EMPLOYMENT TRIBUNALS

Claimant | Respondent

Mr Lee Tooze **v** **DHL Global Forwarding (UK) Limited**

FINAL MERITS HEARING
(CONDUCTED IN PERSON AND AS A HYBRID HEARING VIA THE CLOUD VIDEO PLATFORM)

Heard at: **Birmingham** On: **7-11, 14-18, 21-22 March 2022 and in chambers 23-25 30, 31 March and 27 May 2022**

Before: **Employment Judge Perry, Mr P Simpson & Mrs W Ellis**

Appearances
For the Claimant: **In person**
For the Respondent: **Ms I Ferber (counsel)**

JUDGMENT

1 The claimant was not discriminated against in contravention of part 5 of the Equality Act 2010. His complaints of disability related harassment, direct disability discrimination, discrimination because of something arising from disability, the failure to make reasonable adjustments and victimisation are dismissed.

2 The claimant's complaints of unfair dismissal, wages and holiday pay are not well founded and are also dismissed.

REASONS

References below in circular brackets are to the paragraph of these reasons. Those in square brackets to the page of the bundle or where preceded by a document reference or the initials of a witness, that document or witness statement. A number after a paragraph mark symbol '¶' refers to the paragraph number of a witness statement or document.

The background and issues

1. This series of claims has been the subject of multiple case management and other hearings to determine a variety of issues. We do not propose to set out the complete history here; this judgment will be lengthy enough already. It is helpful for context to adopt the summary of the claims brought that was extremely helpfully given by Employment Judge McCluggage in his

case management summary following the hearing held on 24 & 25 August 2021 [287-298][1]. Employment Judge McCluggage summarised the claims thus:-

> *"7a. 2304747/2019: [this number is incorrect - the correct number is 2304743/2019] non-payment of wages. This was decided by the decision of EJ Beck noted above. Resolved.*
>
> *b. 1300289/2020 (issued 21/01/20): this was dismissed upon withdrawal by the Claimant at the hearing on 5 January 2019 after the Respondent paid him outstanding holiday pay to his satisfaction. Resolved.*
>
> *c. 1304291/2020 (issued 14/02/20): this is another claim for unpaid holiday pay, seeking 20 days holiday taken over 18 months (value of £,4,688). Live and disputed claim.*
>
> *d. 1304855/2020 (issued 09/03/20): a disability discrimination claim. Live and disputed claim.*
>
> *e. 1304905/2020 (issued 11/03/20): another disability discrimination claim, though with obvious overlap with 1304855/2020. There were no proper particulars in this claim though it obviously involves allegations of a failure to make reasonable adjustments. A single ET3 was prepared in respect of both 1304855 & 1304905. Live and disputed claim.*
>
> *f. 1309421/2020 (issued 28/09/20): this is the first post-dismissal claim. Legal & General Insurance were named as a second respondent. The claim was stated as being for "Income Protection Benefit". L&G were the providers of the income protection/permanent health insurance policy. The Respondent was not required to prepare an ET3 to this claim: see EJ Kelly order 16/10/20. The claim against L&G was dismissed upon withdrawal. Live and probably disputed claim.*
>
> *g. 1309448/2020 (issued 30/09/20). Claim for unfair dismissal, amended on 16/10/20 to include automatic unfair dismissal contrary to section 103A of the ERA 1996 (public interest disclosure): see §5.1 of EJ Kelly 16/10/20 order. The Respondent was not required to prepare an ET3 to this claim until after this case management hearing: see EJ Kelly order 16/10/20. Live and probably disputed claim.*
>
> *h. 1310711/2020 (issued 19/11/20). This related to disability discrimination but in substance just set out different impairments said to constitute disabilities. EJ Kelly discussed this*

[1] That summary had attached the first draft of the list issues [299-305] that in its amended form is at [331-337] which in turn was attached to the Order of Employment Judge Noons of 19 November 2021 [327-330]

claim at paras (25-27) of her 05/01/21 order. The claim was to be treated as an application to amend today. As a separate and fee-standing tribunal claim it was withdrawn. Resolved save for application to amend.

8. Also in the background, there was a case 1309325/2020 relating to s.103A ERA unfair dismissal, which was rejected. However, that allegation is now incorporated into case 1309448/2020 above."

2. Given the date the first claim was presented was omitted from Employment Judge McCluggage's summary we have checked the Tribunal's file and identified that was presented on 29 October 2019 to London South Employment Tribunal. Employment Judge Beck identified in her Judgment and Reasons [263] following that it was unclear at the outset if that was pursued as a breach of contract or non payment of other sums. She ultimately determined it as a wages complaint not least because when it was presented Mr Tooze was still employed and thus a breach of contract complaint fell outside the Tribunal's jurisdiction [2]. That point aside both the Tribunal file and Employment Judge Beck's order record that complaint followed early conciliation between 20 September and 11 October 2019. That claim was sent to the respondent on 5 November 2019.

3. Given the issues raised before us it is relevant to state that Employment Judge Beck dismissed the wages complaints before her, which (remedy issues aside) fell into two principal issues:-

    a. *Did the respondent fail to adhere to an agreement in June 2009 that it would pay the claimant the sum of £10,000 in addition to salary and instead only paid £5,000 and did this amount to an unauthorised deduction from the claimant's wages in accordance with ERA section 13?*

    b. *Did ceasing all additional payments from June 2019 onwards when the claimant was absent by reason of illness amount to an unlawful deduction of wages? [274]*

4. We do need to briefly address matters that arose at the start of and during this hearing. Mr Tooze not having attended on the first day for reasons that will become apparent, what happened at the outset is explained in the letter the tribunal directed be sent to him having heard submissions from Ms Ferber,:-

[2] Employment Tribunals Extension of Jurisdiction Order SI 1994/1623

"1) This is a hearing that has been listed since 1 February 2021 for 15 days (albeit that listing stems from a case management order of 5 January 2021) and relates to some seven remaining claims, (one having been resolved).

2) The first of those complaints was commenced on 29 October 2019. I am informed that chronologically the first act about which the claimant complains was on 10 May 2019 and the final specific act about which the claimant complains was his dismissal on 15 July 2020 (albeit there is an ongoing complaint about certain matters).

3) I should state at this point that the issue of disability has been determined for the material time. The claimant's impairments are set out at [291]. They include:-

a. Chronic Pain Syndrome involving widespread pain including [a]ffecting the Claimant's upper and lower limbs.

b. Work-related upper limb disorder

c. Osteoarthritis in hands, neck and back.

d. Work related stress.

e. Sleep disorder (albeit the respondent informs us that is an aspect of (a))

4) The claimant did not attend the hearing of this trial today having made an application to postpone the trial late last week. I will return to that in a moment. He has repeated that application over the weekend.

5) Whilst the claimant informed the Tribunal via an email of 2 March 16:48 that the case was not ready for hearing and he was not fit enough to attend the hearing, a formal application for postponement was not made until 16:43 the following day, 3 March. A response sent after close of business on 3 March from the respondent identified that no medical evidence had been provided in support of that application. The respondent accepts that for the most part and subject to what we set out below, that has been remedied and in addition to certain medical records, we have before us two letters from the claimant's GP. The first GP letter is dated 1 December 2021. Having identified his medical conditions and medication the first GP's letter stated that the claimant's disability was :-

> *"… permanent and there is no likelihood of improvement in the future. Additionally, the Osteoarthritis is likely to worsen with increasing age. He requires ongoing and regular medical care. He informs me that he is representing himself in court against his former employer after a*

longstanding inability to return to work, this caused Mr Tooze work related stress, he also states that he and his wife are divorcing, this is understandably causing him a great deal of stress."

6) The latest GP's letter is dated 4 March. In addition to repeating those matters, s/he states:-

"I understand that he is currently in the middle of a court case and this is causing him a great deal of stress and anxiety, which is further impacting his chronic health conditions. …"

7) The claimant's GP then pointed to an increase in the number of recent consultations as support for that premise, before continuing :-

"It is my professional opinion that the court hearing should be postponed, so that this stress is alleviated, which in turn will benefit both his physical and mental health."

8) Given the link the claimant's GP identifies between the hearing and the stress the claimant is encountering the GP does not address how postponing the hearing will assist the claimant. The respondent reminds us that in such circumstances occupational health advisors regularly suggest that a postponement of a trial does not address the cause of the stress, the litigation, but extends the period of stress and instead the better course can be to proceed with the hearing.

9) Nor does the claimant's GP go on to address if that is so, when the claimant is ever likely to be fit to attend what will be a 15-20 day trial during which he will be giving evidence and/or conducting the claim personally and/or what if any adjustments could be made to facilitate that.

10) Whilst an applicant, bears the onus of proving the need for an adjournment, his/er right to a fair trial under Art.6 European Convention on Human Rights demands that where s/he was unable to be present at a hearing through no fault of his/er own, s/he would usually have to be granted an adjournment however inconvenient it may be to the Tribunal or other parties.

11) However, in undertaking the art.6 assessment the Tribunal is required to consider the implications for the other party, and the wider public interest of not postponing, must also be weighed in the balance, and may tip it the other way. The Tribunal's assessment of when, realistically, the matter is likely to come to an effective Hearing if the application is granted, and what the medical evidence indicates about that, will often be of crucial importance in doing so. (see amongst others Teinaz v London Borough of Wandsworth [2002] ICR 1471, Andreou v Lord Chancellor's Dept [2002] IRLR 728 and the Presidential Guidance and most recently Phelan v Richardson Rogers Ltd & Anor [2021] UKEAT 0169/19).

12) Accordingly, it appears based on the evidence currently before us that the claimant has failed to provide a medical opinion that addresses those issues. The claimant having failed to attend we have concluded that before we are in a position to determine the application to postpone the claimant should be given an opportunity to provide that information and if necessary but only if necessary a witness order can be issued to require a suitably qualified medical practitioner (e.g. his GP) to provide that information.

13) Accordingly, the claimant has until 1:00 pm on 8 March 2022 to provide by email to the Tribunal (copied to the respondent) such of the information as set out in paragraph (14) below that he wishes the Tribunal to take into account in determining his application for a postponement and/or to make an application for a witness order (as identified above). Any such application for a witness order shall set out his reasons for doing so.

14) The medical information the claimant is invited to provide from a suitably qualified medical practitioner is as follows:

a) What is the operative cause of his current symptoms (for example is that the tribunal proceedings and/or their subject matter),

b) When, if ever, will he be fit to attend,

c) if the claimant is unfit to attend what adjustments could be made to allow the hearing to proceed (for instance breaks, the presence of a supporter, the running order of witnesses, by any questions the claimant wishes to ask of the respondent's witness being provided by him in writing and/or the hearing being conducted as a hybrid or (partly) remotely, (see also the Equal Treatment Benchbook February 2021 which acknowledges that a Tribunal hearing is a stressful situation and addresses mental health and suggested adjustments at p.423 following))."

