended to reflect his medical condition. Elaine Maxwell offered to check whether HR had retained a copy of the original form sent to them by the DWP. She informed the claimant that it would 25 be inappropriate for the respondents to seek to change the statements provided to the DWP and that the respondents did not provide employees with training on the completion of forms provided by the DWP for their own investigations.

40. Having considered Dierdre Duncan's report (P46) and met with the claimant, 30 she was satisfied that Dierdre Duncan had addressed all relevant points raised by the claimant in his complaint and that there were no procedural irregularities. She was satisfied that Dierdre Duncan's decision was in accordance with the respondents' policy and procedures. She was not persuaded that the outcome sought by the claimant in terms of statements provided to the DWP and training employees on how to complete DWP forms were competent matters for referral to the respondents' Appeal Panel.

5 41. The claimant's post with Money Matters became permanent on 3 August 2015.

42. Elaine Maxwell informed the claimant of her decision by letter dated 20 August 2015 (P53) as follows:-



10

**“Stage III Grievance**

*I refer to our meeting to discuss your grievance; you were accompanied by Stephen Smellie, Unison. I would apologise for the length of time it has taken to deal with your grievance and formally respond to you.*

*As the Corporate Personnel Adviser, I explained that I am responsible for ensuring that South Lanarkshire Council policies and processes have been followed appropriately by all parties and advised you of the possible options for the next steps in the grievance process.*

*We discussed the circumstances of your grievance and in particular the issue of the Disability Living allowance, which you advised had been awarded to you a number of years ago, and the subsequent request for information from South Lanarkshire Council employees relating to you from the Department of Work and Pensions (DWP). You talked at detail of the issues in the lead up to this situation with office moves, desk issues and lifting problems. You and your trade union confirmed that you were unhappy with the statements that had been provided to the DWP and you felt that there was a concerted effort to make things difficult for you and suggested that the statements provided were factually inaccurate, noting in particular how they were written, suggested that additional information was being provided that had not been asked.*

*I advised you that in my experience in many years of responding to the DWP, the request for information comes in and basic information is provided, this generally will come to the personnel teams to complete and thereafter if further information is required they will contact normally the line manager. I understand that this was the case for you. I advised that I would check if a copy of the original form had been kept by the personnel team. Due to the volume of forms received these are not copied and kept. I further advised that the DWP would ask questions of the individual and that perhaps depending on what question was being asked would depend on the answer provided and we talked over some examples.*

*You advised that the matter is being dealt with by your solicitor in respect of the case against you, and that duties had been set for a Diet hearing and a Trial date but because your appeal was successful this was changed to September and October.*

15 *In looking at what you wanted as an outcome you advised that you wanted the group of individuals trained on how DWP requests should be responded to, you were also looking for the statements to be re written.*

*I can advise you that there is no such training to be provided for the completion of these forms. The forms belong to the DWP and individuals*  
20 *completing or providing information on these would be supported by either personnel of DWP at the time. I can also advise it is not for South Lanarkshire Council to ask the DWP to re look at their process, they have obtained information and this is for them to do so as per their procedures. You are involved in a legal process with them at this time and it would be*  
25 *inappropriate for the Council to comment on that matter.*

*Having reviewed the documentation in your case I am satisfied that Deidre Duncan considered all points relating to your case in accordance with Council Policy and Procedures.*

*The outcomes that you are looking for are not within the gift of the appeals panel to grant and would confirm that this now ends the grievance process.*

43. Marie Moy, Financial Officer was nominated to conduct a fact finding 5 investigation into the claimant's alleged breached of the respondents' Code of Conduct (P54) by failing to immediately advise his Executive Director that he had been charged with a criminal offence contrary to the Social Security Administration Act 1992. Marie Moy appointed Sharon McGuigan, Locality  
Team Leader with assistance from Ross McFarlane, Money Matters Manager  
10 to prepare a report.

44. Section 5.5 of the respondents' Disciplinary Procedures (P55) provides that  
*"Any investigation will be conducted as speedily as possible. A timescale will be set in advance based on the complexity of the investigation and the number of witnesses. The investigating officer will notify the Head of Service  
15 or nominated manager if, for any reason the set timetable requires to be revised and the employee and their companion will be advised accordingly"*. The fact-finding investigation was delayed until 27 August 2015 due to Marie Moy's absence from work for medical reasons and the workload and availability of employees with suitable qualifications and relevant experience 20 to undertake the investigation.

45. The claimant was invited to a fact-finding meeting by letter dated 28 August 2015 (P57). The claimant was informed that an investigation was being undertaken into an alleged breach of the Code of Conduct (P54). The claimant was aware that the alleged breach of the Code of Conduct (P54) was his  
25 failure to report to the respondents until 15 April 2015 that he had been charged in February 2015. The claimant attended a fact finding interview with Sharon McGuigan and Ross Macfarlane (P61B) on 7 September 2015. He was accompanied by his trade union representative, Stephen Smellie. At the meeting, the claimant was asked why he was or had been in receipt of DLA  
30 and whether his condition was ongoing. He confirmed that he was in receipt of DLA from 2003 due to psoriatic arthritis which he described as an ongoing condition. He confirmed that he was first made aware of the DWP investigation in April 2014 and had advised Jackie Lawson and Marie White about the investigation at that time. He was asked about his Appeal against the overpayment. He was asked about when he received notification of the  
5 charge. He referred to receiving the citation in March or April 2015. He was referred to a chronology of events submitted by Stephen Smellie (P61E) which gave 14 February 2015 as the relevant date. The claimant confirmed that this was the correct date. When asked when he had notified Jackie Lawson about the charge he referred to being on sick leave from 25 March to

10 11 May 2015 and confirmed that he had advised Jackie Lawson on 15 April 2015. When questioned about the amount of time it took him to advise Jackie Lawson about the charge, the claimant explained that as far as he was concerned the citation was part of the process. He explained that his priority was always the Appeal as he knew that it would have an impact on the legal  
15 proceedings. The claimant explained that having told his Manager what was happening from the outset, he believed that it was understood that charges would be brought. He referred to the citation not containing court dates when he first received it. He stated that with hindsight he could see that possibly he should have formally advised Marie White and Jackie Lawson about the 20 citation. He claimed to have advised them on receipt of court dates.

46. The claimant confirmed that he was aware of the respondents' Code of Conduct (P54). He referred to informing his Managers from the beginning and that he held his hands up to what he described as an oversight in not advising  
25 them formally when he first received the citation. He was unwilling to confirm what was upheld at his Appeal. He questioned the relevancy of this information to the fact-finding investigation. He confirmed that his Appeal was upheld; that he had closed his claim for DLA and that he did not want details of his claim for DLA to affect his work. The claimant explained that he had 30 complied with his obligation to inform the respondents of potential court proceedings at the time of discussing the overpayment and that given the sum involved it was well known to Jackie Lawson and Marie White that it would lead to prosecution.

47. As part of their fact finding, Sharon McGuigan and Ross McFarlane interviewed Jackie Lawson on 11 September 2015 (P61C) and Marie White  
5 on 15 September 2015 (P61D). In response to a question at her interview (P61C) about when she became aware of criminal proceedings against the claimant, Jackie Lawson recalled asking the claimant when he attended work on 15 April 2015

whether he was aware if charges had been brought against him. She recalled the claimant explaining that he had received a citation in

10 February 2015 in relation to an offence under the Social Security Administration Act for making a false claim for benefits. She recalled asking the claimant why he had not told her about the citation when he first received it. She described telling the claimant that she did not accept his explanation that he thought that he only needed to tell her if he was convicted and that he 15 knew that he had a duty to tell her as soon as he found out that he was being charged with a criminal offence. At her interview (P61D), Marie White described her various attempts to contact the claimant while he was absent from work. She described the claimant attending work on 15 April 2015 and appearing agitated and being evasive when she asked him whether he had  
20 heard anything further regarding his case. She recalled asking the claimant whether he had heard anything further about the case and that he only referred to receipt of the DWP's submissions. She described Jackie Lawson telling her that when she had asked the claimant if he had heard whether charges were to be brought against him that "*he finally said yes*". Marie White  
25 confirmed that the claimant had been sent home due to concerns over him remaining at work against his GP's advice.

48. The claimant informed Marie White and Jackie Lawson around 29 September 2015 that the criminal charges against him had been abandoned. The claimant returned to his normal duties. Given his residual knowledge and  
30 experience of welfare rights and the duties he had undertaken while on restricted duties, in particular research and training on relevant changes to welfare benefits including Universal Credit, the respondents did not consider it necessary or appropriate to offer the claimant training before his return to full duties.

49. The claimant provided additional information on 26 October 2015 (P62). The claimant was informed by Sharon McGuigan in writing on 27 October 2015

5 that she was unable to include the additional information in her report as it was not discussed at the fact finding meeting. She advised the claimant that he should contact HR if he wished further information to be taken into account.

50. Sharon McGuigan completed a fact finding report (P61) on 12 November 2015. Her report (P61) contained the following conclusions:-

10                    *“5.1 Code of Conduct Section 3 states that;*

*‘Any employee charged with, or convicted of a criminal offence must advise his/her Executive Director immediately.*

15                    *5.2 Following an investigation into his DLA award, X failed to advise his line manager immediately he was notified that he would be facing legal proceedings for same.*

*5.3 X maintains that as he informed his line manager about the investigation from the beginning he believed that charges’ being brought was understood by his line manager.*

20 *5.4 X admitted that it was an oversight on his part to not formally advise his manager when he first received the citation. However, X was presented with plenty of opportunities and reminders to advise his line manager when charges were brought but failed to do so thus breaching the Code of Conduct.*

*5.5 From the evidence gathered X was aware of the council’s policy and 25 was reminded on more than one occasion that he must advise his line manager if and when he was charged with an offence. X admits that he received the citation on the 14 February 2015 but failed to notify his line manager until the 15 April 2015. This was confirmed by both Jackie Lawson and Marie White.*

*5.6 X would not sign his statement”.*

51. Marie Moy considered the report (P61). She discussed it with Stephen Smellie who sought to persuade her that the claimant's delay in notifying the respondents about the citation should be treated as a technical breach of the Code of Conduct (P54). Marie Moy was not persuaded. She was satisfied that the claimant's failure to notify his Manager about the citation in February 2015 justified disciplinary action. She was particularly concerned about the finding that he had been presented with plenty of opportunities and reminders to advise his line Managers about the citation before 15 April 2015. She concluded that disciplinary action was appropriate.

52. The claimant was informed by letter dated 10 December 2015 (P63) that he was required to attend a Disciplinary Hearing on 15 January 2016. He was informed that the reasons for the Hearing were that it was alleged;

15

*1. On 14<sup>th</sup> February 2015 you were charged with offences contrary to the Social Security Administration Act 1992 Section 111A (1)A or C and did not disclose this to your line manager until 15<sup>th</sup> April 2015.*

20

*2. Your conduct and actions in respect to the above is unacceptable and inappropriate in relation to your role as a Welfare Rights Officer within Social Work Resources.*

*3. Your actions have breached South Lanarkshire Council's Code of Conduct and Social Work Resources Code of Conduct and Scottish Social Services Council Code of Practice.*

The claimant was informed that the Fact Finding Officer would be calling Marie White and Jackie Lawson as witnesses. The claimant was also informed that if any or all of the allegations were upheld that the disciplinary sanction may be a disciplinary warning.

53. The claimant attended a Disciplinary Hearing on 15 January 2016 (P64). He was represented by Stephen Smellie. The Disciplining Officer was Sandy Cruickshank, Procurement Adviser. Sandy Cruickshank began the Hearing by confirming the allegations against the claimant. He confirmed that the Hearing was concerned with the claimant having been charged and failing to tell his Line Manager. Sharon McGuigan called Marie White and Jackie

Lawson to give evidence. Stephen Smellie presented the claimant's case. He confirmed that the claimant did not deny that he was charged and that he knew that there was the possibility of a criminal conviction. He explained that  
10 there were no court dates on the original citation and it was an oversight on the claimant's part and not a deliberate attempt to hide anything. The claimant stated that his focus had been on seeking legal representation as he knew that prosecution was likely given the size of the alleged overpayment. The claimant provided Sandy Cruickshank with a copy of his e mail to Leslie  
15 Stirton (P64A). He described feeling well supported by Jackie Lawson and Marie White.

54. Sandy Cruickshank advised the claimant and Stephen Smellie on 21 January 2016 that there was a case to answer and that a disciplinary sanction was  
20 appropriate given that he was aware of the obligation to report the charge against him and accepted that "in hindsight" he should have notified management about the citation in compliance with the Code of Conduct (P54). Sandy Cruickshank advised the claimant that he was satisfied that his failure to report the citation was an omission and that he had not tried to hide  
25 anything. Sandy Cruickshank considered that given the claimant's employment as a Welfare Rights Officer and the nature of the charges against him that the allegations against him were serious enough to warrant a final warning. He was satisfied that after taking mitigating circumstances into account and having found that it was an omission rather than the claimant's



30 intention not to advise his line manager of the charge at the time that a written warning was appropriate. He concluded that the written warning should remain on the claimant's record for six months. The respondents provided the claimant with a written record of the Disciplinary Hearing (P64) which the claimant signed on 28 January 2016.