5. The Tribunal adjourned to reconvene after lunch on Day 2. Mr Tooze attended with a further 2 page letter from his GP dated 7 March 2022. There his GP described that Mr Tooze reported that his health conditions had flared up not because of the stress of the court case but because he was inadequately prepared, and the respondents had deliberately not given him access to documents. He advised that once the respondents had given Mr Tooze access to the documents and he had had adequate time to prepare (3 months) Mr Tooze's stress would lessen. The tribunal having explained to Mr Tooze that what that neglected to consider was that if the claim could not be heard within the existing trial dates it would not be relisted until March

2023 at the earliest and if the claim was causing him stress we were concerned that would continue in the interim.

6. We sought to explore with him the cause of the stress as described - that the respondent had failed to disclose/include documents within the bundle that were relevant and problems he had had with uploading documents. Following those enquiries of him he confirmed that if they were included, the cause of the stress would go away, and he would be able to proceed. We asked him to provide a list of the non-disclosed documents. The respondent ("DGF") informed us so far as it was aware virtually all of the documents that were sought had been included.

7. We next checked, if that aside, the claim was ready for hearing. Witness statements had been disclosed and save for some clarification DGF required of Mr Tooze's case both parties were aware of the complaints that we were addressing. We asked Mr Tooze if he was thus ready to start. He told us he had not been able to prepare questions for DGF's witnesses because of the problems he had encountered. The panel offered to give him some time to do so, for him to be questioned by Ms Ferber first, suggesting that would be on what would have been day 4, that we would not expect him to ask questions of DGF's witnesses until the following week. That would give Mr Tooze additional time over the weekend to prepare his questions and due to the commitments of the panel we also informed him we would not be sitting on the afternoon of what was to be Day 8 which would give him yet further time to prepare.

8. He was told the panel would take regular breaks and if he wished to conduct the hearing remotely he could (he initially chose to attend on the first day of giving evidence but having done so elected to be remote thereafter). Mr Tooze appeared content with that, but we asked him to reflect on that overnight. We indicated we would reconvene and hold a remote case management hearing to check the bundle had been resolved, to clarify the issues and any further matters the parties need to raise and allow him time to consider if he wished to proceed.

9. The respondent agreed to review the omitted documents and save for one proviso; include any. That proviso was that the bundle complied with an order Judge McCluggage had made on 6 October 2021 (Hearing 24 & 25 August) [276-286]) concerning the redaction of without prejudice discussions.

10. The hearing reconvened remotely the next day and Mr Tooze confirmed that he was comfortable for the hearing to continue. Overnight any documents had been included and the bundle revised, Mr Tooze having identified the documents he wanted included in the bundle

via a table/spreadsheet. The respondent identified where these were/added by annotations to that table/spreadsheet. The result was that several documents were added to the bundle. Other documents were replaced with redacted copies. The respondent also provided an annotated copy of Mr Tooze's witness statement to him and the panel, cross referencing the pages of all the documents referred to.

11. The panel then sought to ensure its understanding of the issues was correct. That was no easy task and so having identified the various questions that needed to be addressed Ms Ferber was asked to prepare a table setting out the various complaints made and summarising each party's position and to send that to Mr Tooze once she had clarified his position in cross examination. That was supplied and he subsequently set out his own position on it. She later updated and adopted that as part of her closing submissions.

12. The e-bundle ran to almost 1300 pages and the hard copy 1060 although as the case proceeded various documents were added. Whilst we do not intend to list them all here, but they included, amongst others, various factsheets concerning his medication and what was initially a password protected 28 page document "Work Related Joint Disorders"

13. The panel explained to Mr Tooze the need to set out his case where there were disputes as to events in his witness statement, challenge the respondent's witnesses by asking them questions and referring to documents and to summarise his case at the end. Mr Tooze provided some closing submissions in writing that he elaborated upon orally (as did Ms Ferber). We explained if there was anything he did not understand to let us know but we would to take lead if we felt he had not understood matters, which we did at various points.

14. As to remedy we noted there was no detailed schedule of loss and so indicated we would address remedy if the issue arose, and time permitted. It did not.

15. Before we identify the witnesses called, we should point out that their own commitments aside, they were called in an order requested by Mr Tooze. The witnesses were:-

    15.1. The claimant, Mr Lee Tooze. His job title at the time of the matters that concern us was a National Customer Experience Manager and it was agreed he was employed by DGF from 19 April 1999 to 15 July 2020. In his witness statement he cross referenced not only contemporaneous documents but also a number of documents that essentially were statements of position/submissions.

15.2. Roseline O'Brien. She provided what was essentially a character reference. She was not called, and we agreed to give that such weight as we deemed appropriate.

DGF called:-

15.3. Mr Nicholas Sandison, DGF's Vice President Human Resources. He occupied that role since October 2018 but has been employed by DGF since October 2008. His involvement related to allegations made Mr Tooze against him, including a failure to deal with Mr Tooze's grievances

15.4. Ms Julia Marsh, who was one of DGF's Human Resources Business Partners who dealt with Mr Tooze from the latter part of 2018 until May/June 2020. She commenced her employment with DGF in May 2018.

15.5. Mrs Collette Turner, another of DGF's Human Resources Business Partners who took over as a HR contact for Mr Tooze in the second quarter of 2020 and was the note taker at the formal disciplinary hearing as a result of which Mr Tooze was dismissed.

15.6. Mr Lawrence Wright, DGF's Head of Business Development and Key Account Management. His involvement with Mr Tooze commenced when he was asked in June 2019 by Ms Marsh to support with Mr Tooze on 4 September 2019. His last involvement with Mr Tooze that we could trace centred around a meeting on 14 January 2020.

15.7. Mr Nigel Wing. He conducted Mr Tooze's appeal against dismissal. He was DGF's Vice President of Marketing and Sales, a Senior Leadership role, reporting to the UK CEO. He was employed by DGF since June 1998 and in his current post since May 2019.

16. The grievance and dismissing officer Mr Jean-Claude Raes who was DGF's Station Manager at Purfleet was not called. We were told this was for operational reasons.

17. As we state the revised list of issues [331-37] included complaints of Unfair Dismissal, harassment, direct discrimination, discrimination because of something arising from disability, the failure to make reasonable adjustments, victimisation and claims for wages (Mr Tooze having accepted that did not include a holiday pay claim as he had been paid for that). We do not propose to set out the issues in full at this point as we relay them below as they arise chronologically.

18. As we say we sought to clarify them both at the start of the hearing and as the hearing progressed. It was essential to do so that DFG, knew the case it had to meet and the Tribunal the complaints it had to determine. That is no criticism of Mr Tooze, as he acts in person, but even before us and despite the clarification that he has provided previously new points arose. We sought to ensure Mr Tooze's complaints were clarified and so far as the interests of justice allowed, they were addressed.

19. It is not in dispute that Mr Tooze was dismissed by DGF, the effective date of termination was agreed as the date he received notification of his dismissal on 15 July 2020 (see (450)). He was paid up to that date and thereafter for his notice period (and for holiday pay). The potentially fair reasons DGF gives for his dismissal were some other substantial reason, specifically the breakdown of his working relationship with colleagues and/or that his conduct that gave rise to that.

20. As to the disability issue this was the subject of a previous determination [326] and it was not in dispute that from 10 May 2019 [3] the following impairments as set out [291] satisfied the criteria in s.6 Equality Act 2010 (EqA). They were:-

    a. Chronic Pain Syndrome involving widespread pain including affecting the Claimant's upper and lower limbs.

    b. Work-related upper limb disorder

    c. Osteoarthritis in hands, neck and back.

    d. Work related stress.

    e. Sleep disorder (Mr Tooze accepted that is an aspect of (a) so we address that separately no further).

21. As to knowledge of the disability there are separate tests for ss. 15 & 20-22 EqA. Knowledge of the disability was conceded for impairments (a), (b), (c) throughout the material time. As to impairment (d) knowledge was conceded from 10 May 2019 (the date it was determined Mr Tooze's condition became a disability (see [326])). We address the additional element of knowledge for ss. 20-22, that is of disadvantage, below (505-509).

[3] We identified a disparity between the dates stated in the "disability issue" judgment and its reasons as to the year when the impairment fell within the s.6 EqA definition of disability. The chair checked with the Judge concerned and she confirmed from her note that date of 10 May 2019 was correct. We asked the parties if they were content with that clarification and they confirmed they were.

22. For completeness a whistleblowing complaint was struck out by Employment Judge McCluggage on 6 October 2021 [276-286]) and does not form part of the issues before us.

23. During the hearing Mr Tooze conceded a number of matters:-

23.1. he was paid for 5 days leave after his employment was terminated. That goes to issue 14(c). However, he argued instead that he had been required to take 15 days before the end of the year and should not have been. We address that below (334).

23.2. He told us his complaints that DGF prevented him from returning to work by failing to make the reasonable adjustments between October and December 2018 and/or failed to inform him of, consider him for, or appoint him to alternative roles namely a Freight Export role in July 2019 and/or Customer Service Agent role in September 2019 were not pursued as the failure to make reasonable adjustments, and

23.3. a factual complaint that DGF failed to pay to him sums under an income protection insurance policy was no longer pursued as an unlawful deduction from wages claim (issue 28), but instead as a claim of failure to make a reasonable adjustment (issue 10(e)).

The Law

24. We do not intend to refer to all the authorities to which we were referred to; but instead focus on the principles that apply. Further to avoid repetition we address some in our conclusions below.

Harassment

25. Harassment is prohibited by s.40 EqA. It is defined in s. 26 EqA. Where relevant, it provides as follows:

> *"(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> . . .

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

(a) the perception of B;?

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect. [4]

(5) The relevant protected characteristics are— age; disability; …"

26. The matters referred to in (1)(b)(i) and (ii) are sometimes referred to as the *proscribed consequences* and we shall adopt that phrase here.

27. Following a decision of Burton J sitting in the Administrative Court [5] the use of "*grounds of*" as a requirement for harassment was replaced with *"related to"* which has a broader meaning in that the conduct does not have to be *"because of"* the protected characteristic (The Equality & Human Rights Commission Code of Practice on Employment ("EHRC Code") ¶7.9) and will include someone who is wrongly perceived as having a protected characteristic when in fact they do not [6].

28. When assessing the effect of a remark, the context in which it is given is always highly material and whether conduct is *"related to"* a disability has to be judged by assessing the evidence as a whole [7]. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. Whilst:

> *"22. … not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."* [8]

29. Elias LJ in *Grant v HM Land Registry* [9] reinforced that point stating that

> *"47 ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.".*

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[4] The predecessor provisions were slightly differently worded hence s. 3A(2) of the Race Relations Act 1976 provided
"Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."

[5] *Equal Opportunities Commission v Secretary of State for Trade & Industry [2007] IRLR 327*

[6] as highlighted by Laws and Sedley LJJ in English v Thomas Sanderson Ltd [2009] IRLR 206 CA

[7] *Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15*

[8] *Richmond Pharmacology v Dhaliwal[2009] UKEAT 0458/08, [2009] ICR 724*

[9] [2011] IRLR 748 *CA*

30. Langstaff P adopted a similar view in *Betsi Cadwaladr University Health Board v Hughes* [10]:-

> *"12. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

31. It will also be relevant to deciding whether the response of the alleged victim is reasonable. Langstaff P also in *Betsi Cadwaladr* said this:-

> *"9. Whether [the conduct] has that effect is a matter of fact is to be judged by a Tribunal … objectively. In determining that, the subjective perception of the Claimant is relevant, as are the other circumstances of the case. But, as was pointed out in Dhaliwal it should be reasonable that the actual effect upon the Claimant has occurred."*

32. That was also the view of Elias LJ in *Grant*:-

> *"13 … When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable."*

Direct discrimination

33. Direct discrimination (like all other forms of discrimination other than harassment) is prohibited by s.39 EqA. Section 13 EqA provides that direct discrimination occurs where because, of a protected characteristic, a person is treated less favourably than another person has been or would be treated. That involves a comparison and for that comparison there must be no material difference in the circumstances of the case (save for the protected characteristic) [11]. Mr Tooze referred us in his closing submissions to a first instance decision *Barrow v Kellog Brown & Root (UK) Limited UKET 2303683/2020* on the basis of the comparison exercise forming a very substantial part of his claim but did not refer us to any specific points he made in that regard. *Would treat'* allows for a hypothetical comparator in addition to an actual comparator.

34. Thus, it is not sufficient merely for a claimant to have a protected characteristic and to be treated less favourably; for a respondent to be guilty of direct discrimination the less favourable treatment must be done '*because of*' the protected characteristic. The protected characteristic also

[10] *Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13*
[11] s.23 EqA

need not be the sole or even principal reason for the treatment so long as it has significantly influenced (that is *one which is more than trivial)* the reason for the treatment [12].

35. In cases where the difference in treatment is based on a criterion which is a protected characteristic or that cannot be disassociated from it (and thus the category of those suffering the disadvantage coincides exactly with the category of people with the particular protected characteristic) [13] the application of the criterion will constitute the reason or ground for the treatment complained of, this constitutes direct discrimination and there is no need to look any further :-

> *"… By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."* [14]

36. In other cases, [15] the question to be asked is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? [16] Unlike causation, which is a legal conclusion, the reason why a person acted as s/he did is a subjective question and one of fact [17].

37. The one (subjective) question the tribunal must not concern itself with is *"if the discriminator treated the complainant less favourably on racial grounds, why did he do so?"* That question is irrelevant [18]. Discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds.

> *"… Parliament did not consider that an intention to discriminate on racial grounds was a necessary component of either direct or indirect discrimination. One can act in a discriminatory manner without meaning to do so or realising that one is."* [19]

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[12] Nagarajan v London Regional Transport *1999 IRLR 572 HL* as applied in Igen v Wong *[2005]* IRLR 258 *at* [37]
[13] *Bressol v Gouvernement de la Commaunité Française at* [56] and per Lady Hale in Bull v Hall [2013] UKSC 73 [19
[14] Elias P in London Borough of Islington v Ladele *[2009] ICR 387, [2008] UKEAT/0453/08, [2009] IRLR 154 at [32]*
[15] An example is Nagarajan *(see above)*
[16] An example is that of the shop keeper given by Lord Phillips in *Governing Body of JFS [2010] 2 AC 728 at [21] "A fat black man goes into a shop to make a purchase. The shop-keeper says* 'I do not serve people like you'. *To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated."*
[17] Chief Constable of West Yorkshire Police v Khan *[2001] UKHL 48 at [29]*
[18] R. v Birmingham City Council, ex p. Equal Opportunities Commission [*1989] AC 1155*, see Lord Goff at p. 1194.
[19] As Lady Hale put it in *JFS* at [57]

Discrimination because of something arising from disability

38. Section 15 EqA provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

39. Traditionally the most useful guidance to be found in one place on the proper approach to determining section 15 claims, was the decision of Simler P, as she then was, in *Pnaiser* [20] where she drew the threads together of the previous authorities [21]. 'Defences' in the wider sense aside, there are three basic elements to a s. 15 complaint:

39.1. a disability

39.2. something arising in consequence of the complainant's disability

39.3. unfavourable treatment

40. As to the unfavourable treatment the tribunal must ask itself whether the complainant was treated unfavourably in the respects relied on and if so by whom. No question of comparison arises [22].

41. The three elements require an investigation of two distinct 'causative' issues:

41.1. did A treat B unfavourably because of an (identified) something? and

41.2. did that something arise ***in consequence*** of B's disability? [23]

42. It does not matter precisely in which order these questions are addressed [24]. That will depend on the facts [25].

43. The first 'causative' issue the Tribunal must determine is what caused the treatment complained of, or what was the reason for it. That involves an examination of the alleged discriminator's

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[20] *Pnaiser v NHS England & Another [2016] IRLR 170 at [31 (a)-(i)]*
[21] *including IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2015] UKEAT 0397/14, [2016] ICR 305 per* Langstaff P *and Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*
[22] *Pnaiser [31(a)], Griffiths/25*
[23] [Sheikholeslami/62 & Grosset/36]
[24] *Weerasinghe*
[25] *Pnaiser [31(i)]*

state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s. 15 case.

44. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. This is not a binary question was the treatment done *because of his/her disability* or *because of some other reason*. Both reasons might be in play [26]. Again, as in direct discrimination motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment [27].

45. The second 'causative' issue is a question of in 'consequence of' her disability (rather than because of) [28].

46. This is a looser connection such that more than one link in the relevant chain of consequences of the disability may require consideration. Whether something can properly be said to arise in consequence of disability will be a question of objective fact to be robustly assessed in each case by the Tribunal in light of the evidence [29] and the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact [30]. It does not depend on the thought processes of the alleged discriminator [31].

47. The EHRC Code provides:-

> *"5.9. The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.*
>
> *Example:*

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[26] *Sheikholeslami* [62, 66]; *Grosset* [37]; *Pnaiser [31(b)]*
[27] *Nagarajan (see above)*
[28] *Pnaiser [31(g)] City of York Council v Grosset [2018] EWCA Civ 1105 [2018] IRLR 746, [2018] WLR(D) 296, [2018] ICR 1492, (CA) [38]*
[29] *Sheikholeslami* [62, 66]; *Grosset [38]*
[30] *Pnaiser [31(e)]*
[31] *Pnaiser [31(d) (f)]*

A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker. …"

48. The statutory language of s. 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability [32]. Had this been required the statute would have said so as for reasonable adjustments where the knowledge required includes the substantial disadvantage. In the example, it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (i.e., so that the employer cannot avail himself of the defence in s.15(2)) [33].

49. As to the defence provided by s.15(1)(b) in *Ministry of Justice v O'Brien [2013] ICR 499* following a reference to the European Court the SC adopted the ECJ's guidance which is encapsulated in the summary of AG Kokott:-

"62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued ..." 34

50. The authorities [35] thus suggest that the proportionality assessment requires the Tribunal as a minimum to critically evaluate: -

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[32] *Pnaiser [31(h)]*
[33] *Grosset [51]*
[34] *see Del Cerro Alonso (Free movement of persons) [2007] EUECJ C-307/05, [2008] ICR 145 para 58, and Angé Serrano v European Parliament (Case C-496/08P) [2010] ECR I-1793, para 44.* Albeit that is essentially a restatement of *R. (Elias) v Secretary of State of Defence[2006] EWCA Civ 1293, [2006] 1 WLR 3213* where Mummery LJ gave the following guidance on what was required :-
"[151] ... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."
Which in turn is a repeat of his view in Hardy & Hansons plc v Lax [2005] IRLR 726 CA at [31 & 32], a view that was endorsed by Lady Hale in Homer at [20-23].
[35] *Northumberland Tyne & Wear NHS Foundation Trust v Ward [2019] UKEAT 0249/18 [66];* Scott/57 & 58 citing are most usefully and comprehensively summarised in *Hardys & Hansons Plc v Lax [2005] ICR 1565, MacCulloch v Imperial Chemical Industries Plc [2008] UKEAT 0119/08, [2008] IRLR 846, [2008] ICR 133410* and *Dutton v The Governing Body of Woodslee Primary School UKEAT/0305/15.* The cases of Ali, cited by the Claimant, and also *Grossett* at [54] confirm that.

50.1. Whether the employer's reasons demonstrated a real need to take the action in question [36]. Whilst business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test [37]. Establishing that an aim is capable of being a legitimate aim is only the beginning of the story. It is then, for the tribunal, according an appropriate margin of discretion, to decide whether it is legitimate in the circumstances of the case. For this purpose, an aim must at least be rational and, if it is not, the employment tribunal is entitled to say so [38]; and

50.2. If so, to make its own objective assessment of whether the reasonable needs of the undertaking which include the systems of work, their feasibility or otherwise, the practical problems which may or may not arise from the matter in issue in a particular business, the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action outweigh the discriminatory effect of the employer's measure on those sharing the relevant protected characteristic, including the Claimant [39]. The more serious the disparate adverse impact, the more cogent must be the justification for it [40]. The question is an objective one so it is no bar to the act being justified if the alleged perpetrator had not turned its mind to the question of proportionality at the time and thus matters that have come to light after the event can be relied upon [41].

51. Whilst it is for the alleged perpetrator to justify the provision, criterion or practice the authorities make clear that the alleged perpetrator is not required to provide evidence of justification; Tribunals are expected to use their common sense, reasoned and rational judgment. What may not be argued in support are subjective impressions or stereotyped assumptions [42].

52. Unlike unfair dismissal there is no margin of discretion or 'range of reasonable response' test here allowing a significant latitude of judgment for the employer. The test under section 15(1)(b) EqA is an objective one, and the ET must make its own assessment [43].