55. Sandy Cruickshank confirmed his decision by letter dated 21 January 2016 (P65) as follows;

5

*"I refer to the disciplinary hearing which was held on 15 January 2016. In terms of the Council's Disciplinary Procedures, I have to confirm that you have been issued with a Written Warning regarding the following:-*

10

*1. On 14<sup>th</sup> February 2015 you were charged with offences contrary to the Social Security Administration Act 1992 Section 111A (1)A or C and did not disclose this to you line manager until 15<sup>th</sup> April 2015.*

15

*2. Your conduct and actions in respect to the above is unacceptable and inappropriate in relation to your role as a Welfare Rights Officer within Social Work Resources.*

*3. Your actions have breached South Lanarkshire Council's Code of Conduct and Social Work Resources Code of Conduct and Scottish Social Services Council Code of Practice.*

*This Written Warning will be noted on your personal record and will stand to be admissible against any further misdemeanor for a period of six months from the date of this letter, namely until 20 July 2016. Any further complaint I receive about your conduct or work performance may result in more serious disciplinary action being taken against you".*

25 56. The claimant lodged an Appeal on 28 January 2016 against the decision to issue him with a written warning (P66). He appealed against the level of disciplinary

action taken against him and raised concerns about the delay in completing the disciplinary procedure.

57. On or about 17 February 2016 concerns were reported to Jackie Lawson about an application for disability related benefits completed by the claimant on behalf of a client. The client was concerned that the application contained errors that might have affected his entitlement to a welfare benefit. Jackie  
5 Lawson contacted the claimant to discuss the case. (P76L). The claimant replied by e mail (76L) confirming that that he had made a mistake by failing to keep notes of his appointment with the client and arranging for the client to read and sign the relevant paperwork. The claimant could not recall the case in any detail. He advised Jackie Lawson that he did not think that the client 10 should be too concerned as any discrepancies could be clarified when the

claimant's case was assessed. In a further e mail (7BM) the claimant referred to an earlier form for DLA and stated that he would not deliberately put down information that was not provided to him during discussions with a client.

Jackie Lawson was concerned about errors in the application. She was  
15 concerned by the extent of the errors and how they might be explained during an assessment. Jackie Lawson met with the claimant on 18 February 2016 to discuss her concerns. She was unimpressed with the claimant's reaction to the errors in the application and how they might be resolved. They were dismissive and offhand. She swore under her breath. She referred to the  
20 application as "*a pile of pish*". The claimant asked her if she would rather he did not work in her department. Jackie Lawson felt exasperated with the claimant's inappropriate and offhand response to unsatisfactory work. She replied "*no, but that (the claimant) was high maintenance*". She informed the claimant of her concerns by e mail dated (P76M).

25 58. The claimant did not attend work on 19 February 2016. He was absent from work with stress. On the same day he lodged a Grievance (P76F) against

30 Jackie Lawson. He complained about Jackie Lawson's behaviour towards him dating back to September 2014. He complained of bullying, harassment and intimidation and in particular that Jackie Lawson was critical in her attitude towards him; insulted him and threatened him with dismissal. Jackie Lawson was upset and taken aback by the claimant's complaint (P76F). Karen Martin, Personnel Assistant was appointed as Fact Finder in relation to the claimant's complaint. She was instructed to investigate and prepare a report. As part of her investigation, Karen Martin interviewed the claimant on 16 March 2016 (P76A) & 4 May 2016 (P76D); Jackie Lawson on 5 April 2016 (P76B); Marie White, on 14 April 2016 (P76C) and Susan Browning, a Welfare Rights Officer on 11 May 2016 (P76E).

5 59. The claimant remained absent from work. On 15 March 2016 he was notified by the respondents (P86) that he was required to attend a medical assessment with Dr Herbert, the respondents' Occupational Health provider.

10 60. At his interview with Karen Martin on 17 March 2016 (P76A), the claimant was represented by his trade union representative, Stephen Smellie. Karen Martin questioned the claimant in detail about his complaints against Jackie Lawson. During the interview the claimant read out a statement which included the following;

15 *"Jackie Lawson has directly made my life at work unbearable and if it continues I fear for my physical and mental health. I feel I have no choice now but to address the issues I have in the hope that I am allowed to move on within the organisation and contribute in the way I know I can without being a detriment to my health.*

- 20
- *Jackie Lawson has swore directly at me*
  - *Jackie Lawson has advised me on many occasions that she mistrusts me and does not believe me when I speak to her.*

- *Jackie Lawson has issued threats that I could be sacked from my job.*
- 25 • *Jackie Lawson has breached the disciplinary policy as it took her 8 months to instigate and complete a spurious disciplinary, knowing the full impact this delay was having on my health.*
- *Jackie Lawson suspended me from work duties without following the disciplinary process laid out in the code of conduct and ended my suspension before the start of any disciplinary or fact-finding activity.*
  - *Jackie Lawson instigated a confused and delayed investigation and suspension of duties which led me to develop a chronic 5 cardiac condition brought on by anxiety in work.*
  - *Jackie Lawson breached the flexible working policy by ignoring a flexible working request*
  - *Jackie Lawson has used prolonged and sustained abusive and intimidating language towards me, despite my pleads to her that they were causing me stress and anxiety.*
- 10

- *Jackie Lawson failed to address concerns I had about treatment of colleagues during my period of suspension.*
- *Jackie Lawson has failed to ask for my side of things in every conversation we have had, where another person besides me 15 was involved, she always took their word before mine and made it clear that she thought I was a liar".*

The claimant was provided with a copy of the notes from his interview on 17 March 2016 (P76A) which he signed on 4 April 2016.

61. The claimant also attended a meeting with Marie White on 17 March 2016 to

20 discuss his attendance level at work. Marie White wanted to support the claimant's return to work. The meeting was arranged in accordance with the respondents' Policies and Procedures for Maximising Attendance (P81). He was accompanied by his trade union representative, Stephen Smellie. During their meeting the claimant advised Marie White that his most recent absence  
25 was due to work related stress and that he had been advised by his GP to rest. He advised Marie White that he had felt this way since joining Money Matters. The claimant declined an offer of employee counselling. Options to support the claimant's return to work were discussed which included a phased return to a different work location in a different team. The claimant advised Marie White that due to work related stress he did not wish to return to Money Matters. When asked by Marie White, the claimant was unable to identify anything else that she could do to assist him. Mediation was not identified as an option while the claimant remained absent from work. Marie White wrote 5 to the claimant following their meeting by letter dated 17 March 2016 (P87).

62. During her interview with Karen Martin on 5 April 2016 (P76B), Jackie Lawson could not recall whether she had received a flexible working request from the claimant. She suggested that it would have been passed to Marie White. She  
10 did not recall the claimant panicking when asked for proof of his medical condition. She explained that when his Appeal was successful she had asked the claimant if he was agreeable to her passing on one of the medical reports from his case papers for the DWP to HR to show that he had a genuine condition. She had sought to reassure the claimant that she was not 15 questioning that his condition was genuine. She did not dispute that she had been angry and felt very disappointed when the claimant did not inform her about the citation when he first received it in February 2015. She recalled informing that claimant that she had kept on asking him about whether he had heard about a citation because her "*neck was on the line as much as his*".

20 She recalled receiving an e mail from the claimant thanking her and Marie White for their support. She accepted that she may have advised the claimant against placing

information on social media about being on holiday while absent from work as it upset his colleagues. She denied any knowledge of an e mail being sent to the claimants' colleagues about him not having contact

25 with clients while suspended from his normal duties. She denied calling the claimant the "*most arrogant and obnoxious person she had ever met*". She recalled describing the claimant as the "*most evenly balanced person she knew because he had a chip on both shoulders*". She did not deny swearing on occasion and under her breath in exasperation at the standard of his work.

30 She denied that she would swear at the claimant as she was not in the habit of swearing at people. She referred to the claimant trying to "*trip her up*" and to feeling angry when he suggested that he would lie about who was responsible for mistakes when presenting a client's Appeal. She was concerned about how this would reflect on the integrity of the respondents. She thought it unlikely that she would have sworn at the claimant about the standard of his work. She suggested that she might have said "*this is a pile of*

5 criticised for using it. She denied saying to the claimant that she would prefer it if he did not work in the department. She did recall an occasion when the claimant had asked her if she wished he had never come to Money Matters. She denied making such a remark but did recall becoming angry and replying

"*no – but I have to say you have been high maintenance*". She recalled the 10 occasion when she did not believe the claimant had understood that he had only to inform her if he was prosecuted. She did not accept that the claimant was unaware of the difference between being charged and prosecuted. She recalled the occasion when she had offered him a job which was subsequently withdrawn after she had received his references which suggested that he had 15 lied on his application form. She described giving the claimant a "*second chance*" when she subsequently offered him his current post with Money Matters.

63. During her interview with Karen Martin (P76C), Marie White confirmed that

20 she had received a flexible working request from the claimant which she had passed to Jackie Lawson. She explained that the request was made after the claimant's baby was born. Marie White confirmed her understanding that Jackie Lawson had passed the request to Marie Moy. Marie White described the support offered to the claimant by herself and Jackie Lawson for which 25 she recalled him thanking them. She described her attempts to contact the claimant while he was absent from work due to stress caused by the DWP investigation. She described the support provided to the claimant including the referral for cognitive behavioural therapy and providing the claimant with adapted equipment. She referred to the occasion when Jackie Lawson met 30 with the claimant to discuss training and he was "*very aggressive, shouting and losing it*".

64. The claimant attended an appointment with Dr Herbert from Occupational Health on 7 April 2016. Dr Herbert reported to the respondents (P88) that the claimant had been unfit for work because of "*the situation within work*" and the impact on his mental health. Dr Herbert assessed the claimant as fit to 5 return to work with relocation or mediation "*as the situation requires to be managed*". Occupational Health recommended a phased return to work. Dr Herbert reported to the respondents (P88) as follows;

*"It is relevant that he suffers from a condition which is known as psoriatic 10 arthritis. This is an inflammatory arthritis quite like rheumatoid arthritis and the treatment for this is powerful medication which is designed to reduce inflammation. One possible side effect of such medication is a lowering of resistance to infection and therefore when he has described to me today that at times he has a cold he feels his joints stiffer I can*

15 *accept and understand that this could well be the case. However I do not think there has been a substantial amount of absence from this condition over the years nor from associated problems with infections. It is unlikely to impinge significantly in the future so far as can be told in the kind of work he undertakes.*

20 *The more pertinent issue seems to be a level of distress and anxiety from which he has been suffering. He explained that he had essentially got into a situation at work which was being investigated in relation to his own received payments for disability. I understand in essence that this issue has been worked through and is resolved so far as the DWP are 25 concerned but he described feeling distressed and under pressure because of the investigations that were going on in his work regarding it. Having said that he accepts that that would be a necessary thing to be pursued because of the kind of role that he undertakes.*

30 *He is quite firm in his view that his relationship with his own manager is very poor and this has occasioned his most recent absence. He said that he feels “undervalued” and also that there is no relationship of trust between them. This appears to be the issue that is actually keeping him off work. During periods of distress he has experienced some palpitations with his heart and in fact this is being pursued at the hospital. I need to write to his doctor for some background regarding the heart issue but at this point there is apparently no significant problem arising from it that*  
5 *should keep him off his work.*

*Therefore I think he is fit in a general; sense to return to work. However that return has to be managed and I think therefore you have to discuss with him the particular grievance and difficulties that he is experiencing in his work place. He appears to be of the mind that relocation will be 10 necessary because he feels the relationship is irrevocable but I will leave it to you to manage this circumstance. In essence I think he can resume duties once you have worked this through with him”.*

The claimant was provided with a copy of Dr Herbert’s report (P88).

15

65. The claimant attended an Appeal Hearing against his written warning on 3 May 2016. The Hearing (P69) was before Pat McCormack, Welfare Rights Officer. The claimant was represented by Stephen Smellie at the Appeal Hearing. Stephen Smellie confirmed that the claimant did not dispute that he



20 failed to disclose the charge against him immediately and accepted that he should have contacted his Managers to provide an update. He explained that the claimant had moved to another office around the time that he received the citation and that he did not have the same level of contact with his Managers which may have been a reason for his oversight. The claimant stated that the  
25 investigation had been a deliberate attempt to find out about his disability and the delay had caused him additional stress and anxiety. He referred to management's unreasonable response to the allegations against him of benefit fraud for which he was exonerated. He referred to his suspension from duties for a delay in reporting the citation and being allowed to return to his 30 duties as soon as the charges against him were dropped. In response, Sandy

Cruickshank denied that the claimant's disability, other than as mitigation, was a factor in making his decision. He denied having questioned the claimant's disability during the disciplinary process. He confirmed that the disciplinary decision was based solely on the Code of Conduct (P54) and the claimant's delay in declaring the charges against him. The claimant became agitated. He accused the respondents of discrimination, declined to participate further in the Hearing and stated that the only way the matter would be resolved was  
5 at an Employment Tribunal. He left the Hearing.