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[36] Dutton/9(a)
[37] *Cross v British Airways plc [2005] IRLR 423EAT and CA in Woodcock v Cumbria Primary Care Trust [2012] IRLR 491*
[38] The Lord Chancellor v McCloud [2018] EWCA Civ 2844, [2019] ICR 1489 [86] approved Lady Hale's comments at para. 59 of *Seldon v Clarkson Wright & Jakes [2012] ICR 716, [2012] IRLR 590, [2012] UKSC 16 (SC)*
[39] Hensman v Ministry of Defence UKEAT/0067/14 [41 to 44]; *MacCulloch [10(3)];* and *per Sedley LJ in Allonby*
[40] Dutton 9(b) *MacCulloch [10(3)] Hardys per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60*
[41] *Cadman v Health and Safety Executive [2004] IRLR 971*
[42] *see Elias J in Seldon v Clarkson Wright and Jakes [2009] IRLR 267 EAT at [73] affirmed by the Court of Appeal and Supreme Court and in Homer [2009] IRLR 601 EAT per Elias (now LJ) at [48] and also paragraph 4.26 of the Code.*
[43] *see Hardys [31-34], and Homer [20] and [24]-[26] per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed. Grosset [54]* MacCulloch/11

The duty to make reasonable adjustments

53. Section 39(5) EqA imposes a duty to make reasonable adjustments upon employers. Where such a duty applies sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that the duty comprises three requirements. Insofar as is relevant for us, where the absence of an auxiliary aid, or where a physical feature or a provision, criterion or practice ('PCP') applied by the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

54. A substantial disadvantage is one which is more than minor or trivial [44].

55. Paragraph 6.10 of the EHRC Code suggests that *'provision, criterion or practice'* should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions and may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied.

56. Paragraph 20 of Schedule 8 EqA provides:-

> *"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -*
>
> …
>
> *(b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

57. To amount to knowledge of a disability, there must be knowledge, whether actual or constructive, of the matters set out in s. 6(1) EqA :

> *(i) the impairment (whether mental or physical);*
> *(ii) the impairment is long term [45];*
> *(iii) the impairment has had a substantial (non trivial) adverse effect on the individual's ability to carry out normal day-to-day activities*

[44] s. 212(1) EqA. That reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. see paragraph 8 of Appendix 1 EqA, EHRC Code; *Sheikholeslami [49]*

[45] That it has lasted or is likely to last at least 12 months or the rest of the life of the person affected (Schedule 1 paragraph 2 of the EqA)

58. If the duty is engaged the steps it requires are those that were reasonable to avoid the disadvantage, the question of whether, and to what extent, the step would be effective to avoid the disadvantage would always be an important one [46]:

> *"18. … given the language of section 20(3) - where the steps required are those that are reasonable to avoid the disadvantage - the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one [47]. Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it; conversely, if there was a prospect - even if considerably less than 50 per cent - it could be [48]. The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage [49]; a, or some, prospect of avoiding the disadvantage can be sufficient [50]. All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness [51]."*

59. To put it another way:

> *"… in our judgment an adjustment which gives a Claimant 'a chance' to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP having the effect of placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive."* [52]

60. Whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable [53]. The focus is on the practical result of measures that can be taken [54]. The EHRC Code ¶7.29 states that what is a reasonable step *"depends on all the circumstances of*

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[46] *South Warwickshire NHS Foundation Trust v Lee & Ors [2018] UKEAT 0287/17* the EAT at [37] (albeit a case on s.15 EqA) repeating the guidance given in *Birmingham City Council v Lawrence [2017] UKEAT/0182/16*
[47] *see per HHJ David Richardson at paragraph 59 of Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341 EAT*
[48] *per HHJ Peter Clark at paragraph 39 of Romec Ltd v Rudham UKEAT/0069/07*
[49] *Noor v Foreign & Commonwealth Office [2011] ICR 695 EAT per HHJ David Richardson at 33*
[50] *per HHJ McMullen QC at paragraph 50 in Cumbria Probation Board v Collingwood UKEAT/0079/08 and Keith J at paragraph 17 in Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10*
[51] *see per Elias LJ in Griffiths [29] and per Mitting J at paragraph 18 in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/ 0341/15*
[52] *Lancaster v TBWA Manchester* UKEAT/0460/10 at [46] (Slade J presiding)
[53] *Firstgroup Plc v Paulley [2014] EWCA Civ 1573, [2015] 1 WLR 3384, [2014] EWCA Civ 1573*
[54] *Royal Bank of Scotland v Ashton* UKEAT/542/09, [2011] ICR 632 at [24].

the case." before giving a list of factors to be considered. DGF asserts paying an employee for not being at work is not a reasonable adjustment [55].

Victimisation

61. Section 27 EqA provides:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do a protected act."*

62. Detriment has been given a wide meaning by the courts [56] . Brandon LJ in *Ministry of Defence v Jeremiah [1979] IRLR 436 CA*, a case involving the interpretation of the 1975 Sex Discrimination Act, stated *"… I do not regard the expression 'subjecting to any other detriment', as used in s.6(2)(b), as meaning anything more than 'putting under a disadvantage' " and went on to say that was a question of fact for the Tribunal [57].*

63. Detriment is assessed objectively. Namely, how it would have been perceived by a reasonable litigant [58]. In making that assessment we must bear in mind that an unjustified sense of grievance cannot constitute detriment [59], and whilst it is not a defence per se that the employer behaved honestly and reasonably, save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment [60]. A person may be treated less favourably and yet suffer no detriment.

64. A tribunal is entitled to consider if an employer's reason for acting in the way it did was not the protected act itself but some other feature of it that could be treated as properly separable from the protected act [61]. Such circumstances are exceptional circumstances and Employment Tribunals need to be cautious about regarding features such as a multiplicity of grievances and obsessive over-reaction by an employee as exceptional. [62]

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[55] *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley, EAT 0417/11*
[56] Lord Hoffman in *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830* at [53].
[57] *adopted and approved by* the HL in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 which in turn referred often to another HL decision in *Chief Constable of West Yorkshire Police v Khan (as above)*
[58] *Ministry of Defence v Jeremiah (as above)* [31] per Brightman LJ approved in Chief Constable of West Yorkshire Police v Khan *(as above)*
[59] *Shamoon v Chief Constable of Royal Ulster Constabulary (as above)* per Lord Hope [35].
[60] Pothecary Witham Weld (a firm) & Anor v. Bullimore & Anor [2010] IRLR 572, [2010] ICR 1008, [2010] UKEAT 0158/09 at [19(3)] applying Derbyshire v. St. Helens Metropolitan Borough Council [2001] ICR 841
[61] *Martin v Devonshires Solicitors [2011] ICR 352* applied in *Page v Lord Chancellor [2019] 6 WLUK 289 both EAT*
[62] Woodhouse v West North West Homes Leeds Ltd [2013] UKEAT/0007/12, [2013] IRLR 773

The burden of proof

65. Direct evidence of discrimination is rare and therefore the burden of proof provisions were enacted. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanation, that there has been a contravention of the act the tribunal must hold that the contravention occurred unless the alleged perpetrator shows that the contravention did not occur.

66. Thus, the first stage is to establish if there are facts found on the balance of probabilities from which a Tribunal could conclude in the absence of an adequate explanation if an act of discrimination had taken place, if there are not, the claim will be bound to fail. In doing so the ET has to consider all the primary facts, not just those advanced by the complainant; save in one respect the total picture has to be looked at [63]. It is only the explanation which cannot be considered at the first stage of the analysis. Whereas evidence adduced by a respondent can properly be taken into account at the first stage when a tribunal is deciding what the "facts" are in order to see if a *prima facie* case of discrimination has been established by the claimant [64].

67. A difference in treatment alone is not sufficient to establish that discrimination could have occurred and the burden of proof passes to a Respondent, similarly unreasonable conduct without more is not enough either. The protected characteristic need not be the sole or even principal reason for the treatment so long as it has significantly influenced [65] the reason for the treatment[66]. That said, it is unusual to find evidence of discrimination and accordingly it is for the Tribunal to draw appropriate inferences from primary facts. Context is important and adverse inferences may be drawn where appropriate from the surrounding circumstances of the Respondent's conduct. The Tribunal can also consider the relevant codes of practice and draw inferences from non-compliance with them.

68. Where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture [67].

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[63] see *Hewage* at [31], and Laing v Manchester City Council *[2006] ICR 1519* at [56 to 59]. *"Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation)."* per Elias P in *Laing* at [65]*).* Discrimination complaints *"rarely deal with facts which exist in a vacuum and to understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. … one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II … since these both provide the context for and cast light on the overall picture."* (see Kansal v Tullett Prebon Plc UKEAT/0147/16 at [31] where Langstaff J also *referred to* Qureshi v Victoria University of Manchester [2001] ICR 863 and X v Y [2013] a decision of the EAT (UKEAT/0322/12/GE)

[64] *Ayodele v Citylink Ltd [2017] EWCA Civ 1913 per Singh LJ [67]*

[65] "A *'significant' influence is an influence which is more than trivial.*

[66] Nagarajan *as applied in Igen v Wong at* [37]

[67] *London Borough of Ealing v Rihal [2004] IRLR 642 CA applied in Laing [59] and endorsed in Madarassy v Nomura International [2007] IRLR 246 also CA*

69. Where facts are proved from which inferences of less favourable treatment because of protected characteristics can be drawn, then the burden of proof moves to the respondent and it is then for the respondent to prove on the balance of probabilities that it did not commit or are not to be treated as having committed the alleged discriminatory act or that treatment was in no sense whatsoever on the ground of protected characteristic [68]. That requires a consideration of the subjective reasons which cause the employer to act as it did [69]:-

> *"At the second stage, the ET must 'assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities'."* [70]

70. Discrimination complaints *"rarely deal with facts which exist in a vacuum. To understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. It might be said, for instance, that one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II and, it may be, having understood what happens in later scenes too, since these both provide the context for and cast light on the overall picture."* [71]. Thus, when considering whether a protected characteristic was a ground for less favourable treatment, the total picture has to be looked at and where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation should be avoided as it omits a consideration of the wider picture [72].

71. It was made clear in *Hewage v Grampian Health Board [2012] UK SC 37*, by Lord Hope (approving dicta of the Employment Appeal Tribunal in *Martin v Devonshires Solicitors [2011] ICR 352* (Underhill P as he then was)) that whilst the burden of proof provision in s.136 EqA is a tool to be used in a case where a tribunal cannot make clear findings about the reason for impugned treatment. If the tribunal is in a position to make positive findings on the evidence one way or the other that is an end to the matter [73].