66. The claimant also attended a meeting with Marie White on 3 May 2016 to discuss his attendance level at work. The meeting was in accordance with the respondents' Policies and Procedures for Maximising Attendance (P81). The  
10 claimant was accompanied at the above meeting by his trade union representative Stephen Smellie. The meeting was arranged to discuss the claimant's return to work and the report from Occupational Health (P88). The claimant advised Marie White that his medical condition was the same as when they last met on 17 March 2016; he identified his conditions as anxiety,  
15 stress, psoriatic arthritis and supraventricular tachycardia. The claimant agreed that he was fit to return to work. He informed Marie White that due to his anxiety and

stress that he was unable to return to any location in Money Matters as they were all managed by the same person. The claimant advised Marie White that he felt unable return to work, on a phased basis or otherwise, until his complaint under the Dignity at Work Policy had been resolved. The claimant was offered the possibility of working one day per week at a different location to help address his anxiety. The claimant confirmed that he would consider this option. The claimant's suggestion that he work from home was unacceptable to the respondents' HR over concerns about data protection and IT support. Mediation was not offered while the claimant remained absent from work. They agreed to meet again in four weeks. Marie White wrote to the claimant following their meeting by letter dated 3 May 2016 (P90).

67. Pat McCormick decided not to uphold the claimant's Appeal. He recorded his reasons for not upholding the Appeal in his notes of the Hearing (P69) as follows;

- *Do not believe appellant to have been discriminated against as the process would be the same for any employee in line with the code of conduct*
- 5 • *Fact finding process is that the nominating manager provides scope of investigation and terms of reference. This would have been why the fact finder answered in such a way regarding her questioning*
  - *Purpose of the appeal is to consider if the decision to issue a written warning was fair based on all the information presented to the Disciplining Officer on the day. Stephen Smellie confirmed that questions asked at the fact finding about X's disability did not affect Sandy Cruikshank's decision to issue a written warning.*
- 15 • *X was aware that he should have informed his manager of charges timeously and had been reminded of this obligation*

- *X accepts that he should have done so and that this was an oversight on his part*
- *Satisfied that the disciplining officer took into account all mitigation presented and arrived at a lesser sanction as a result of this*
- *Satisfied that Disciplining Officer considered other actions in line with 25 the disciplinary process and that the level of sanction was fair in circumstances*

The claimant was provided with a copy of the above notes and reasons in a letter dated 4 May 2016 (P70). Pat McCormack confirmed in the above letter that he had decided to reject the claimant's Appeal and that;

*"Consequently, in accordance with the Disciplinary Procedures, the Written Warning issued to you on 21 January 2016 will stand and will continue to be admissible against any further misdemeanor for a period of SIX MONTHS from that date, namely 20 July 2016".*

68. Karen Martin completed her report on 20 May 2016 (P76). She made the following conclusions;

***"Conclusions***

5.1 *X believes that Jackie Lawson is critical towards him at every opportunity, not believing the information he is giving her and asking for written evidence of investigation dates, medical conditions and reasons for his DWP investigation.*

5.2 *Jackie Lawson claims that her attitude has not been critical of X but that she has required further information in order to ensure that X has had the full supports required to enable his appeal for the DWP investigation and also to supply information to HR*

15 *in relation to the internal investigation into X's non declaration of the offence related to the DWP investigation. Jackie Lawson states that X is defensive in his attitude towards her whenever she has to engage in conversation with him.*

20 *Jackie Lawson stated that X became defensive when she was having a discussion with him regarding mistakes on a client's claim form and attempting to blame another Welfare Rights Officer who had left the Council for the mistakes*

*5.3 X claimed that Jackie Lawson made inappropriate insults towards him, using inappropriate language, accusing him of 25 lying, not believing his version of events, calling him obnoxious, arrogant and high maintenance*

*5.4 Jackie Lawson is unsure if she used inappropriate language in front of X or not but would be sure that if she did use inappropriate language this would not have been meant directly at X but more as an expression of frustration. Jackie Lawson admits that on one occasion she did say that she did not believe what X was saying as this was around his non declaration of his citation and believes that X should know the difference between 5 a charge and being prosecuted. Jackie Lawson also admits to being angry with X when he failed to tell her about his citation for 2 months after receiving it in February and not telling anyone about it until April.*

10 *5.5 Jackie Lawson denies calling X arrogant and obnoxious but did tell him that he was the most balanced person she had met as he had a chip on both shoulders. Jackie Lawson stated that she has on one occasion called X high maintenance.*

*5.6 X believes that Jackie Lawson made inappropriate threats of dismissal towards him on several occasions including whilst he*

15 was under investigation with DWP for benefit fraud, and whilst he was under investigation with SLC for non declaration of a criminal offence and for going on annual leave whilst on sick leave with SLC although this trip was booked and authorised by X's manager prior to his sick leave commencing.

20 5.7 Jackie Lawson refutes these threats but did go on to say that during the SLC investigation she would have been factual about the possible outcomes X could face at the outcome of either the DWP investigation or the internal investigation regarding non declaration of a criminal charge.

25 5.8 Jackie Lawson also stated that although X had authorisation for his pre booked annual leave he did not advise his current line manager that he would still be going during his sick leave but his line manager also did not make contact with X to ascertain if he would still be going on holiday.

5.9 X submitted a flexible working request in October / November 2014 and it appears that this has not been dealt with appropriately. Jackie Lawson has no recollection of receiving the formal request but Marie White is clear that she passed this  
5 to Jackie Lawson to deal with and believes that Jackie Lawson was going to discuss this with Marie Moy.

5.10 X states he felt humiliated when an e-mail was sent to the team advising them of his change in duties during his fact finding investigation.

10 5.11 Jackie Lawson denies sending this email or seeing it and would not agree to anyone sending such an email regarding a colleague. Marie White has no knowledge of an email and confirmed that X asked for colleagues to be made aware of his situation which she and Jackie Lawson confirmed they could not

15 do but if X wished to tell colleagues himself that would be his decision. No email can  
be located.

5.12 Marie White felt that Jackie Lawson was always supportive of X  
whenever she was present at any meetings with them and could  
not confirm any of the allegations X has made".

20

69. The claimant remained absent from work. He attended a meeting with Marie  
White on 2 June 2016 to discuss his attendance level at work. The meeting  
was in accordance with the respondents' Policies and Procedures for  
Maximising Attendance (P81). The claimant was accompanied by his trade  
25 union representative. At their meeting Marie White reminded the claimant that he should  
keep in touch while absent from work and expressed concern that he had not  
provided her with a Fit Note due on 31 May 2016 or responded to an e mail  
about their meeting. The claimant confirmed that in addition to his existing  
conditions of psoriatic arthritis and supraventricular tachycardia he  
30 was still experiencing anxiety and stress. Marie White informed the claimant that his  
absence from work was now subject to the Incapability Procedures in  
terms of the respondents' Maximising Attendance Policy (P81). The claimant  
became aggressive. He started to shout at Marie White and was verbally  
abusive. The meeting was terminated. Marie White wrote to the claimant  
following their meeting by letter dated 3 June 2016 (P92).

5

70. The claimant replied to Marie White by letter dated 7 June 2016 (P93) in which  
he referred to having previously advised her that his GP felt that he should  
not return to work while his Dignity at Work complaint was in progress and  
that while he was able to return to work that he would have to be redeployed  
10 out with Money Matters. He denied having used unacceptable language during their  
meeting. He requested that Marie White identify what he had said that she  
found to be unacceptable. He informed Marie White that he "*would like to take  
this opportunity to remind (you) that any false allegations made against me  
will be taken very seriously with serious consequences*". Marie

15 White did not reply to the claimant's letter (P93).

71. Karen Martin's report (P76) was referred to Michelle McConnachie, Social Work Services Manager. Michelle McConnachie had been appointed as the nominated Manager to make a determination in relation to the claimant's  
20 complaint. Michelle McConnachie did not know the claimant. She knew Jackie Lawson by sight only. Having considered the report (P76) and findings with Karen Martin, Michelle McConnachie concluded that the claimant's complaints against Jackie Lawson were not well founded. She was satisfied that Karen Martin had adequately investigated each aspect of the claimant's  
25 complaint. She met with the claimant on 17 June 2016 to inform him of the outcome of the fact finding investigation and of her decision. The claimant chose not be accompanied at the meeting by his trade union representative.

72. Michelle McConnachie was not persuaded that there had been a failure on the part of the claimant's Managers to respect his right to dignity at work.  
30 While she accepted that there was a tension on occasions between the claimant and his Managers, in particular Jackie Lawson, she was not persuaded that this had resulted in any hostile or degrading behaviour by Jackie Lawson. She recognised that Jackie Lawson had on occasions used inappropriate language. She was not persuaded that such language was directed at the claimant. She concluded that the claimant's Managers, including Jackie Lawson, were supportive. Michelle McConnachie considered 5 the claimant's complaint about the failure to process his application for flexible working. She did not identify it as a ground for establishing a hostile and degrading environment. She was satisfied that the application had been overlooked by the claimant's Managers. She noted that it was not something that had been progressed by either the claimant or management. In all the  
10 circumstances she was satisfied that it was more than likely to have been a genuine oversight as opposed to a deliberate omission.

73. At their meeting Michelle McConnachie advised the claimant that she had not upheld his Grievance. The claimant became agitated. Michelle McConnachie was concerned about a reference made by the claimant to having recorded a conversation with Jackie Lawson. She sought reassurance from the claimant that the recording did not include any reference to service users' details or other confidential matters. The claimant became aggressive. The claimant indicated that he had no interest in discussing matters further at mediation and that he intended to appeal Michelle McConnachie's decision.

74. By letter to the claimant dated 28 June 2016 (P77) Michelle McConnachie confirmed her decision that the claimant's complaints against Jackie Lawson were unfounded. She informed the claimant as follows;

25

*"The dignity at work complaint alleged that Mrs Jackie Lawson had been bullying, harassing and intimidating towards yourself by not treating you appropriately in the workplace in respect of the following issues:*

30

*1. Mrs Lawson being critical in her attitude towards yourself.*

*2. Inappropriate insults by Mrs Lawson towards yourself.*

*3. Inappropriate threats of dismissal towards yourself.*

*1. Mrs Lawson being critical in her attitude towards yourself –*

*You cited Mrs Lawson to be critical of yourself at every opportunity but in considering statements from others interviewed, it appears Mrs Lawson both directly in contact with yourself and through Mrs White, your line manager, was seeking to ensure both that supports were in place for you as an employee but also that services were effectively being delivered to the public and staff supported.*



From consideration of the evidence supplied Mrs Lawson also had to  
10 ensure remedies were in place where your performance was found to be lacking e.g.  
significant recording errors containing wrong information which could have had adverse  
consequences for a service user had there not been management intervention. Mrs  
Browning also advised she personally had been annoyed about this situation she had to  
clear 15 up and that it wasn't the first time you had made mistakes like this and that a lot  
of allowances were made for you but that things that were said to the team by yourself  
were out of order.

Similarly staff feedback on training delivered by yourself required  
management intervention. You perceived the management 20  
interventions put in place by Mrs Lawson to be criticisms towards yourself but it is  
concerning that you do not appear to evidence understanding of the responsibilities and  
role of the manager to supervise workload and staff discharge of role. From  
consideration of statements you fail to exhibit insight into your own shortcomings in 25  
carrying out your role and why management supports and interventions were required.

From consideration of information this ground is **Unfound**.

## 2. Inappropriate insults towards you

Mrs Lawson refutes this allegation and no evidence has been provided  
to substantiate your claims that Mrs Lawson made inappropriate insults  
towards yourself. Both yourself and Mrs Lawson have differing  
perceptions of inferences about discussions you jointly engaged in. In  
5 fact finding interview you cited an example where Mrs Lawson is alleged  
to have said "you are the most arrogant and obnoxious person I have  
met" and that this was witnessed by Marie White. Mrs Lawson denies making this  
statement and Mrs White stated Mrs Lawson had not made this statement. Conversely  
Mrs White in her statement outlined a 10 situation where she and Mrs Lawson met with  
you to discuss training

issues and Mrs White described you as "being very aggressive, shouting  
and losing it".

*From consideration of information this ground is **Unfound***

*3. Inappropriate threats of dismissal*

*15 You allege Mrs Lawson made inappropriate threats of dismissal towards you on several occasions. Mrs Lawson refutes this stating she had been factual about possible outcomes of an investigation. No evidence has been provided to substantiate your allegation of inappropriate threats of dismissal. Indeed it would be a responsibility of a manager to support 20 and advise an employee undergoing fact finding and that may include outlining potential outcomes but also how the employee would be supported through the process. Through reviewing information it is clear both Mrs White and Mrs Lawson tried to ensure you were being supported whilst investigations were taking place e.g. early intervention 25 referral, CBT, referral for medical, DSE assessment and provision of practical equipment such as gel key pad for arthritis, footstool and wrist support. Both Mrs White and Mrs Browning advised that Mrs Lawson was very supportive of you.*

*From consideration of information this ground is **Unfound***

*In reviewing all submissions it is clear there was a degree of tension on both parts in the working relationship between yourself and Mrs Lawson and that this did potentially manifest in behaviour which should not appear in a workplace e.g. Mrs Lawson conceding she may have on one*

*5 occasion swore about a situation but that she never swore at yourself. Mrs White in recounting supports offered to you stated that you always thanked her and Mrs Lawson for support offered during the investigation period you were previously involved in".*

The claimant was informed of his right to appeal against the above decision.

10

75. The claimant lodged an Appeal against Michelle McConnachie's decision by letter dated 29 June 2016 (P78).

76. The claimant remained absent from work. By letter dated 28 June 2016 (P94) Marie White requested that he attend a meeting to discuss his recent medical 15 with the respondents' Medical Professional and to ensure that he receive any support and assistance available should he require it. A meeting was arranged for 5 July 2016. The claimant contacted Marie White by e mail on 1 July 2016 (P96.1) requesting that she confirm the purpose of the meeting as she had advised at their last meeting that she would be invoking the capability

20 procedures. He referred to her advising him that this was the case as the department had offered all the support and assistance that was available and therefore "*will be terminated from post*".

77. Marie White replied to the claimant (P96.2) to confirm that the reason for the 25 meeting was to discuss a return to work date as his complaint under the Dignity at Work policy had concluded and he had advised her previously that he wanted that issue to be resolved before returning to work. Marie White informed the claimant that the meeting was to try and resolve matters before "*taking the Incapability procedures route*".

30

78. The claimant wrote to Marie White by letter of 4 July 2016 (P98). He informed her that his GP had advised him that he was too ill to attend "*any more stressful situations*" such as the proposed meeting. His letter concluded as follows;

*"If you are genuine in your support towards me as my manager, I'm happy to meet with you at my home to discuss supporting me back into 5 work. If however you are implementing the Incapability Procedures then please do as you said you would do".*

79. Marie White replied to the claimant by letter dated 5 July 2016 (P99). She confirmed that at their meeting on 3 June 2016 she had advised him that she 10 was now dealing with his absence under the capability procedures and that this was on the basis of the advice she had received that he was fit to return to work. She

confirmed that she had also taken into consideration the request from his trade union representative that the respondents wait until a decision had been made regarding his complaint under the Dignity at Work Policy.

15 Marie White explained that as the complaint had concluded she was of the view that they should meet again to discuss working together to facilitate his return to work. She advised the claimant that as he intended to challenge the outcome of his complaint, at the proposed meeting they would have discussed an alternative Money Matters location for him to work from until the matter  
20 was fully resolved. She confirmed that as he had indicated he would not be returning to work, she would progress the incapacity procedures about which she would write to him in due course. Marie White sought to assure the claimant that she was acting under the respondents' Maximising Attendance

Policies (P81) and had at all times sought to support him and avoid causing  
25 him stress. Marie White confirmed that she had received a request for a reference for him from a prospective employer and requested that he confirm his intentions to allow her to respond appropriately.

80. The claimant replied to Marie White by e mail on 11 July 2016 (P100) as  
30 follows;

*"Just to advise you that I am still unwell due to the fact that I now have issues with my Arthritis as well as my ongoing stress, I am required to see my GP this week, at which point I will get a relevant fit note and post to you. If you require to speak to me please call my mobile:XXXXXXXXXXXX and I will be happy to talk to you about it.*

*In terms of your comments around "what my intentions are" as you  
5 have received a reference request for me, I wish to make it clear that my intentions are, and always have been to return to my role as WRO. Due to the fact that you have recently stated that you intend to pursue my contract termination through incapability procedures and also the numerous threats that I have had over the last 2 years about me being*

10 sacked, it is reasonable for me to look at alternative employment options, as you have  
stated several times that SLC refuses to redeploy me to a suitable role  
away from the person who is causing me the work place stress and  
heart problems.

I have the right to do this without having to explain my reasons,  
15 although I would have thought that you would have been able to figure this out given  
the circumstances, however I hope that this clears things up and that  
you give some more thought to redeploying me in a role where my  
health is not at risk of further deterioration”.

20 81. The claimant resigned from the respondents’ employment by letter dated 15 July  
2016 (P101) in the following terms;

“I am writing to inform you that I am resigning from my position of  
Welfare Rights Officer, South Lanarkshire Council, Money Matters,  
25 with immediate effect. Please accept this as my formal letter of resignation and a  
termination of our contract. I feel that I am left with no choice but to  
resign in light of my recent experiences regarding a fundamental  
breach of contract”.

30 82. At the date of his resignation the claimant was aged 52. His salary with the  
respondents was £24,760 per annum from which his weekly net pay was  
£360.67. He was a member of the respondents’ pension scheme. The  
claimant obtained alternative employment on 18 July 2016. He works 25  
hours per week for which he was paid £211.13 net per week until 18 January  
2017 and £269.45 net per week thereafter. The claimant has applied without  
success for various welfare rights and money advice related jobs.

5

## ISSUES

83. The issues to be determined by the Tribunal were as follows;

10 **FAILURE TO MAKE REASONABLE ADJUSTMENTS**

i. Did the respondents know, or could they reasonably have been expected to know that the claimant had a disability before June 2014?

15 ii. If the respondents knew or ought reasonably to have known that the claimant had a disability before June 2014, did they require the claimant to desk share and undertake heavy work while employed in their Housing Department and if so, did they know or ought they reasonably to have known that desk sharing and undertaking heavy tasks would put the claimant at a substantial <sup>20</sup> disadvantage in comparison with persons who are not disabled?

iii. If the respondents knew or ought reasonably to have known that the claimant had a disability before June 2014 and that having to desk share and undertake heavy work put him at a substantial disadvantage in comparison <sup>25</sup> with persons who are not disabled, did the respondents fail to take such steps as it was reasonable for them to have to take to avoid that disadvantage?

**HARRASSMENT**

30 iv. Did the respondents by providing statements to the DWP about the claimant's disability; making enquiries about his medical condition and suspending him from his duties engage in unwanted conduct relating to the claimant's disability and if so,

v. Did the conduct of the respondents violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant when taking into account the claimant's perception, the other <sup>5</sup> circumstances of the case and whether it was reasonable for the conduct to have that effect.

## CONSTRUCTIVE DISMISSAL

- vi. Was there a course of conduct on the part of the respondents which 10  
cumulatively amounted to a fundamental breach of contract and if so,
- vii. Did the respondents' said conduct cause the claimant to resign and claim  
constructive dismissal and if so?
- 15 viii. Was the claimant's dismissal unfair?

## COMPENSATION

- ix. If some, or all, of the claims succeed, what should the claimant be awarded in  
terms of compensation including injury to feelings?
- 20

## SUBMISSIONS

### CLAIMANT'S SUBMISSIONS

- 25 84. The claimant provided the Tribunal with written submissions on 12 & 26 February  
2018. What follows is a summary of the above.
85. Ms Freeland on behalf of the claimant submitted that the respondents had  
harassed him by providing inaccurate statements about his disability to the  
30 DWP. She referred to the statements provided by Blair Millar (P37); Myra

Stevenson (P38) and Jacqueline Fernie (P39). Ms Freeland submitted that based on the information the claimant had provided to them; his hospital appointments (P22A; 24 & 25A) and other documentation (P9; 31.1; 32 & 33) that the respondents and in particular the above employees knew or ought to have known that the claimant was disabled and that providing their statements to the DWP was an act of harassment. Ms Freeland submitted that the above evidence showed that the claimant had informed his line Managers that he had psoriatic arthritis and had on several occasions unsuccessfully requested an adjustable workstation from Myra Stevenson and Blair Millar. It is the  
10 claimant's position submitted Ms Freeland that by failing to consider information including the LWPS (P9), Dierdre Duncan deliberately ignored crucial evidence in a deliberate attempt to cover up the mistakes made by her Team. Ms Freeland submitted that this was a breach of several internal policies and displayed inappropriate and unfair behaviour by someone in the  
15 position of a public servant. Ms Freeland disputed that the claimant had failed to specify that the claim of harassment included the respondents' alleged failure to address his concerns about the statements provided to the DWP. Ms Freeland referred the Tribunal to the claimant's Grievance (P44), the Case Management Preliminary Hearing held on 9 January 2017 and evidence at 20  
the full Hearing.

86. Ms Freeland referred to Jacqueline Fernie's refusal to meet with the claimant as a deliberate attempt by the respondents to avoid responsibility for the negligence of their employees for which they were aware of the serious consequences. Ms Freeland submitted that the respondents failed to 25 undertake a full and proper investigation in response to the claimant's Dignity at Work complaint (P44). In particular, Deirdre Duncan, according to the claimant deliberately delayed her investigation in order to withhold any potential support for the claimant during his DWP Appeal. The claimant submitted that Deirdre Duncan's reasons for the delay were unacceptable given the size of the respondents' organisation. Ms



Freeland submitted that because it would have supported the claimant's position Deirdre Duncan had failed to probe witnesses about the claimant's condition and seek relevant information.

87. Ms Freeland submitted that the respondents failed to comply with the ACAS Code of Practice on Bullying & Harassment at Work. In particular, submitted Ms Freeland, the respondents failed to investigate the complaint promptly and objectively; take the complaint seriously or be seen to undertake an objective and independent investigation. The respondents' inaccurate statements, submitted Ms Freeland, could have resulted in the claimant being convicted and given a custodial sentence. They had a detrimental effect on the claimant's disability, submitted Ms Freeland, resulting in him developing supraventricular tachycardia, which she described as a life changing condition. The respondents, submitted Ms Freeland, should be found liable for providing misleading or inaccurate information about the claimant as their employee. Their conduct in providing the statements and failing to correct any inaccuracies contained in the statements amounted to harassment.

88. Ms Freeland submitted that Elaine Maxwell failed to comply with the procedural requirement to arrange a meeting of the parties concerned in an attempt to resolve the matter. She had failed, submitted Ms Freeland, to attach sufficient weight to the claimant's position or consider the evidence in enough detail before making her decision. Referring to the respondents' Code of Conduct for Employees (P54), Ms Freeland submitted that when dealing with the claimant's Appeal, Elaine Maxwell failed to comply with the responsibilities and commitments to which employees agree when undertaking work on behalf of the respondents. Elaine Maxwell, submitted Ms Freeland, despite the obligations on the respondents of good governance had no intention of allowing the claimant's Appeal to be considered by an Appeal Panel. Her evidence, submitted Ms Freeland like much of the respondents'

evidence generally was evasive and contradictory. In particular Elaine Maxwell was evasive about how she knew about the criminal charges against the claimant being dropped and had failed to show that the claimant was sent a copy of her report (P53) which, submitted Ms Freeland she had produced at a later date. Ms Freeland accused Elaine Maxwell of misrepresenting when her report was produced and of failing to show that it had been copied to the claimant at the time claimed by the respondents. There is no reference to the date of their meeting in her letter of 20 August 2015 (P53) suggesting, submitted Ms Freeland, that Elaine Maxwell had forgotten the date and had 5 no records to check the position.

89. The claimant, submitted Ms Freeland, complied with his obligation to inform the respondents about the criminal charge. In all the circumstances, submitted Ms Freeland, a fact finding investigation was unnecessary and should have been dealt with as speedily as possible. The respondents, submitted Ms

10 Freeland, acted unlawfully by gathering information about the claimant's disability.

90. Referring in particular to her fact finding interview (P76B), Ms Freeland submitted that Jackie Lawson had admitted to making comments that the claimant took as derogatory and demeaning. Her explanation in cross

15 examination that "*she was only joking*" was insufficient, submitted Ms Freeland. Describing him as having "*a chip on both shoulders*" submitted Ms Freeland was taken by the claimant as a reference to his disability and the discomfort of the arthritis in his shoulders at that time. Jackie Lawson, submitted Ms Freeland spoke to the claimant in a confrontational and

20 derogatory manner; her behaviour demonstrated harassment and bullying with no regard for the claimant's mental health or the risk to his heart condition. The Tribunal, submitted Ms Freeland, should disregard any

attempts by Jackie Lawson when giving her evidence to appear remorseful for any distress she may have caused and to explain that she was trying to support him at a difficult time. Jackie Lawson, submitted Ms Freeland, knew full well what she was doing; her explanation in cross examination that she was “only joking” should be rejected as unacceptable. Ms Freeland submitted, referring to ACAS Guidance and the Equality Act 2010 that the behavior of Jackie Lawson amounted to harassment. Ms Freeland also referred the Tribunal to the Health & Safety at Work Act 1974 and the Management of Health & Safety at Work Regulations 1999 in support of her submission. Jackie Lawson, submitted Ms Freeland, lacked empathy and concern when

the claimant collapsed with a suspected heart attack. Her failure to remove staff from the scene and to leave the claimant lying on the floor in sight of people having their lunch amounted to an act of harassment.

91. Ms Freeland further submitted that Jackie Lawson and Marie Moy were only 5 concerned about the respondents' reputation; they had little regard for the claimant's mental health and used the breach of the Code of Conduct (P54) to instigate a fact finding exercise to gain further information about his disability and benefit claim. Ms Freeland referred the Tribunal to the evidence of Marie Moy in cross examination and notes of the fact finding investigation 10 (P61B) in support of the above submission.