> *"… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But*

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[68] Ayodele v Citylink Ltd & Another [2017] EWCA Civ 1913.
[69] see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 341, para. 7, per Lord Nicholls.
[70] see the Igen guidance at Annex paragraph 12 and Laing [51]
[71] see Kansal v Tullett Prebon Plc UKEAT/0147/16 at [31] where Langstaff J also *referred to* Qureshi v Victoria University of Manchester [2001] ICR 863 and X v Y [2013] a decision of the EAT (UKEAT/0322/12/GE
[72] London Borough of Ealing v Rihal *[2004] IRLR 642* CA applied in *Laing* [59] and endorsed in Madarassy v Nomura International *[2007] IRLR 246* also CA
[73] *Hewage at [32]*

they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. …"

Timing

72. Section 123 EqA provides so far as is relevant:-

> *"(1) … Proceedings on a complaint within section 120 may not be brought after the end of —*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> …
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period 74 is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

73. The Court of Appeal gave guidance on the exercise of the just and equitable discretion in Abertawe Bro Morgannwg University Local Health Board v Morgan *[2018] EWCA Civ 640* per Leggatt LJ

> *"18. … it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 75, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account 76. The position is analogous to that where*

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[74] The wording differs to that in s.76(1)(b) SDA 1975 "...any act extending over a period shall be treated as …"

[75] British Coal v Keeble *[1997] IRLR 336*

[76] London Borough of Southwark v Afolabi *[2003] EWCA Civ 15; [2003] ICR 800 at [33]*. That principle was more recently reinforced in a different context in Neary v St Albans School *[2010] IRLR 124*, (CA) per Smith LJ where, it was held that where a line of EAT authority requiring a Tribunal to consider the then factors in CPR 3.9(1), to decide whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect.

a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998 77.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay 78 and (b) whether the delay has prejudiced the respondent 79 (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). "

74. Thus, the exercise of the broad discretion involves a multi-factoral approach taking into account all of the circumstances of the case [80] in which no single factor is determinative [81]. In addition to the length and reason for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the merits and balance of prejudice, other factors which may be relevant are the extent to which the respondent has cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate legal advice once the possibility of taking action is known.

75. The CA in *Robertson v Bexley Community Centre [2003] IRLR 434* said this:-

"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. …."

76. In cases involving adjustments the position is more nuanced as they involve the failure to do something, an omission. Again, this was addressed by Leggatt J in Abertawe v Morgan:-

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[77] Dunn v Parole Board *[2008] EWCA Civ 374; [2009] 1 WLR 728 at [30-32, 43, 48]* and Rabone v Pennine Care NHS Trust *[2012] UKSC 2*; *[2012] 2 AC 72*, at [75]

[78] A failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused, the tribunal must weigh in the balance the prejudice and potential merit of the claim (Rathakrishnan v Pizza Express (Restaurants) Ltd *UKEAT/0073/15 per* HHJ Peter Clark disapproved the reasoning of the then President of the EAT Mr Justice Langstaff in *Habinteg Housing Association Limited v Holleran UKEAT/0274/14 (which was at odds with two* EAT decisions, *Pathan v South London Islamic Centre UKEAT/0312/13* HHJ Shanks presiding at [17 to 18], and *Szmidt v AC Produce Imports Limited UKEAT/0291/14* HHJ Peter Clark presiding at [4 to 6] and neither of which appear to have been cited to the President in Habinteg). *Authority for the need to consider the merits and the balance of hardship dates back to Dale v British Coal Corporation [1992] WL 12678386.*

[79] See also Hale v Brighton and Sussex University Hospitals NHS Trust [2017] UKEAT/0342/16 at [49] where the current president of the EAT Mr Justice Choudhury (albeit prior to his appointment as president) approved the reasoning in Bahous v Pizza Express Restaurant Ltd *UKEAT/0029/11 at [19-21]* that the question of the balance of prejudice is a material factor and the merits should not be treated as a separate consideration but as part of that prejudice balancing exercise. Concluding the Tribunal's failure to take this into account was an error of law, *see* Baynton v South West Trains Ltd *[2005] UKEAT/0848/04, HHJ Burke QC presiding (see particularly [59]).*

[80] *Hutchison v Westward Television Ltd [1977] IRLR 69*

[81] see also Rathakrishnan v Pizza Express (Restaurants) Ltd *UKEAT/0073/15 per* HHJ Peter Clark

"14. Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20(3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired.

15. This analysis of the mischief which section 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. This is further supported by the decision of the Court of Appeal in Kingston upon Hull City Council v Matuszowicz [2009] EWHC Civ 22; [2009] ICR 1170. In that case the Court of Appeal considered the effect of the predecessor provision (which was in materially identical terms) to section 123(4) of the Equality Act in relation to a claim based on failure to make reasonable adjustments by finding alternative employment for the claimant. On the facts, the duty (and hence the failure to comply with it) was said to have arisen by, at the latest, August 2005 and to have continued until 1 August 2006, when the claimant's employment ended (see para 25). Although the Court of Appeal did not find it necessary to reach any conclusion about the date on which time began to run, Lloyd LJ (with whose judgment the other members of the court agreed) considered that the relevant date may have been 28 July 2006 – observing that, at any rate during the period of April to July 2006, the employer was representing to the claimant that the question of his possible redeployment was being taken seriously (see paras 28-29). This illustrates, first of all, that the date by which the employer might reasonably have been expected to comply with a duty to make reasonable adjustments for the purpose of the test in what is now section 123(4)(b) of the Equality Act may be different from the date when the breach of duty began. Secondly, the approach of Lloyd LJ supports the view that the date by which the employer might reasonably have been expected to comply with the duty should be determined in the light of the facts as they would reasonably have appeared to the claimant – including in that case what the claimant was told by his employer.

16. In the present case, although its reasoning might have been more clearly expressed, I think it apparent that the employment tribunal approached the matter correctly in asking itself at what point it became clear or should have become clear to the claimant that the Board was not complying with its duty to make reasonable adjustments by looking for alternative suitable roles to which she could be redeployed. The tribunal found that this would probably have become clear to the claimant by June/July 2011. Although it was generous in those circumstances to find that the time for bringing a claim did not begin to run until 1 August 2011, it cannot be said that this was not a judgment which on the facts was open to the tribunal. Nor is there any inconsistency between that finding and the tribunal's conclusion that the claim based on failure to make reasonable adjustments was well-founded. Although the tribunal did not identify the earliest date by which the Board could and should have offered to redeploy the claimant to a suitable alternative post, it found that on the balance of probabilities it is likely that there would have been a suitable role to which the claimant could have been redeployed during the period from April to the beginning of August 2011. Indeed, the tribunal's discussion of the date by which the Board might reasonably have been expected to comply with its duty presupposes that the Board was failing to comply with its duty during the period under consideration. I therefore consider that the first ground of appeal is misconceived."

Unfair dismissal

77. Where, as here, a claimant was an employee, has been continuously employed for 2 years, and a brought a claim for unfair dismissal within the relevant time limits the employee concerned has the right not to be unfairly dismissed [82].

78. In such cases it is for the employer to show the reason (or, if there was more than one, the principal reason) for dismissal was one of the potentially fair reasons. The potentially fair reasons relied upon here are:-

78.1. some other substantial reason and

78.2. conduct.

79. The reason for dismissal was classically assessed by reference to the set of facts known or beliefs held by the employer which caused it to dismiss the employee [83] and that includes information coming to the respondent's knowledge on the hearing of the appeal [84]. Whilst that

[82] s. 94 Employment Rights Act 1996

[83] *Abernethy v Mott, Hay & Anderson [1974] ICR 323 CA* per Cairns LJ at 330B-C

[84] Browne-Wilkinson P in *Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91 (EAT) at [95]* approved by Lord Bridge in *West Midlands Co-Operative v Tipton [1986] IRLR 112 (HL)*

formulation as originally drawn was directed to a particular issue [85] and thus may not be perfectly apt in every case, the essential point remains a valid one; the "reason" for dismissal refers to the matters(s) operating on the mind of the decision-maker which cause him/her to take (or, as it is sometimes put, what "motivates") the decision [86]. The Court of Appeal has more recently repeated that view; the tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss [87].

80. If a potentially fair reason is shown by the employer, the Tribunal must then go on to assess the fairness of the dismissal. The starting point for that determination is the words of s.98(4) Employment Rights Act 1996 ("ERA"). The burden of doing so is neutral:-

> *"…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

81. The Tribunal must not carry out its assessment of the reasonableness of the employer's conduct using its own subjective views as to what was the right course to adopt for that of the employer [88]; in many, (though not all) cases there is a "*band [sometimes called range] of reasonable responses"* within which one employer might take one view, and another might quite reasonably take another. The role of the tribunal is to decide in the circumstances of each case whether the decision to dismiss and procedure adopted fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal and preceding procedure falls within the band the dismissal is fair: if outside the band, unfair [89].

82. No timing point is raised in relation to the unfair dismissal complaints.

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[85] Hazel v Manchester College *[2014] ICR 989* (CA) per Underhill LJ at [23]
[86] see also The Co-Operative Group Ltd v Baddeley *[2014] EWCA Civ 658* [41]
[87] Per Underhill LJ in Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632. That is subject to the possible qualifications discussed at [62 & 63] and "it is the [ET's] duty to penetrate through the invention rather than to allow it also to infect its own determination"
[88] Orr v Milton Keynes *[2011] ICR 704 CA*
[89] Iceland Frozen Foods Ltd v Jones *[1982] IRLR 439 EAT*

Wages/Sick pay/Holiday Pay

83. The law concerning wages is neatly summarised by Employment Judge Beck. So far as concerns us we adopt herself direction.

84. Section 13(1) ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

85. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to s.23 ERA

86. Section 27 (1) ERA defines wages in relation to any worker means any sums payable to the worker in connection with his employment including (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. It includes other categories such as statutory sick pay but excludes any payments within subsection (2). Subsection (2) defines the excluded categories as (a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (b) any payment in respect of expenses incurred by the worker in carrying out his employment, (c) any payment by way of pension, allowance or gratuity in connection with the workers retirement or as compensation for loss of office, (d) any pay referable to the workers redundancy and (e) any payment to the worker otherwise than in his capacity as a worker.

87. In relation to sick pay that is pursued as a breach of contract and so it is for the claimant to show a term of his contract (express or implied) was breached on the balance of probabilities.

88. As to holiday pay the issues before us related to whether DGF were entitled to require Mr Tooze to take that before the end of the leave year or whether he should be entitled to carry that over.

89. Ms Ferber reminded us that the principles in *Plumb v Duncan Print [2016] ICR 125, EAT and Smith v Pimlico Plumbers [2021] ICR 1194, EAT* where an employee is unable to take their annual leave before the end of the leave year do not apply here because Mr Tooze was no longer signed off as sick as from 7 October 2019.

Our Findings

90. We make the following primary findings of fact on the balance of probabilities and from the information before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

Background

91. Mr Tooze was employed by DGF from 19 April 1999. It is agreed Mr Tooze was dismissed on 15 July 2020. Mr Tooze did not attend the hearing at which the decision was taken to terminate his employment and he received notification of his dismissal by a letter dated 13 July 2020 [815]. It was agreed the date he received that notice was 15 July 2020 and that was his effective date of termination. It was also agreed he was paid until 15 July 2020, in lieu of notice and for any outstanding holiday.