92. Ms Freeland submitted that delays on the part of the respondents were in breach of the ACAS Code of Practice on Disciplinary and Grievance procedures. She questioned why, despite the claimant successfully appealing against the overpayment, he remained suspended from normal duties in 15 particular given the impact this was having on his health. Ms Freeland submitted that the suspension from his normal duties was a punishment. While it lasted, submitted Ms Freeland, the claimant was given no objectives and no updates on the fact finding investigation. When it ended – after 5 months – he was given no coaching or retraining. There was a presumption 20 of guilt, submitted Ms Freeland. There was unacceptable delay in appointing the fact finders and completing the report. The allegation that the claimant was required to answer lacked specification. There was no detail as to any potential outcome in the letter sent to him (P57), submitted Ms Freeland, referred to only an “alleged breach of the code of conduct”. The claimant was

25 asked irrelevant questions about his disability and inappropriate requests were made for his medical records amounting, submitted Ms Freeland, to a breach of the ACAS Code. Information provided by the claimant (P62) was ignored.

93. The claimant, submitted Ms Freeland was subjected to harassment by the 30 respondents in the demands they made for medical evidence to prove his disability. Jackie Lawson, without his consent, submitted Ms Freeland had

provided personal and inaccurate information about his health to Marie Moy and others (P61A). Ms Freeland submitted that the respondents acted in breach of the Data Protection Act & Access to Health Records Act 1990 by collecting the claimant's medical evidence. Concerns raised at his Appeal 5 about the length of the disciplinary procedure and of being asked about his

disability were not addressed. Ms Freeland submitted that the claimant's concerns were denied and ignored. Ms Freeland submitted that a further example of harassment to which the claimant was subjected was Jackie

10 Lawson's behavior in relation to his involvement in a client's application for benefits. In particular, submitted Ms Freeland, the manner in which Jackie Lawson expressed and recorded her concern before and at their meeting on 18 February 2016 amounted to bullying and harassment causing the claimant to be absent from work with stress and risk to his heart condition resulting in absence from work.

15 94. Ms Freeland submitted that manner in which Marie White administered the respondents' absence policy amounted to harassment. In particular, notwithstanding the advice from Dr Herbert, she failed to consider deployment outside Money Matters and away from Jackie Lawson's line of management, mediation or working from home and was unwilling to wait until  
20 the outcome of the Dignity at Work procedure before starting the Incapacity Procedure. Ms Freeland submitted that Marie White and HR had no interest in supporting the claimant back to work and ignored his requests and the options put forward by him; Marie White showed no regard for the claimant's welfare and failed in her duties and her responsibilities.

25 **FAILURE TO MAKE REASONABLE ADJUSTMENTS**

95. It was the claimant's position that while employed in Housing he had to desk share and did not have an assessment of his workplace. This, submitted Ms Freeland, was despite raising concerns at regular intervals about having to share a desk and issues such as the storage of food parcels under desks.

30 96. The claimant questioned why the respondents had failed to provide evidence to support their position that on his return to work in December 2014 the claimant was provided with support by management. Ms Freeland submitted that the evidence before the Tribunal supported the claimant's position that the respondents failed to consider his application for flexible working and by doing so had failed to comply with the Employment Rights Act 1996 and 5 paragraph 8 of the ACAS Code of Practice and make a reasonable adjustment.

### **CONSTRUCTIVE DISMISSAL**

97. In relation to the claim of constructive dismissal, Ms Freeland submitted that the respondents were in breach of the implied duty of mutual trust and 10 confidence. The respondents, submitted Ms Freeland, failed to address the legitimate concerns identified in his Dignity at Work complaint against Jackie Lawson (P76F) and instead sought to return him to the workplace that was causing him unacceptable levels of stress and was detrimental to his wellbeing. Michelle McConnachie, submitted Ms Freeland, failed to be 15 impartial; she sought to blame the fact finder, Karen Martin, when challenged in cross examination and submitted Ms Freeland , eventually accepted that Jackie Lawson's behavior was inappropriate. Ms Freeland submitted that Michelle McConnachie was particularly dismissive of the claimant's complaint relating to Jackie Lawson's failure to respond to his application for flexible 20 working, dismissing it as an understandable oversight. In addition, despite identifying "*a degree of tension on both parts in the working relationship*", Michelle McConnachie failed to offer mediation, submitted Ms Freeland.

98. Ms Freeland identified the letter received by the claimant on 28 June 2016 (P77) from Michelle McConnachie confirming the outcome of his complaint 25 against Jackie Lawson as the final straw in response to which he had no choice but to resign and claim constructive dismissal. His health, submitted Ms Freeland, could not withstand the possibility of another fact finding investigation and

disciplinary action into his alleged failure to write up case notes. The allegation that he included false information on a client's benefit form submitted Ms Freeland would have put his professional reputation into question.

## REMEDY

99. In relation to remedy, Ms Freeland submitted that at the time of his constructive dismissal the claimant had worked in the benefit advice and representation sector for over 13 years and had anticipated that he would remain working with the respondents until his retirement aged 67. In terms of his Schedule of Loss (P112) the claimant sought compensation for loss of earnings in the region of £120,000 with an ACAS uplift in the region of £30,000. Ms Freeland referred the Tribunal to the case of **Chagger v Abbey National PLC & Hopkins 2010 ICR 397**. Ms Freeland sought stigma damages as a result of the respondents' alleged conduct towards the claimant and in particular that of Jackie Lawson. The claimant should also be compensated, submitted Ms Freeland for the damage caused to his career, professional reputation in the benefits sector and ability to retain the requisite experience and skill level to gain employment. Ms Freeland referred to the claimant's lack of success in obtaining alternative employment and the impact that his experience while employed by the respondents has had on his private life, health and ability to undertake his current job. Ms Freeland referred the

Tribunal to the case of **Hampshire County Council v Wyatt UKEAT/0013/16**.

20

100. Ms Freeland submitted that the respondents' breach of their duty of care caused his stress, depression, anxiety and supraventricular tachycardia. In terms of his Schedule of Loss (P112) the claimant sought compensation for injury to feelings of between £18,000 and £30,000. Had the respondents' employees provided accurate information to the DWP, submitted Ms

Freeland, it is very likely that criminal proceedings would not have been brought against him. Ms Freeland referred to the subsequent proceedings

which resulted in a successful challenge to the DWP's original overpayment decision and to the criminal proceedings being abandoned. In these

30           circumstances, submitted Ms Freeland, the respondents did not have to suspend or change the claimant's duties; there was no risk to the respondents' business. The real reason, submitted Ms Freeland, for the respondents' fact finding was to investigate whether the claimant had a "genuine illness" and to satisfy their curiosity for reasons unknown. The respondents, submitted Ms Freeland, continued to harass the claimant for a further 14 months, engaging in negligent behaviour that was oppressive and unreasonable.

## 5    **RESPONDENTS' SUBMISSIONS**

101. The respondents provided the Tribunal with written submissions on 13 and 19 February 2018. What follows is a summary of the above submissions.

### **FAILURE TO MAKE REASONABLE ADJUSTMENTS**

102. In terms of his claim of failure by the respondents to make reasonable 10 adjustments, Ms Lunny for the respondents submitted that the complaint under the Dignity at Work Policy made in February 2015 related to his period of employment in the Housing department until he moved to Social Work on 3 March 2014 (with the element of desk sharing limited to the period after December 2012). The respondents, submitted Ms Lunny, were not aware that

15 the claimant had psoriatic arthritis until June or July 2014 when he first disclosed his condition to Marie White. By his own admission, submitted Ms Lunny, the claimant did not show the various medical letters (P16 to 25A) to his line Managers. There was no evidence that Patricia Douglas had seen his first assessment (P30) which in any event did not disclose that any 20 adjustments were required. The forms relied upon by the claimant submitted Ms Lunny, were completed by employees such as the LWPS (P9). There was no evidence that Myra Stevenson received the completed physiotherapy report



(P32). There was no evidence that the claimant did not have to a desk when he moved to the post of Housing Support Officer in December 2012.

25 There was no evidence, submitted Ms Lunny that the claimant raised concerns about sharing a desk or using a pool care while employed in Housing. In any event, submitted Ms Lunny, the claimant exaggerated the physical nature of the work he was required to undertake.

103. The respondents, submitted Ms Lunny, did not know and could not reasonably have been expected to know that the claimant was disabled before June 2014. In these circumstances, submitted Ms Lunny, they were not obliged to make reasonable adjustments. The LWPS (P9) is not sufficient to establish 5 knowledge of the claimant's disability, submitted Ms Lunny. It is not a

document that is used to inform the respondents about an employee's disability. In any event, the claimant subsequently stated in his application for employment in Social Work (P10) that he did not consider himself to be disabled; something that he was unable to explain when questioned in cross  
10 examination.

104. As regards information about the claimant's medical condition, the respondents, submitted Ms Lunny did not disclose medical evidence about the claimant without his permission or in breach of the Data Protection Act  
15 1988. They did not, submitted Ms Lunny either ask the claimant inappropriate questions about his health, seek to challenge his disability or otherwise act unreasonably.

105. In the event that the respondents ought reasonably to have known that the 20 claimant was disabled, submitted Ms Lunny, the Tribunal should find that they were not under an obligation to make reasonable adjustments on the basis that the claimant was not required to undertake heavy physical work and produced no evidence that adjustments were required to his desk. Separately, submitted Ms Lunny, this element of the claim is timebarred on the basis that

25 it relates to the claimant's period of employment prior to 3 March 2014. It was  
the claimant's evidence, submitted Ms Lunny, that he was given a great deal  
of support and adjustments following his move to Social Work in March 2014.  
On the basis that the claim was presented on 6 October 2016, submitted Ms  
Lunny, it follows that the claim under this heading is time barred. The claimant  
30 cannot, submitted Ms Lunny rely on his claim of harassment to establish a  
continuing act of discrimination extending beyond 3 March 2014;  
discrimination by failure to make reasonable adjustments is neither the same  
type or involved the same persons as the alleged harassment and there was  
a gap of six months between the different types of alleged discrimination. Ms  
Lunny referred the Tribunal to the case of **Aziz v First Division Association  
2010 EWCA Civ 304**. There are also no grounds in this case, submitted Ms  
Lunny to justify extending the time limit; the passage of time alone, over two  
5 and a half years since the alleged failure to make reasonable adjustments, makes it not  
just and equitable to extend the time limit of three months. No evidence was  
led by the claimant, submitted Ms Lunny, to explain the delay.

## HARRASSMENT

106. Ms Lunny submitted that the only employees identified by the claimant as  
10 having harassed him were Jackie Lawson and Marie Moy. As regards Jackie Lawson,  
submitted Ms Lunny, the respondents were entitled to find that she had acted  
appropriately in questioning the claimant about his work and standard of service provided  
in February 2016 and to explore with him the criticisms received in relation to training.  
These interventions, submitted Ms 15 Lunny, did not amount to harassment; they were  
appropriate and supportive. The issue about failure to deal with his request for flexible  
working, submitted Ms Lunny, was only raised by the claimant when interviewed in  
relation to his complaint. It was not something that he pursued or about which he lodged  
an appeal. It was however raised by Karen Martin with Jackie Lawson and Marie 20 White  
and dealt with as part of the complaint. Jackie Lawson's explanation for the oversight,  
submitted Ms Lunny was acceptable; the claimant was off work sick shortly after making

the application and on his return four weeks' later was relocated to another office in Lanark to cover staff shortages.

107. There was no evidence, submitted Ms Lunny, to support the claimant's case 25 of harassment. No allegations were made against Marie Moy before the Preliminary Hearing; her contact with him was limited until the disciplinary process in relation to which she acted as nominated Manager. There was no evidence of her questioning the claimant's disability or of asking the fact finding officers to question him about it; she was supportive throughout.

30

108. The Tribunal, submitted Ms Lunny, should find that the respondents did not harass the claimant by reason of his disability. Both the claimant and Jackie Lawson had used inappropriate language which in context, submitted Ms Lunny did not amount to harassment. Remarks made by Jackie Lawson were made in an attempt to diffuse a situation in which the claimant was agitated and angry. There was no evidence that the claimant treated any of the 5 remarks as referring to his disability; the remarks were not made in a confrontational or derogatory manner. The respondents, submitted Ms Lunny, were supportive of the claimant.

### **CONSTRUCTIVE DISMISSAL**

109. Ms Lunny submitted that the claimant has failed to establish that the 10 respondents' conduct in relation to the first complaint was so prejudicial to him that it resulted in a breach of the implied term of trust and confidence. He delayed bringing his first complaint and had confirmed that it was only because of the statements given to the DWP; he had refused to identify the officers against whom he brought his complaint which prevented Deirdre 15 Duncan from investigating the matter and his appeal raised no concerns about delay. The respondents, submitted Ms Lunny, had no jurisdiction to intervene in the statements made to the DWP. They were part of an independent investigation and had no bearing on the relationship between the claimant and the respondents. Ms Lunny described the claimant's colleagues providing 20 the DWP with statements as a matter extraneous to the claimant's employment. Dierdre Duncan had not, as suggested by the claimant, "failed to

probe witnesses” during her investigation. Dierdre Duncan had explained that she did not ask further questions because she was satisfied that they had told her all that they knew. The respondents, submitted Ms Lunny, had <sup>25</sup> behaved appropriately throughout.