92. Mr Tooze reported for the majority of his employment with DGF to Mr Rob Aldridge and prior to 2018 was based at DGF's site at Coleshill. At that time his role was as a Key Account Manager. After that site closed he "hot desked" from DGF's site at Starley Way, Marston Green where it employed approximately 100 or so staff. In about 2018 Mr Simon Parker succeeded Mr Aldridge as his line manager. Mr Parker was based at Chertsey, Surrey (DGF's head office) and Hayes, Middlesex and thus managed Mr Tooze remotely.

93. Around the time of those changes Mr Tooze was also appointed as a National Customer Experience Manager. As the epithet, national implied, he told us it entailed more driving. Whilst he told us his role required him to travel to customer sites every day, the vast majority of these were within a 20 mile radius of Marston Green; one client was based in Luton where he travelled once a week. He also travelled two or three times a year to DGF's head office in Chertsey, Surrey.

94. We accepted what he told us about the potential journey times to the sites in Luton and Chertsey as being 1½ -3 hours travel time (dependent on traffic) and his normal journey to work each day was in the region of 20 minutes or so.

95. On any measure he was a senior employee His salary from April 2019 was £56,255 [488] although that was usually subject to an annual increase to reflect inflation, performance etc. In April 2019 he also received a bonus of £4,665 for the previous financial year. In addition he benefited from private medical insurance, an income protection benefit (see (99) following) and

a business needs car (see (107)). DGF did not at any point seek to argue that prior to the events that concern us, that he had a clean disciplinary record.

96. DGF is a part of muti national logistics company that is ultimately owned by Deutsche Post, the now privatised successor to the former German postal service Deutsche Bundespost. In the UK, DGF and its 3 "sister" companies form separate business units, and instead of forming part of a UK parent are directly owned by the German parent Company. DGF's UK turnover was €1B and together with its UK sister companies €6.5B. DGF employed in the region of 1,000 or so UK staff and together with its sister companies 60,000 staff in the UK. DGF had its own in house HR function and access to legal advice; its solicitors in turn being part of a multinational legal firm.

97. The version of DGF's grievance policy that was before us [382] is dated August 2014 and provided:-

> *"5 PROCEDURE*
>
> *The following stages of the Grievance Procedure are usually followed in most cases but it is not essential that all levels are used on every occasion.*
>
> *5.1 Stage 1 - Informal Stage*
>
> *An employee who wishes to raise an issue should, in the first instance, raise it for discussion with their immediate manager and if possible the company will deal with the matter informally.*
>
> *5.2 Stage 2 – Formal Grievance*
>
> *5.2.1 If, within seven working days of a matter having been raised at stage 1, it cannot be resolved informally or the employee considers that he or she has not been treated fairly or that the outcome is not satisfactory, then the employee may raise the matter in writing with the next level of management who will convene a meeting between the employee and an appropriate manager as soon as reasonably practicable.*
>
> *5.2.2 The employee and the company will chose a mutually convenient date and location for the meeting but both parties should strive to book this meeting within 7 working days of the request."*

98. The grievance policy provided for an appeal (¶5.3) and made specific provision for grievances involving a line manager (¶6) then it might be *"… appropriate to refer the grievance to the grandfather,*

HR Manager or any other DHL Manager at the same level as the Line Manager, in the first instance.". We understood *"grandfather"* we took that to mean the line manager's manager.

Income protection benefit policy

99. It is not in dispute that Mr Tooze also benefited from an income protection benefit policy ("IPB"). The IPB policy [386v] less than helpfully defined incapacity as *"that shown for the relevant category in the schedule".* The schedule to the policy [404] set out a definition of incapacity [405] by reference to a *"suited occupation".* The policy in turn defined "s*uited occupation"* [386y]

> *"Means the insured member is incapacitated by an illness or injury so that he is unable to undertake all occupations which we consider appropriate to his experience, training or education.*
>
> *For the purposes of this definition an occupation will not be considered to be inappropriate to an insured member's experience, training or education on the grounds that:*
>
> > *i. the pay from such occupation may be lower than that paid to the insured member prior to the deferred period in relation to his own job or lower than the amount of member's benefit, or*
> >
> > *ii. such occupation lacks the status or seniority associated with the insured member's own job.*
>
> *For this definition "own job" means the essential duties required of the insured member in his occupation immediately before the start of the deferred period."*

100. The IPB policy [386x] also provided for a "Rehabilitation programme" which was defined as

> *"a comprehensive programme of medical, clinical and vocational support for a disabled member, the objective of which is to restore him to his fullest physical, mental and social capability with the intention of reintegrating him to the workplace."*

101. Whilst DGF's in house leaflet setting out the terms of the IPB scheme [366a-b] stated

> *"This leaflet is intended to provide a brief summary. The Income Protection Scheme is governed by an Insurance Policy the terms and conditions of which shall prevail for the purposes of interpretation."*

before continuing:-

> *"… any employees entitled to and eligible for cover who are absent from work for more than 6 weeks because of a long-term illness or injury:*
>
> - *can, if appropriate, receive fast access to independent specialist rehabilitation support; and*
> - *if still absent from work after 26 weeks receive a regular monthly income.*
>
> *The scheme is designed to provide appropriate rehabilitation support and help you with your recovery."*

Incapacity was defined as *"... your ability to perform your own role or any role that is suited to your experience, training or education."*.

Under the heading of *"Deferred Period"* the leaflet stated, "*The benefit starts after 26 weeks of continuous absence."*

2018 Grievance and Appeal

102. Whilst this forms no part of the specific issues before us and neither party addressed the detail of this before us in their witness statements, in April 2018 [478] Mr Tooze made a complaint to Mr Michael Young, the (UK) chief executive of DGF, about the way he was being treated by managers including Mr Parker. We refer to this to place into context matters the parties raised that we relay below. Mr Tooze referred in that complaint to having had 2 nights of no sleep and feeling stressed and upset Mr Tooze stated *"Torben wanted me sacked"* before alleging that he was *"being managed out of the business"*. Mr Tooze also referred to historic issues going back almost 25 years (we take that to mean the start of his employment given he had not been employed for that long at that point) and described Mr Parker in that email as *"arrogant and cocky"*, wanting to "*micro manage his people*" [all 478] and *"rude, arrogant, argumentative and dictating" [479]*. Mr Tooze went on to refer to his remuneration package as being unfair and went onto say *"… I am ill, however I get up for work every day and give more than 100%, I may however have to go to the Doctor's tomorrow because of the stress this is all causing me …"*. He then went on to complain about the lack of duty of care shown by DGF [480] and to state *"You don't see me taking company data and looking for another job"* [479]. We return to that latter comment at (109).

103. Mr Tooze accepted before us that whatever the reason for that was, by the time of his complaint he had an issue with Mr Parker stating of him "*He wanted to control every decision made and every thought I had"*.

104. Mr Tooze's complaints were addressed as a grievance by Mr Andy Cooke, Vice President of DGF's Customer Experience team, under three principal heads

104.1. Pay Review

104.2. A Training issue

104.3. The contents of the email to Mr Young.

105. The outcome was dated 4 June 2018 [480a-c]. The training issue by then had been resolved. The outcome formed Appendix 16 of the pack of documents that were forwarded to Mr Tooze

as part of the subsequent disciplinary process (see (350) following). The outcome letter concluded:-

> *"To summarise, I do uphold your point about the 1.5% pay increase and can confirm that this will be amended to 2.5% and actioned in the June pay run, back dated to April, 2018. In addition, I will make arrangements for you to receive a 'business needs' car. Finally, Simon has confirmed that he would like the opportunity to forge a good working relationship with you and therefore, as suggested at your hearing, once this grievance has been concluded, I will arrange a meeting between you and Simon with a view to you both agreeing the way forward. My recommendation is also that you reflect on perhaps what you could have done differently to avoid matters getting to this point and consider what you might be able to take away from this that will help you in the future.*
>
> *You have the right to appeal against my decision. …"*

106. The outcome also addressed a number of other issues. Mr Tooze's issue about pay appeared to concern a complaint that Mr Simon Parker was treating him unfairly [480a-b]. Mr Cooke explained it thus:-

> *"You told me that you felt it had been unfair that during this year's review you were only awarded 1.5% out of an available 2.5% and that you knew others in your team had received more. … You told me that [your Manager, Simon Parker] then had a conversation with you indicating that you hadn't supported him during the year and that this was the reason for the review being set at 1.5%. You went onto say that the decision was personal and didn't reflect the amount of good work you had produced throughout the year.*
>
> *Following investigations, I understand that the reason for the lower review was in fact to do with a perceived derogatory email you sent about another employee, Ben. … Since the criteria for reducing the 2018 percentage increase was solely based on the email you sent about Ben and because I believe this issue was never brought to a satisfactory conclusion, I do believe this was unfair. … What didn't help this situation is that the Motiv8 process had not been launched, therefore, there was no ability to conduct a proper performance review.*
>
> *Regarding your point about Simon discussing other team member's salary increases with you, I am unable to corroborate this. Simon expressly denies having any conversations with you that specifically told you what other team members were getting, but does say that he stated there were different percentages being applied across the board.*
>
> *You went on to tell me that you weren't being treated equally … Having spent some time researching your pay history back to 2011. I find that on balance you have been awarded fair increases over time and have also been awarded a number of bonuses. I can further confirm that you are paid in the upper quartile where your team is concerned. …*

and under the section headed *the email to Mr Young* [480b]:-

> *"In addition, I can find no specific evidence to support your claims concerning Simon. At worst I think this comes against a backdrop of a year of change and a role/team that Simon has had to manage in almost a 'transitionary' period whilst 'ways of working' were ironed out. I do however, accept that there are some ground rules to be set and some clear expectations around defined job roles and measures going forward. I will also be coaching managers on all aspects of interaction and communication with their teams."*

107. Mr Cooke also addressed within section headed *the email to Mr Young* an historic complaint as far back as 1998 against Mr Rob Aldridge:-

> *"… I am unfortunately not able to corroborate the alleged behaviour aimed at you by Rob as he no longer works for the company. It doesn't appear either that a grievance was raised at any stage between the issue in 1998 or Rob leaving the company, therefore, I am not able to comment on this any further."*

108. Mr Cooke then went on to address other issues Mr Tooze had raised [480c]:-

> *"In your email you also brought up the issue of a car allowance. You told me that you had at one stage been supplied with a 'business needs' car but that when it was time to change it you declined as you didn't want to be paying the tax on this. You told me that others in your team received an allowance, specifically Ben Goodwin who joined 5 years ago.*
>
> *In respect of this, I can confirm that in line with current policy you are entitled to a 'business needs car.'*
>
> *Another point you raised in your email was the fact that you have given up holiday at personal expense for the needs of the business. Having spoken to Simon about this, I am satisfied that this isn't an expectation and whereas we appreciate people moving holidays to support the business, this should be the exception and not the norm. I certainly wouldn't expect anyone to be out of pocket as a result.*
>
> *Going forward my expectation is that all team members book and take their annual holiday entitlement within agreed timescales.*
>
> *Lastly we spoke about your health and Julia Marsh agreed to pick up separately with you about this."*

109. Mr Tooze appealed the grievance outcome. An appeal hearing was chaired by Mr Simon Neville on 18 July 2018. The minutes (Appendix 18) were before us [481e-m]. Mr Raes who subsequently dismissed Mr Tooze, in the dismissal letter [817] referred to a comment Mr Tooze made in those grievance appeal hearing notes (Appendix 18) *"It would have been easier to go to Kuehne & Nagel and get £10,000 more"* stating he found it difficult to comprehend why Mr Tooze would make that comment and the comment that we refer to at (102) about "*taking company data"* to his employer.

110. There were three heads of appeal:-

110.1. Parity of salary

110.2. Car allowance

110.3. Customer Experience Manager (CEM) restructure and consultation processes.

111. The outcome was dated 8 August (Appendix 19) [481n-o]. Mr Neville upheld Mr Cooke's decision on salary (giving a commitment to ensure call out fees were treated in a consistent manner) and also the business needs car (stating that based on his grading Mr Tooze was not entitled to a car allowance and nor was he entitled to that as a ring fenced benefit or similar)

before acknowledging the introduction of a restructure had not been handled well, understood Mr Tooze felt aggrieved at its handling and apologised accordingly. He then continued:-

> *"I would also like to thank you again for the personal sacrifice you made in giving up your holiday in order to support the business and while not expected, is greatly appreciated. On this occasion you will be reimbursed the cost you incurred of £250. I would however strongly encourage you to discuss with your line manager any personal cost implications before volunteering yourself in similar circumstances in future if a similar situation arises. The company would not expect nor want you to be out of pocket.*
>
> *I also note that in your appeal letter you are keen to meet with Simon Parker in order to forge a good working relationship going forward and while I understand that hasn't happened to date, I will ensure Simon reaches out to you accordingly so that this process can commence.*
>
> *Finally I can confirm that Rob Aldridge is currently on Garden leave and while that means he is still employed by the business he is not active in the business and there are currently no plans for him to return to any role after his notice is completed.*
>
> *l trust that you will understand the reasons for my decisions and while I appreciate you may not be entirely happy with my findings, it's important that we treat all individuals in the organisation in a consistent [manner] and my findings support that. I would also re-emphasise that your loyalty and long standing service to the business is greatly appreciated and I would encourage you to now look forward and focus on the new business challenges ahead of us as these decisions are final and as per the Company Grievance Policy, you have no further right of appeal and the process is closed."*

112. The appeal outcome identified (see the extract at (108)) that by that time Mr Tooze had made it clear that there were tax implications for him with the provision of a *"a business needs car"* and had previously declined such a vehicle for that reason. That remained his position before us. We return to that issue at various points below (see (115) & (164 following) amongst others).

113. At this point for context we need to record that:-

113.1. DGF subsequently sent the necessary details to Mr Tooze to enable him to order *"a business needs car"* but for the reasons we address at (164 following) he delayed ordering that vehicle.

113.2. That by the time he received the grievance appeal outcome Mr Tooze clearly knew how to pursue a grievance, and

113.3. For reasons that we will go on to despite the outcome of that grievance appeal he retained a sense of grievance. We say that because his first tribunal claim repeated elements of the matters that formed part of his grievance and its appeal (see Employment Judge McCluggage's summary at (1)).

114. Returning to the reference to Mr Tooze's health that we make in the final paragraph of the quote at (107) at this point we need to address five matters:-

114.1. Whilst that grievance and grievance appeal process was ongoing, between 22-28 June 2018 Mr Tooze was signed off work with stress (which his GP records [937] support) but which the OH report dated 11 October 2018 stated had incorrectly been linked to osteoarthritis in the OH referral (see (114.3.3))). In the summary of his sickness absences that was before us [770] the only other absences that refer to stress in whole or part were, *"3 February 2020 to date"* and a period of just over a fortnight in the Summer of 2002 when Mr Tooze's mother sadly passed away.

114.2. In his impact statement [126] Mr Tooze told us he had been informing DGF of his problems for several years, that the then HR manager Kim King had offered support, he had had 2 weeks off work in summer 2016, in October 2016 Ms King had made an OH referral and he had had several meetings with Ms King and his then manager Mr Aldridge.

114.3. Only one occupational health (OH) report was before us that preceded/overlapped with the start of the matters that concern us. That was dated 11 October 2018 [482]. As to how that came about we find:-

114.3.1. That on 17 August 2018 [481p-q] Ms Julia Marsh (who had joined DGF's HR department in May 2018) contacted Mr Tooze to give a gentle reminder that the last time they had caught up a referral to Maitland Medical (DGF's OH providers) had been canvassed but that her recollection was that it had been agreed they wait until a letter from Mr Tooze's consultant had been received before it was actioned.

114.3.2. Mr Tooze responded the same day to give an update on the position, saying he had a repetitive strain injury caused by excessive keyboard use, it had been suggested he discuss that with his employer and an occupational therapist, he his workstation needed to be assessed, he go on a pain management programme and been referred to acupuncture and physiotherapy (that was

due to start in late September) by his pain management consultant. He asked for this to be kept private between himself and HR and did not want it shared with Mr Parker until such point as it needed to be.

114.3.3. He went on to say he completed a form for Maitland Medical in April but had heard nothing. See (114.3.1) for Ms Marsh's response.

114.3.4. The OH report that ensued (dated 11 October) [482] identified the last OH referral was in 2016, and that the referral had referenced Mr Tooze having a 2 week absence from work from 22 June 2018 to 6 July 2018 (although his absence records suggest that was only one week) and that linked to his osteoarthritis but that this was incorrect and that his GP has certified him off work at that time because of "work-related stress". The OH report primarily addressed Mr Tooze's underlying musculoskeletal problems and their consequences. Section 3; *Background and summary of information* said this;

> *"The main issues, as far as I can see, relate to chronic pain leading to sleep disruption and chronicity in pattern. …*
>
> *… his sleep which can be as minimal as 3 hours per night. He tells me he struggles with sustained driving distances when his musculoskeletal pain heightens and he finds this limits his safe driving capacity. He recognises a cycling effect in regards to his symptoms which have an impact upon his recovery rates and I believe he is taking analgesia to help control the symptoms but he has not been able to tolerate some pain medication because of drowsiness and side effects. His sleep disruption, he feels, has an impact upon his energy levels and ability to concentrate safely in the daytime.*
>
> *Lee is currently awaiting further pain management programme involvement. This is likely to unfold over the next few months. He is, however, currently engaging with physiotherapy and acupuncture."* [484]

114.3.5. Section 4; *Opinion and recommendation to include adjustments*, said this :-

> *"Lee appears to have an established diagnosis confirmed by specialists. … this is therefore likely to be an ongoing issue for him. …*
>
> *… Whilst there may be scope to review his pain management I do not think that there will be any significant improvement in his symptoms certainly in the short to*

medium term. Individuals with chronic pain syndrome invariably experience longer term pain which can fluctuate and vary unpredictably. ***It is not uncommon that such individuals also experience sleep disruption and secondary psychological factors.***

Can I ask you to consider whether you have sufficient scope and flexibility in defining a geographical territory for Lee in order to support reliable attendance and performance at work in the future? Lee expressed an interest in a more local role since I believe there is scheduled changes in geographic responsibilities in place. There is a risk that his symptoms will affect his capacity to attend and perform reliably at work in the future. I believe his workstation has been risk assessed but please ensure that this is up to date.

Lee is likely to be afforded protection under current Equality Act 2010 disability regulations. I think the reasonable adjustments needing to be considered from a practical perspective are working arrangements and routine which can be reasonably accommodated to allow him to function with his given musculoskeletal symptoms. There is no reason why Lee cannot necessarily travel by alternative transport where driving longer distances is needed but the practicalities of this to allow him to do the job will need to be individually assessed."

[our emphasis]

114.3.6. The report concluded (section 5) that a welfare meeting should be held to discuss the content of the report and for DGF to gain greater insight into Mr Tooze's symptoms and impact to support the situation. We return to this below (115).

114.4. In his disability impact statement having identified various conditions [126 ¶1] Mr Tooze asserted various diagnoses had been confirmed as:-

114.4.1. Osteoarthritis at multiple sites in September 2016 [127 ¶4.5],

114.4.2. Chronic Pain Syndrome (CPS) and Degenerative Disease – Cervical/Lumbar Spine both in February 2018 [127 ¶4.3 & 4.4],

114.4.3. Work Related Stress in June 2018 [127 ¶4.6], and

114.4.4. Work Related Upper Limb Disorder (WRULD) & Repetitive strain disorder (RSI) both in July 2018 [127 ¶4.2 & 4.1].

and listed the various medications he was prescribed [126 ¶2].

114.5. We set out the agreed position with regards to disability issue and the judgment upon that above (20-21). We return to the question of knowledge at (21) and the additional element of knowledge for ss. 20-22, that is of disadvantage, below (505-509).

115. There was no formal record of a welfare meeting having taken place following the 2018 OH report but Mr Tooze accepted that he had agreed his own adjustments with Mr Cooke who had agreed he could reduce his travelling. In addition, the outcome of Mr Tooze's 2018 grievance and the consequent appeal was that he would be issued with a "business needs car". The way Mr Tooze put that decision was that he was *told* to take such a vehicle. Mr Tooze's view was that his role was a local role so a business needs car was not needed, and he pointed us to the tax burden he told us would give rise to because he would have need to travel 10,000 miles to avoid tax consequences.

116. We find that attempts had been made to make adjustments to Mr Tooze's role in line with OH recommendations. The October 2018 OH report did not require travelling to be excluded completely. The subsequent July 2019 OH report identified that Mr Tooze's annual mileage had formerly been as much as 24,000 miles pa whereas Mr Tooze told us he was driving less than 10,000. Whilst the subsequent July 2019 OH report identified that Mr Tooze required "a radically different role", the October 2018 OH report had identified that travelling could be addressed in other ways (see (114.3.5) final paragraph) and for instance the vehicle Mr Tooze eventually ordered was an automatic, had an adaptive steering assistance system at lower speeds and was an SUV, so was higher off the ground (see (165) & (338)).

The alternative ("Dean Carter") role - Autumn 2018.