110. Likewise submitted Ms Lunny, the delays about which the claimant complained in relation to the Disciplinary Process were not unreasonable when considered in the context of the claimant and Marie Moy’s absences  
30 from work and the administrative complications of identifying and appointing appropriate Fact Finders. When considered in the context of the investigation, the questions put to the claimant about the DWP and his disability were not unreasonable. Ms Lunny submitted that the respondents were able to provide a reasonable explanation for the delays. The claimant, submitted Ms Lunny, did not suffer any prejudice and was supported in presenting his Appeal to the DWP. The respondents, submitted Ms Lunny, did not act in way that breached  
5 the ACAS Code.. The claimant did not complain about any delay during the Disciplinary Hearing and there was no evidence of the claimant having suffered any prejudice. He did not raise his Grievance until sometime after the alleged events, which again, submitted Ms Lunny suggests that he did not suffer prejudice.

10

111. While Marie Moy did not instruct the Fact Finders to ask specific questions about the claimant’s disability, submitted Ms Lunny. She was entitled to have regard to the context and surrounding circumstances of their investigation in particular given the serious nature of the charge against the claimant and how <sup>15</sup> it related to his work. Marie Moy did not challenge the claimant’s disability, submitted Ms Lunny. She did not make the decision to issue the claimant with a written warning and there was no evidence that the claimant’s disability played any part in that decision.

20 112. In relation to the claimant’s second complaint (P76F), Ms Lunny submitted that the respondents had acted appropriately and fairly. The Tribunal should find, submitted Ms Lunny, that Michelle McConnachie took cognisance of the

claimant's complaint that his request for flexible working had not been processed. If, submitted Ms Lunny, the claimant now seeks to show that this  
25 was a failure on the part of the respondents to make a reasonable adjustment, it was not advanced as an argument at any stage before making his submissions. The claim of failure to make reasonable adjustments related to his period of employment in the respondents' Housing department. The claimant, submitted Ms Lunny, had failed to pursue the matter by lodging an  
30 Appeal in accordance with the respondents' Policy on Flexible Working (P105) and in any event the reason for the claimant's request was said to be for child care and not because of his disability.

113. The respondents, submitted Ms Lunny acted reasonably in placing the claimant on restricted duties. This was something they were entitled to do while he was subject to criminal proceedings for alleged benefit fraud. He was returned to full duties as soon as possible after the criminal charges had been 5 dropped. Ms Lunny submitted that the claimant's evidence does not support his position that being on restricted duties had a detrimental effect on his mental and physical health or that there was a growing resentment from his colleagues during this period. Likewise, submitted Ms Lunny, the respondents acted reasonably in response to his disability once his medical condition was  
10 known and during his periods of absence for ill health. The respondents did not threaten the claimant with dismissal, submitted Ms Lunny. They were entitled to manage the claimant's absence by invoking their Maximising Attendance Policy (P81). The respondents' conduct on its own or cumulatively, submitted Ms Lunny, did not amount to a fundamental breach 15 of contract destroying the implied duty of trust and confidence. As with the claims of disability discrimination, submitted Ms Lunny, this head of claim is unfounded.

## **REMEDY**

114. In the event that the Tribunal found any of the claims to be well founded, Ms 20 Lunny submitted that the amounts sought by the claimant were excessive. They could not

be supported by the evidence and the calculation for loss of earnings was based on an assumption that the claimant's employment position will remain the same for the foreseeable future. Likewise submitted Ms Lunny, the claim for injury to feelings was excessive. The Tribunal should

25 reduce any basic award made to the claimant in terms of Section 122 of the Employment Rights Act 1996 on the grounds that his conduct make it just and equitable to do so and also reduce any compensatory award in terms of Section 123 of the Employment Rights Act 1996 on the grounds that he contributed to his dismissal.

30

### **NOTES ON EVIDENCE**

115. Where there was a dispute on the facts the Tribunal preferred the evidence of the respondents to that of the claimant. The Tribunal found that the 5 claimant's evidence lacked reliability and in certain respects credibility. When giving his evidence the claimant would avoid answering questions which directly challenged his version of events. For example, when questioned on the lack of information available to the respondents about his disability while employed in Housing the claimant repeatedly replied, "*I do not accept*" without

10 further explanation. The Tribunal also found that the claimant exaggerated events to support his case. His description of working conditions while managed by Myra Stevenson was of being expected to lift heavy items and clean exceptionally dirty homes. He subsequently conceded however that he was not required to lift furniture or help clean clients' homes. The Tribunal did 15 not accept the claimant's evidence that he was unaware of the reason for disciplinary action being taken against him. It was clear from the evidence that the claimant was informed at regular intervals that his delay in reporting the citation, amounting to a breach of the respondents' Code of Conduct (P54), was the reason for the disciplinary action and the Tribunal did not doubt that 20 he understood this to be the case.

116. The claimant sought to show that his relations with Marie White and Jackie Lawson were particularly acrimonious. He described interactions with Jackie Lawson in which she made derogatory remarks to him and threatened him  
25 with dismissal. This conflicted with the evidence of the respondents, which the Tribunal accepted, of a management Team seeking to support the claimant during a difficult time. According to the claimant on the occasion that he collapsed at work he was left lying on the floor while other employees continued eating their lunch nearby. The Tribunal found this to be an 30 exaggeration of events with no evidence to support the claimant's position. The Tribunal did not doubt that being investigated by the DWP and subsequently prosecuted caused the claimant stress. This was understandable. The claimant's perception of how he was treated by the respondents was not supported by the evidence before the Tribunal however.

The Tribunal found that the claimant had an unreasonably hostile view of his Managers and struggled to appreciate the role of management in relation to him and the workplace generally.

5 117. As regards the respondents' witnesses, the Tribunal found Deirdre Duncan to be a credible witness. She had a clear recollection of events. The Tribunal was persuaded that her approach to the claimant's Dignity at Work complaint (P44) was thorough and balanced. The Tribunal accepted her evidence that she questioned each of the Managers about whom the claimant had  
10 complained in detail and about the information that was available to them when they managed the claimant. She was honest when questioned about the LWPS (P9) in cross examination. It was not something to which she attached any significance at the time on the basis that it was completed by the claimant for a specific purpose unrelated to his medical condition and  
15 there was no evidence that it had been passed to Myra Stevenson. The Tribunal did not find that she had deliberately failed to question Myra Stevenson about the LWPS (P9) because it would lead to evidence that supported the claimant's position. The Tribunal found that she was entitled to conclude that the Managers were unaware that the claimant had a disability  
20 or that adjustments were required. The Tribunal also accepted her explanation that she was unable to investigate the statements provided to the DWP as they were part of a separate investigation over which she did not have jurisdiction. Likewise, the Tribunal found her to be honest and clear about the reasons for the delay in completing her investigation which were  
25 primarily due to pressure of work and not as submitted by the claimant a deliberate attempt to prejudice his Appeal in the DWP proceedings.



118. The Tribunal also accepted Elaine Maxwell's explanation for not referring the claimant's complaint (P44) to the respondents' Appeal Panel. She explained in clear terms that the amendment of statements provided to the DWP and training employees on how to complete DWP forms were not competent matters for the Appeal Panel. The Tribunal did not find that she had no intention of referring the claimant's complaint to the Appeal Panel. The Tribunal was satisfied that she met with the claimant and his representative and discussed his case in detail before making any decision. It was put to her during cross examination that she had failed to look at his complaint and was party to the respondents' intention to remove the claimant from their 5 employment. The Tribunal did not agree with the claimant's assessment of Elaine Maxwell. Her evidence was not evasive and contradictory as submitted by the claimant. It was clear and disclosed a detailed working knowledge of the respondents' procedures including the Dignity at Work Policy & Grievance Procedures (P43). She displayed a balanced and impartial approach to 10 consideration of the claimant's complaint (P44). It was the claimant's position that he did not receive correspondence said to have been sent to him by Elaine Maxwell (P53, P79 & P80). The Tribunal was satisfied from her evidence that Elaine Maxwell sent the above correspondence to the claimant.

There was no compelling evidence before the Tribunal as to why she would  
15 not have wanted to confirm her decision about the Appeal Panel (P53) to the claimant  
and his trade union representative in writing or why the claimant or his trade  
union representative would not have contacted her for written confirmation.  
The Tribunal did not accept the claimant's submission that Elaine Maxwell  
deliberately misrepresented the position. She was a credible

20 witness. She did not deny that she may have had discussions with Stephen

Smellie in passing about the claimant's prosecution but the Tribunal was not persuaded that this compromised her position or disclosed anything underhand as submitted by the claimant.

25 119. The Tribunal also found Marie White to be a credible witness. Her evidence about managing the claimant was straightforward and honest. She had a clear recollection of events. The Tribunal accepted her evidence that she did not witness Jackie Lawson calling the claimant "*arrogant and obnoxious*". The Tribunal was satisfied that she had provided the claimant with work to undertake during the suspension of his normal duties. While on occasions she was defensive about her decisions and sought to place responsibility on more senior management this did not undermine her credibility. Her evidence about referring the claimant's request for flexible working to Jackie Lawson was consistent with her role as the claimant's line Manager. Overall, the Tribunal found that Marie White was supportive of the claimant and was not persuaded, despite extensive cross-examination, that she wanted to punish the claimant for failing to notify her of the citation or to bring about his 5 dismissal when managing his periods of absence.

120. Much of the claimant's case was directed at Jackie Lawson. She was the subject of his second complaint (P76F) against the respondents' management. It was the claimant's position before the Tribunal that Jackie  
10 Lawson's conduct towards him amounted to harassment relating to his disability and gave him grounds to resign and claim constructive dismissal. The claimant relied on a number of remarks allegedly made by Jackie Lawson in support of his claim. In her evidence Jackie Lawson accepted in a straightforward and honest manner that she had made some of the remarks

15 attributed to her. For example, she accepted that when challenged about the quality of his work, the claimant asked her if she would prefer him to work in a different department to which she replied “no” but that he was “*high maintenance*”. She also accepted that she had sworn and used the term “*pile of pish*” when exasperated at his offhand response to an inadequate piece of work. She recalled describing the claimant as “*the most evenly balanced person she knew as he had a chip on both shoulders*”. The Tribunal accepted Jackie Lawsons’ evidence that it was said in an attempt to diffuse a tense atmosphere caused by the claimant’s aggressive behaviour when informed about concerns over his work. The Tribunal also accepted Jackie Lawson’s

25 evidence that she did not swear or shout at the claimant. She was certain that she did not say to the claimant that he was “*arrogant and obnoxious*”. Marie White who was said to have witnessed the exchange was similarly certain that she did not make the above remark. The Tribunal preferred their evidence to that of the claimant.

121. Jackie Lawson described her use of the above language as “jokey” and an attempt to diffuse the situation when the claimant became agitated and on occasions aggressive. She acknowledged that her language could be inappropriate and unprofessional. The Tribunal was not persuaded that the remarks related to the claimant’s disability. This was not put to her in cross examination. The suggestion in submissions that the remark about having a “*chip on both shoulders*” related to the claimant’s arthritic condition was  
5 rejected by the Tribunal as bearing no relation to the evidence before it was an attempt after the event to present conduct in a manner that supported the claimant’s case. The Tribunal was also not persuaded that the purpose of Jackie Lawson’s remarks was to harass the claimant. As referred to above, the Tribunal found that the remarks were made in response to the claimant’s

10 conduct and were not related to his disability. The Tribunal found that the claimant exaggerated the effect, if any, on him of the above remarks. The Tribunal did not doubt that the claimant reacted badly to being challenged about the standard of his work and that this caused him stress. On occasions he became aggressive. The Tribunal was not persuaded however that Jackie 15 Lawson's conduct in response, including her remarks, either related to the

claimant's disability or had the purpose or effect of harassing him.

122. Jackie Lawson accepted that there had been errors made in failing to process the claimant's request for flexible working. Her recollection was the same as 20 that of Marie White; the reason for the request was child care and not the

claimant's disability. Like Marie White, she had no recollection of the claimant making any further enquiries about the request or of any concerns being raised before the claimant's complaint against her (P76F). The Tribunal was satisfied that in all the circumstances that the failure to process the claimant's 25 request for flexible working was a genuine oversight. The evidence before the Tribunal did not support the claimant's case that it was either deliberate or conduct that related to his disability.

123. Jackie Lawson did not attempt to avoid responsibility for her actions and the decision she made in relation to management of the claimant. She readily accepted it was her decision that the claimant should be placed on restricted duties because of the nature of his job and the charge brought against him. The nature of the charge was such that it would be inappropriate according to

Jackie Lawson for the claimant to continue to give clients advice on welfare benefits. Jackie Lawson's evidence was clear that, notwithstanding the terms of Marie White's letter to the claimant about suspension from normal duties during the fact-finding investigation (P56), she was satisfied that based on  
5 advice from HR it would be inappropriate for the claimant to provide advice on welfare benefits to clients until the DWP proceedings were concluded. The Tribunal accepted her evidence that she was genuinely delighted when the claimant heard that his Appeal against the overpayment had been successful.

The Tribunal also accepted her evidence that she had requested information  
10 from the claimant, with his agreement, including a medical report to support a request that he return to full duties. This did not prove possible due to the subsequent prosecution. The Tribunal was not persuaded that Jackie Lawson doubted the claimant's disability at any stage or sought in any way to challenge his condition. The Tribunal accepted her evidence that she was  
15 anxious to support the claimant throughout the process and was genuinely upset and taken aback when he made a complaint against her. This was not surprising given the claimant's position during the Disciplinary procedure that he felt well supported by Jackie Lawson.

124. Marie Moy was a particularly impressive witness. She presented as a person  
20 of integrity and high professional standards. Her evidence was credible in every respect. She gave full and well-reasoned answers during extensive cross examination. While clearly loyal to the respondents as her employer and the colleagues whom she managed, Marie Moy also displayed a strong sense of responsibility for the welfare of the claimant. The Tribunal found that Marie  
25 Moy was satisfied, not unreasonably, that the claimant was being managed effectively and sensitively by Jackie Lawson and Marie White during the civil and criminal proceedings. The Tribunal accepted her evidence that throughout Jackie Lawson was positive about the claimant's prospects, never questioned his disability and sought to provide him with support. It was

30 unreasonable of the claimant to expect Marie Moy, as a senior Manager, to have a detailed knowledge of his daily activities. She had not unreasonably delegated responsibility for the day to day welfare of the claimant to his line managers. The Tribunal accepted her evidence that she appreciated the stress that the DWP procedure was causing the claimant but was confident that he was receiving support from his line Managers.

125. The Tribunal accepted Marie Moy's explanation for the delays in undertaking 5 the fact finding investigation into the claimant's failure to notify management that he had received a citation. The Tribunal accepted her explanation that there was limited availability of employees with suitable qualifications and experience to undertake the fact-finding investigation. The appropriate employees had limited capacity due to existing workloads. The Tribunal also 10 accepted Marie Moy's evidence about her personal circumstances which involved her being away from the office for medical reasons and which caused further delay with the fact finding investigation. The Tribunal did not find from the evidence before it that that any delay on the part of Marie Moy related to the claimant's disability or intention to harass him by asking inappropriate 15 questions about his medical condition and question his disability.

126. The Tribunal was satisfied that Marie Moy understood that the fact-finding investigation (P57) was about the delay in reporting the citation as opposed to the nature of the charge. It was unreasonable however of the claimant to expect the respondents to ignore the nature of the charge given that his work

20 involved advising on welfare issues and benefit claims. The Tribunal was satisfied that Marie Moy took steps to facilitate the claimant's return to his full duties on learning that his DWP Appeal had been successful. The Tribunal accepted her evidence that the decision was taken to keep the claimant on restricted duties based on advice from HR that it would be inappropriate for 25 him to return to his full duties pending the outcome of criminal proceedings. It was not because she sought to punish or otherwise harass him. Likewise, the Tribunal

accepted Marie Moy's evidence that the decision to discipline the claimant was based on the conclusions of the fact-finding report (P61) and was not related to his disability. The Tribunal did not find that she had  
30 instructed the fact finders to ask questions about the claimant's medical condition.

127. The Tribunal also found Michelle McConnachie to be a credible witness. While on occasions she was defensive of her actions and decision making, she presented to the Tribunal as a diligent and experienced Manager who carefully considered the evidence presented to her for the purposes of  
5 determining the claimant's complaint against Jackie Lawson (P76F). The evidence before the Tribunal did not support the claimant's position that she had deliberately delayed in reaching her decision and was guilty of "complete incompetence". The Tribunal accepted Michelle McConnachie's evidence that her decision was based on an impartial assessment of the information  
10 provided in relation to the complaint (P76F). It was not put to her during cross-examination that the conduct of the claimant's Managers and in particular that of Jackie Lawson related to his disability.

## **DISCUSSION & DELIBERATIONS**

### **FAILURE TO MAKE REASONABLE ADJUSTMENTS**

15 128. The claimant sought to show that the respondents had failed to comply with their obligation to him as a disabled person to make reasonable adjustments under Section 20 of the Equality Act 2010. The respondents did not dispute that the claimant has a disability caused by psoriatic arthritis and that they knew about the above condition from June 2014 onwards when the claimant 20 informed them that he was in receipt of Disability Living Allowance. They denied that they were under an obligation to make reasonable adjustments before then as they did not know and could not reasonably be expected to have known that the claimant had a disability.

129. In terms of Section 20(3) of the Equality Act 2010, the respondents are under  
25 a duty to make reasonable adjustments when a provision, criterion or practice of theirs

puts a disabled person in their employment at a substantial disadvantage when compared to an employee who is not disabled. They are obliged to take such steps as it is reasonable to have to take to avoid the disadvantage. In terms of paragraph 20 of Schedule 8 to the Equality Act 2010, the duty on the respondents to make reasonable adjustments under Section 20 of the Equality Act 2010 does not arise if the respondents did not



know and could not reasonably be expected to have known that the claimant had a disability and was likely to be placed at a substantial disadvantage as a disabled person by their provision, criterion or practice.

5 130. The claimant complained that while employed as a Housing Support Officer (Homelessness) he had to desk share, use a pool car, undertake heavy physical work and clean clients' homes. The above arrangements and duties were identified by the claimant as the provision, criterion or practice that were said to have put him at a substantial disadvantage as a disabled person. The  
10 adjustments which the respondents should have made were identified by the claimant as providing him with his own desk and chair, allowing him to use his own car and providing support to undertake heavy physical work.

131. The issue of whether the respondents knew of his disability became a matter  
15 of concern to the claimant on discovering that his Managers had provided statements to the DWP. He was concerned in particular about how the statements might affect his prospects of avoiding prosecution. When interviewed by Deirdre Duncan about the timing of his complaint (P44) the claimant explained that the reason for raising the issue of failure to make  
20 adjustments at that stage was the DWP investigation. It was not in dispute that while employed in Housing the respondents were unaware that the claimant was in receipt of Disability Living Allowance. Three employees with whom he had worked and who had managed his work gave statements to the DWP in which they claimed not to know that he was disabled or of having  
25 observed anything to suggest that his mobility in particular was impaired. Two of them were aware that the claimant had immune system deficiencies on the basis that claimant had disclosed this information to them. The Tribunal was not persuaded however that the claimant had disclosed sufficient information

while employed in Housing from which the respondents could reasonably have been expected to know that he had psoriatic arthritis or was otherwise disabled.

132. When applying for the posts of Housing Officer (P2 & P5) the claimant answered “no” in response to a question about whether he was disabled. The question was asked in relation to a policy guaranteeing disabled people interviews and his answer was not something to which the Tribunal attached 5 significant weight. The Tribunal did however attach weight to its finding that the claimant did not inform his Managers that he had psoriatic arthritis and did not provide them with the medical evidence that he relied upon before the Tribunal (which included P22, P24, P25 & P32). The Tribunal was not persuaded by the claimant’s submission that authorising leave for the 10 claimant to attend hospital appointments was sufficient to establish constructive knowledge of disability. Likewise, a referral to Physiotherapy was not found by the Tribunal to be sufficient on its own or alongside the other information available to the respondents to establish constructive knowledge of the claimant’s disability. The Tribunal was not persuaded that Myra 15 Stevenson had completed or was aware of the contents of the LWPS form (P9) relied upon by the claimant or that she had requested or been provided with a copy of the Physiotherapist’s report (P32). The statements provided by three of his Managers, including Myra Stevenson were consistent with the respondents’ position that the claimant did not inform them that he had 20 psoriatic arthritis or that there were other indicators of his disability while working in Housing about which they could reasonably have been expected to enquire. The claimant did not advance any persuasive reason as to why three Managers would deliberately provide the DWP with false information about what he had told them and what they had observed when working with

25 him. In all the circumstances, the Tribunal was not persuaded that the respondents knew or could reasonably have been expected to know that the claimant had a disability before June 2014.

133. The Tribunal was also not persuaded that had the respondents known about the claimant's disability while he was employed in Housing that they ought reasonably to have known that desk sharing and use of a pool car put him at a substantial disadvantage in comparison with persons who were not disabled. The claimant did not dispute that the practice, criterion and practice about which he complained did not apply in Money Matters after he moved there in March 2014. Concerns about the failure to provide a personal desk and chair and the requirement to use a pool car were, by the claimant's admission, an inconvenience for a number of Housing Officers including him.

5 There was no persuasive evidence before the Tribunal that the claimant was put at a substantial disadvantage by having to desk share and use the pool car when compared to the other Housing Officers who were not disabled. The Tribunal took account of the fact that the claimant was referred to

Occupational Health. It was the claimant who identified "*different desks,*  
10 *driving different cars*" as aggravating factors. There was no recommendation from Occupational Health that the claimant should be provided with his own desk and chair. Occupational Health recommended home exercises and improved postural awareness. The desk and chair which he had used while employed as a Housing Support Officer (Families Intensive) and which he 15 used while employed as a Housing Support Officer (Homelessness) were assessed by the claimant (P30) and no remedial action identified. As regards having to undertake heavy tasks, the claimant conceded that he did not have to move furniture and was not obliged to help clean a client's house. While it was not in dispute that the respondents were aware of the claimant's

20 compromised immune system, there was no evidence before the Tribunal of the claimant being substantially disadvantaged while employed in Housing because of the above condition.

134. The Tribunal was not persuaded that the respondents knew or could 25 reasonably be expected to know that the claimant had a disability before June 2014. In any event they did not know and could not reasonably be expected to know that desk sharing and use of a pool car put him at a substantial disadvantage when compared with persons who were not disabled. The claimant was not required to undertake heavy tasks or clean clients' homes. In these circumstances the Tribunal was not persuaded that the respondents were in breach of their duty to the claimant as a disabled person to make reasonable adjustments under Section 20 of the Equality Act 2010.

135. In his submissions, the claimant referred to a claim of discrimination arising from disability in terms of Section 15 of the Equality Act 2010. This was not a claim before the Tribunal and accordingly no findings have been made in relation to such a claim. Similarly, the Tribunal having found that the 5 respondents did not know and could not reasonably having known that the claimant was disabled, it did not consider the issue regarding whether the claim was time barred. For the avoidance of doubt however, the claimant did not advance any satisfactory explanation as to why he did not complain to the Tribunal before October 2016 about failure on the part of the respondents to  
10 make adjustments which by his own admission were not required after he moved to Money Matters in March 2014.

## HARRASSMENT

136. Section 26(1) of the Equality Act 2010 provides that “a person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant  
15 *protected characteristic and (b) the conduct has the purpose or effect of (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*” The relevant protected characteristic for the purposes of the claimant’s claim of harassment was disability.

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137. In terms of Section 26 (4) of the Equality Act 2010, when deciding whether the conduct complained of by the claimant had the effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, the Tribunal must take into account (a) the perception of  
25 the claimant; (b) the circumstances of the case and (c) whether it is reasonable for the conduct to have that effect.

138. The conduct identified by the claimant as amounting to harassment was the respondents providing false statements to the DWP in July 2014; the fact 30 finding investigation; enquiries about his medical condition and his suspension

from normal duties. He identified Jackie Lawson and Marie Moy in particular as the persons who had harassed him.

139. The Tribunal did not find that all of the conduct about which the claimant complained was unwanted. In particular, the Tribunal found that the claimant was willing to provide medical evidence to Jackie Lawson in May 2015 to support a request that he be allowed to return to normal duties. Jackie Lawson requested copies of the Appeal decision and a medical report from the claimant for supportive reasons. She wished to inform HR of the claimant's condition rather than, as suggested by the claimant, to satisfy herself that he was disabled. The Tribunal found that the claimant did not object to providing this information. Overall however there was a reluctance on the part of the claimant to discuss his medical condition with the respondents. The claimant sought to show that enquires about his medical condition, in particular during the fact finding investigations, were attempts to undermine him, challenge his disability and bring about his dismissal.

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140. It was the claimant's position that the motive of the Managers who provided statements to the DWP was to prejudice his prospects of avoiding prosecution. The evidence before the Tribunal did not support the claimant's position. The Tribunal did not find that the statements were made with the purpose of harassing him. As referred to above there was no compelling reason advanced by the claimant as to why three Managers would provide the DWP with statements that did not accurately record what they knew about his medical condition and observed while managing him. The Tribunal did not doubt that the claimant was stressed and anxious about the proceedings against him by the DWP. He had concerns about how the statements might

be used by the DWP. The claimant's position however that by providing statements to the DWP, the Managers concerned had violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him was in all the circumstances unreasonable. He had not

30 informed the Managers about his arthritic condition before they provided their statements to the DWP. The statements were not relied upon at any stage by the respondents in relation to the claimant's employment. The respondents proceeded on the basis that the claimant had a disability as soon as they were informed by him that he was in receipt of DLA. The Managers concerned had no further direct involvement with the claimant and his working environment. In all the circumstances the Tribunal was not satisfied that by providing statements to the DWP the Managers concerned had violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive  
5 environment for him.

141. The Tribunal was also not satisfied that the investigations were conducted by the respondents in such a way as to amount to harassment of the claimant.

The first fact finding investigation was conducted in response to the claimant's  
10 complaint about his alleged treatment while employed in Housing and in particular about his Managers providing statements to the DWP. The Tribunal was not persuaded that Deirdre Duncan, when conducting the above investigation, harassed the claimant. She may not have made findings with which the claimant agreed but the evidence before the Tribunal did not show  
15 that her investigation had either the purpose or effect of violating the

claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In his evidence the claimant described the investigation as a "*cover up of some sort*". There was no evidence to support such an assertion. Likewise, there was no evidence that Dierdre Duncan was  
20 sufficiently aware of the DWP proceedings to know when the claimant's Appeal was due to take place to allow her to issue her report at a time most likely to prejudice the claimant. There was no compelling reason advanced as to why Deirdre Duncan would not to investigate the claimant's complaints with an open mind. Her decision not to interfere with the statements provided to  
25 the DWP was based on her understanding that they were part of a separate investigation over which the respondents had no control. In all the circumstances this was not unreasonable and the Tribunal was persuaded that

the manner in which she conducted her investigation did not amount to harassment of the claimant.

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142. The investigation conducted by Sharon McGuigan related to the claimant's delay in reporting that he had received a citation in relation to the DWP proceedings. The investigation was concerned with whether the claimant was in breach of the respondents' Code of Conduct (P54). While there was concern on the part of the respondents that an employee advising on welfare rights and benefit claims was being prosecuted for an overpayment of DLA, the Tribunal was satisfied that the investigation related to whether the  
5 claimant was in breach of the Code of Conduct and not his entitlement or otherwise to DLA. The Tribunal was satisfied that questions about his medical condition during the investigation were asked in that context and not with the intention of harassing him as submitted by the claimant. Again, while the claimant may not have agreed with Sharon McGuigan's conclusions, the 10 evidence before the Tribunal did not show that her investigation had either the

purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

143. In relation to his perception of Jackie Lawson's conduct, the Tribunal found 15 the claimant's evidence to be particularly unreliable. He exaggerated her reaction to the news that he had received a citation. He described her as angry, raising her voice, swearing at him, threatening to have him dismissed, "*snooping on Facebook*" and calling him "*the most arrogant, obnoxious*

*person that she had ever met*". The Tribunal did not accept the claimant's  
20 evidence of how he was treated by Jackie Lawson. Overall her conduct towards the claimant was supportive. On learning about the DWP investigation and the citation she offered him the assistance of an experienced Welfare Rights Officer. In her e mail to Marie Moy (P61A) she highlighted points in the claimant's favour. She sought his early return to



25 normal duties. His post was made permanent during his suspension from normal duties.

The claimant stated at his Disciplinary Hearing in January 2016 that he felt well supported by Jackie Lawson.

144. It was following the meeting at which Jackie Lawson questioned him about 30 his work in relation to a client's application for benefits that the claimant lodged a complaint about her conduct towards him. The Tribunal found that Jackie Lawson's reaction to the claimant's work related to concerns about his failure to complete an application for benefits before it was signed by a client and the lack of paperwork to support the application. Her reaction and the language

she used did not relate to the claimant's disability. The claimant was concerned about the security of his employment when Jackie Lawson questioned the quality of his work. The Tribunal did not find that the claimant had been offended by Jackie Lawson's conduct towards him until then. He

5 had acknowledged her support. Jackie Lawson did however, by her own admission, use language that was inappropriate and unprofessional. The Tribunal was not persuaded that the above circumstances amounted to harassment of the claimant by violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Jackie

10 Lawson used inappropriate language when attempting to diffuse tense situations caused by the claimant's aggressive behaviour and in response to the claimant's inappropriate and offhand response to unsatisfactory work. As referred to above, the Tribunal rejected the claimant's submission that the remark about having a "*chip on both shoulders*" was a reference to his arthritic

15 condition. The evidence did not support this submission which the Tribunal considered to be disingenuous and an attempt to present the evidence in a misleading light. In all the circumstances the Tribunal was satisfied that overall Jackie Lawson behaved in a reasonable manner when managing a difficult situation caused by the claimant being investigated and subsequently 20 charged for claiming DLA. Likewise, while there was no evidence of the

claimant's request for flexible working having been refused by Jackie Lawson or for that matter processed by the respondents, the Tribunal was not persuaded that this omission related to disability or was conduct amounting harassment of the claimant.

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145. Similarly, the Tribunal did not find that Marie Moy's conduct towards the claimant amounted to harassment. The Tribunal found that she was entitled to refer the claimant's case to a fact-finding investigation for disciplinary

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purposes. There was no evidence of her having engaged in conduct related to disability that had the purpose or effect of harassing the claimant.

146. The claimant also identified his suspension from normal duties as harassment by the respondents. He claimed that the purpose of his suspension was to punish him. This was not supported by the evidence. The Tribunal was satisfied that given his role and in particular that he advised clients on applying for benefits it was not unreasonable of the respondents to remove him from his normal duties when he reported being subject to criminal proceedings. He 5 described himself as "*not doing anything*". While Marie White readily accepted that it was not easy to find the claimant alternative duties, the Tribunal found that it was misleading of the claimant to describe himself as having nothing to do. Jackie Lawson and Marie White recognised that it was awkward for the claimant to be removed from his normal duties. The Tribunal was satisfied 10 that they actively looked for work for the claimant and where possible offered him alternatives such as training which were relevant to his normal duties. The reason for suspending the claimant from his normal duties was to allow the respondents to conduct a fact finding investigation into his alleged breach of the respondents' Code of Conduct. The decision was taken to continue the 15 suspension pending the outcome of the prosecution which was not unreasonable given the nature of the charge against him which involved an overpayment of benefits about which the claimant would normally advice clients. The Tribunal was not persuaded that the purpose of the claimant's suspension from normal duties was to punish him. It was a reasonable 20 response to the difficult situation caused by the claimant being investigated and subsequently charged for claiming DLA.

147. The Tribunal found that the decision that the claimant return to normal duties without additional training was based on an assessment of his residual skills 25

and knowledge and that he had been actively involved in research and training on relevant changes to welfare benefits during the period of his suspension from normal duties. The Tribunal did not accept the claimant's position that Jackie Lawson failed to provide him with training on his return to full duties "*to set him up to fail*".

148. In addition to the complaints identified by the claimant of harassment by Jackie Lawson and Marie Moy, the claimant also made complaints in his evidence before the Tribunal against Marie White. For example, the claimant suggested to Marie White in cross examination that she should have considered redeploying him to a post outside Money Matters. This was not what had been recommended by Dr Herbert. Other than not wishing to have any contact with Jackie Lawson whatsoever it was unclear the basis on which

5 the claimant considered this to be a reasonable request. Marie White had offered him relocation. In all the circumstances this was not unreasonable.

The claimant's suggestion that he work from home was unacceptable to the respondents' HR over concerns about data protection and IT support. The Tribunal did not find that Marie White's decision to reject this suggestion by  
10 the claimant was unreasonable. The Tribunal was not persuaded that Marie White's attempts to manage the claimant amounted to harassment. The Tribunal found that she had sought to offer him support in returning to work. The claimant may have felt concerned about the possibility of his continued absence from work becoming a reason for terminating his employment but  
15 the Tribunal did not find from the evidence that there were any reasonable grounds to support his submission that Marie White intended to dismiss him and that her conduct towards him amounted to harassment.

149. When questioned about her decision not to uphold the claimant's Dignity at 20  
Work complaint against Jackie Lawson it was not put to Michelle

25           McConnachie that the alleged harassment about which he complained related  
to disability. The conduct about which she was questioned most closely of  
allegedly ignoring the claimant's request for flexible working was not said to  
relate to his disability. As referred to above, the Tribunal found that it had been  
overlooked rather than ignored and had been made for child care reasons as  
stated by the claimant to Marie White.

150. In all the circumstances, the Tribunal was not persuaded that the claimant was  
harassed by the respondents. The Tribunal was not persuaded from the  
evidence that the respondents had engaged in unwanted conduct related to  
disability which had the purpose or effect of violating the claimant's dignity, or  
creating an intimidating, hostile, degrading, humiliating or offensive  
environment for him.

## CONSTRUCTIVE DISMISSAL

151. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer when “*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s*

*conduct*”. This is known as constructive dismissal. The respondents denied that their conduct entitled the claimant to resign and claim constructive dismissal.

10 152. In the case of **Western Excavating (ECC) Ltd v Sharp** (*supra*), the Court of Appeal ruled that for an employer’s conduct to give rise to constructive dismissal it must involve a repudiatory breach of contract. Lord Denning stated;

15 “*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the* 20 *contract by reason of the employer’s conduct. He is constructively dismissed.*”

153. In order to succeed in a claim of constructive dismissal, in addition to establishing that there was a fundamental breach of contract on the part of 25 the respondents, the claimant must also show that the respondents’ breach caused him to resign and that he did not delay too long before resigning.

154. The claimant sought to show that the cumulative effect of the respondents’ conduct amounted to a breach of the implied term of mutual trust and 30 confidence. The “final straw” was identified as Jackie Lawson accusing him of benefit fraud.

155. To establish a breach of the implied term of mutual trust and confidence, the claimant must show that the respondents, without reasonable or proper cause, conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence that must exist  
5 between employer and employee. When considering whether there has been a breach of trust and confidence; “*The Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*”. (Mr Justice Browne- Wilkinson in **Woods v WM 10 Car Services (Peterborough) Ltd 1981 ICR 666 EAT**).

156. The Tribunal considered the conduct by the respondents about which the claimant complained. As referred to above, the Tribunal did not find that respondents acted unreasonably in response to the claimant’s complaints  
15 about the statements provided to the DWP or Jackie Lawson’s conduct. The Tribunal did not find that the claimant had been harassed by the respondents by reason of his disability, in terms of their Stress at Work Policy (P102) or otherwise. The Tribunal did not find that the respondents attempts to facilitate the claimant’s return to work were unreasonable. They did not seek to return  
20 the claimant to a workplace that would be detrimental to his health. The claimant had informed them that he was well enough to return to work. Dr Herbert had recommended relocation. The claimant’s complaint against Jackie Lawson had been investigated in detail and not upheld. Options were offered including a phased return to a different location. Mediation was not  
25 offered while the claimant was refusing to return to work. This was not unreasonable.

157. It was not in dispute that there had been delays on the part of the respondents in relation to fact finding investigations. They were not completed in  
30 accordance with the timescales contained in the respondents’ own procedures (P43 &P55) or as recommended in the ACAS Code of Practice: Disciplinary & Grievance Procedures. The

Tribunal however accepted the explanations provided by the respondents for the delays.  
There was no

evidence that the delays prejudiced the claimant. The Tribunal rejected any suggestion that Dierdre Duncan had deliberately delayed her investigation to avoid issuing a decision before the claimant's Appeal against overpayment of DLA. The matters to be investigated were complex. The investigations

5 undertaken by the respondents were thorough and balanced. Overall the respondents' conduct in relation to fact finding investigations was consistent with an intention to be bound by the implied term of trust and confidence. It was also not in dispute that Jackie Lawson used inappropriate and unprofessional language. For the reasons given above, the Tribunal was  
10 satisfied that when judged reasonably and sensibly and in the context of the claimant's own conduct and the level of support provided by Jackie Lawson to the claimant that her language did not undermine the implied term of trust and confidence.

15 158. The Tribunal was satisfied that the respondents had not deliberately failed to process the claimant's request for flexible working. The Tribunal was persuaded that it was a genuine oversight on the part of the respondents. There was no evidence of any material prejudice to the claimant. The Tribunal was also not persuaded that the decision to suspend the claimant from his  
20 normal duties pending the outcome of the DWP proceedings was unreasonable. The claimant was suspended to allow the respondents to undertake a fact-finding investigation into his delay in reporting that he had received a citation. The decision to continue the suspension pending the outcome of criminal proceedings was again not unreasonable given the  
25 nature of his job and the charges brought against him.

159. It was the claimant's position that the respondents' conduct had the cumulative effect of breaching the fundamental term of trust and confidence.  
He originally identified the "final straw" as Jackie Lawson accusing him of  
30 benefit fraud. This was not supported by the evidence before the Tribunal. In



his submissions the claimant identified Michelle McConnachie's letter (P77) confirming the outcome of his complaint against Jackie Lawson as the "final straw" entitling him to resign and claim constructive dismissal. The claimant also identified concerns about the possibility of being disciplined in relation to his alleged failure to write up case notes. The Tribunal was not persuaded that Michelle McConnachie's decision not to uphold his complaint against Jackie Lawson was unreasonable. It was a decision made following a  
5 thorough investigation into the claimant's complaints and after Michelle McConnachie had considered the evidence in a balanced and impartial manner. It was not a "final straw" The Tribunal did not accept the claimant's submission that the respondents were intent on dismissing him. They responded to the claimant's complaints against management; supported him 10 during the DWP proceedings and sought to facilitate his return to work after a period of ill health. Their conduct did not amount to a breach of the implied term of trust and confidence in response to which the claimant was entitled to resign and claim constructive dismissal.

## **CONCLUSION**

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160. The Tribunal concluded that (i) the respondents did not know and could not reasonably have been expected to know that the claimant was disabled before June 2014; (ii) the respondents were not therefore in breach of their duty to make reasonable adjustments; (iii) the respondents did not harass the 20 claimant and (iv) the claimant was not constructively unfairly dismissed.

Employment Judge: Frances Eccles

Date of Judgment: 03 May 2018

25 Entered in register: 09 May 2018 and  
copied to parties