117. Two complaints are made concerning alternative roles in the list of issues :-

13(d) Informing the Claimant of, considering the Claimant for or appointing the Claimant to a suitable alternative role including a role at a fixed location which did not require driving, for example,

(i) The customer key account manager role available in the Birmingham office in/about the Autumn of 2018 / January 2019

(ii) The export manager role available in the Birmingham office in / or about July / August 2019.

118. In addition, a linked issue was 2(i), 6 & 14

> *Did R prevent C from returning to work by failing to make the reasonable adjustments set out below and/or did R fail to inform C of, consider C for, or appoint C to an alternative role?*

119. During the hearing Mr Tooze confirmed this issue was not pursued as a failure to make reasonable adjustments (see (23.2)).

120. We return to 13(d)(ii) and 2(i), 6 & 14 below (see (229) following) but as to (i) the only evidential support for that raised by Mr Tooze was [116]:-

> *"… a position that came up in the Birmingham office doing the same role but, local, this would have met all my needs, I was overqualified for the role, it was referred to in the Occi report of 11 October 2018*
>
> *This job was earmarked for the friend of the Station Manager Paul Lyon and was given to that Friend Dean Carter.*
>
> *When I questioned this with Julia Marsh she said it was a lower grade so they never offered it to me, but later offered me a much lower grade job that did not fit my needs as recommended by Occi Health."*

121. That quote refers back to the OH report of 11 October [482] that we refer to at (114.3.5) and specifically the penultimate paragraph of the quote we set out from the OH report. The allegation made by Mr Tooze appears to be that in the light of the OH report DGF should have been looking for alternative roles for Mr Tooze and this was one such role.

122. In cross examination it was put to Mr Tooze that he made no direct mention of *the Dean Carter role* in his witness statement and that was because he had agreed with Mr Cooke to arrange his work better, and he was content with those arrangements. Whilst *the Dean Carter role* was obliquely mentioned in his witness statement (see (230)) no real detail is given around it. Further Mr Tooze raised no complaint about the failure to offer that role to him at the time. Having already raised a grievance earlier in 2018 we find that if that vacancy had been something he wanted to be considered for given the proximity and content of the OH report he would have applied for it or at least raised that as soon as he became aware of Mr Carter's appointment. He did not. Nor did he subsequently raise it in June 2019 (see (147)).

123. When asked when he should have been offered that role Mr Tooze initially told us that was some time in Autumn 2018/ January 2019. Mr Tooze later suggested in his cross examination of Mr Wright that this was between October and the end of December 2018.

124. The primary difficulty with that allegation as put is that despite requested requests to do so Mr Tooze was unable to identify when Mr Carter was appointed to this new role. In the absence of detail when that role arose or what it entailed we cannot be sure when that was, if that was after DGF received the OH report of 11 October 2018 or if it was suitable either objectively, in the sense it had suitable terms, or subjectively in that it could fit with Mr Tooze's medical requirements. We remind ourselves that whilst "*it is certainly not the law that an adjustment will only be reasonable if it is completely effective"* there must be *'a prospect'* of any substantial disadvantage being alleviated [90]. Given the lack of evidence when the Dean Carter role arose and what it entailed we are in no position to identify if that post-dated the OH advice and if there was any prospect of it alleviating any substantial disadvantage.

125. We address the issue of the role that came up in the summer of 2019 below at (232) following.

126. Mr Tooze also accepted had *the Dean Carter role* arisen, it would have been advertised, he had access to DGF's vacancy list ("*Jobwatch*") but whilst he knew about that vacancy list he had never used it. Whilst we accept it was not Mr Tooze's responsibility to find an alternative role that he could perform, given the sparce factual basis for this allegation and the content of the OH advice, if the need to find another role had been an issue for Mr Tooze at the time, on balance he would have been looking for other roles using that vacancy list and on his own account he was not. Accordingly, that is a factor that negatively impacts on the weight we give to Mr Tooze's account.

127. Whilst Mr Tooze was not considered for that role we find that Mr Tooze was content with the arrangements made with Mr Cooke and/or did not want the Dean Carter role and/or consider it was suitable for him at the time. That is supported by him not applying for the role or subsequently raising a grievance about it not being offered to him. That is supported by what we say at (147). Accordingly we find that he did not perceive that as an issue for him at the time or at early June 2019. We find he was treated no differently to anyone else who had not applied for the role. Nor was there unfavourable treatment or unwanted conduct emanating from the way he was treated.

Mr Tooze's Sickness absence - Spring to Autumn 2019

128. On 25 March 2019 Mr Tooze started a period of sickness absence. He was initially signed off work by his GP for just over two weeks [487 - dated 29 March 2019], then a month [489] and then on three occasions for 2 months each [490, 516 & 560].

[90] *Noor v Foreign and Commonwealth Office [2011] ICR 695*

129. The reasons set out by his GP across those various MED3s were chronic intractable pain and/or a repetitive strain injury. At no point did the sick notes over that period refer to stress, depression or hint at a similar impairment.

130. The second of those MED3s expired on 9 May 2019. At approximately 7:40 am on Friday 10 May Mr Parker emailed Mr Tooze referring to a voicemail message he had left the day before seeking an update on when Mr Tooze was due to be back at work or further signed off. Mr Parker asked for a call back after 9:30 am that day [493]. Rather than calling back as had been requested Mr Tooze emailed Mr Parker at just before 9:30 copying in Ms Marsh to say, *"I never got a message!"*, that he had been trying to get to see his doctor since the preceding Friday and had an appointment that afternoon. After which he said he would update DGF accordingly. He referred to Ms Marsh being aware.

131. Mr Parker replied 40 minutes or so later to say that he was "*sorry to hear that*" and that he had tried to call Mr Tooze's mobile and left a message at 13:44 the day before (9 May) at 11:35 on 20 April and 9:59 on 17 April before going on to say he felt it was *"A little worrying if you are not getting the calls or voicemails"* and checking if the number he had used was correct [492]. Mr Tooze responded the mid-morning the following day (11 May) stating

> *"Why on every level do you go into an official mode, what is it [you are] trying to prove?*
>
> *I find your emails doctorial [sic. - it is unclear if this meant dictatorial or doctoral] and harassing. To clarify I have not had an answerphone on in 20 years, it has never caused a problem, I have always been highly successful, you would know from my answerphone message says not to leave a message as with all modern phones it shows who was called and therefore I call the person back IF required and important, I cannot understand how you would find that confusing, Julia is a witness to this process working.*
>
> *Your emails are causing me undue stress that as you are aware has a detrimental effect upon my health, you are also putting the company at risk, I will be communicating with the company and this will be via Julia (HR) in copy."*

132. He then proceeded to set out a list of some 26 or so bullet points of matters that he alleged the company and Mr Parker had undertaken over the last three years that had bought about stress and therefore had detrimental effect upon his health. He concluded:-

> *"End result is I am ill and none of the above aids me in any way.*

If you require further job related contact please use email to save any further misunderstanding I have turned off voicemail.

Anything else please speak with Julia who I will write to under separate cover."

133. Mr Tooze accepted that the reason for his initial response namely that he had not got a message was that as a matter of practice he did not check his answerphone messages. He was specifically asked about the comment *"… I call back if required and important …"*. It was put to him that he filtered whom he called back. He accepted he checked his call log to identify who had called and then decided whether to return the call or not stating if it was a customer he always called back. He accepted that on the basis he filtered his calls it followed that he had chosen not to call Mr Parker back. The reference in Mr Tooze's email to communicating with Julia going forward supports that he did not wish to have any contact with Mr Parker.

134. The preceding paragraph is a brief precis of what was a very protracted set of questions. It was only when the detail had been drilled down into and various tangential responses bottomed out that Mr Tooze accepted the actuality. That was but one of many instances of the lengths the Tribunal had to go to, to clarify Mr Tooze's responses to relatively straight forward questions, and where as here, Mr Tooze's portrayal of events at the time of the events (*"I never got a message!")* was inaccurate. Further examples of that are at (235.2 & 313).

135. When the contents of those emails were put to Mr Tooze he explained that the matters that he was complaining about had been going on at that point for some 18 months, they have been causing him such problems that he had been off work for six weeks, could not sleep and what he perceived as DGF's communications with regards to his failure to respond to messages rather than its concern for his welfare was what he described as *"the icing on the cake"*.

136. We find that Mr Parker attempted to contact Mr Tooze on several occasions. We find it is reasonable to conclude the purpose of the last call of 9 May was to check if Mr Tooze was fit to return to work and if so, when, given there was no evidence led before us to suggest that by that stage Mr Tooze had contacted Ms Marsh to update her upon his absence and the difficulties of getting a GP appointment before then. The only other email to her around that time was that at [494] timed at 11:22 on 11 May.

137. We find that Mr Tooze was being selective about when he responded to calls and who from and thus at the time of those events in May 2019 it was not reasonable for him to assert that DGF was not attempting to keep in touch with him. That is because he simply would not know

if that was so, having not responded to those calls. Indeed, on his own account he was in contact with Ms Marsh which suggests that she was keeping in touch with him.

138. Before us Mr Tooze accepted that the email message from Mr Parker was reasonable in those circumstances, albeit based upon the content and tone of the response we find he did not see it is reasonable at the time. We find that Mr Tooze's response both in tone and content was a wholly inappropriate response from a report to a line manager, irrespective of the provocation he suggests underlay that (Mr Tooze having accepted that the email from Mr Parker was reasonable in the circumstances, sought to assert that his treatment over the last 18 months was the cause of that).

139. It appears that one of those matters was Mr Tooze's perception that Mr Cooke failed to deliver on his promise with regards to "… *coaching managers on all aspects of interaction and communication with their teams."* (106) and Mr Neville's failure to *"… ensure Simon reaches out to you accordingly so that this process can commence."*. If that had been so, we find that Mr Tooze should and would have raised those matters either informally or if nothing was done, formally as a grievance but failed to do so.

140. Mr Tooze was, for the reasons we give above, clearly aware of how to raise a grievance (informally or formally) and what it entailed. His failure to do so compounded any issues he by that stage felt about the way he had been treated and his perception of DGF's lack of concern for his welfare in our judgment and led to his reaction becoming ever more pronounced.

141. We find that his comment that he was not prepared to engage with his line manager any further and instead his decision that he would communicate with Ms Marsh together with the content of his email of 11 May shows that he viewed his relationship with Mr Parker as fundamentally broken down as of May 2019. The evidence before us suggests (see for instance our findings on the grievance and appeal from 2018 and Mr Tooze's reluctance to share details of his occupational health report and medical condition with Mr Parker in October 2018) that Mr Tooze's perspective of their working relationship with Mr Parker was extremely poor for some time before that, and thus the contact from Mr Parker to ascertain whether Mr Tooze was returning to work in May was merely the "*final straw*".

142. For reasons we will go on to that point again is in stark contrast to the effect of in his email, where he actively chose to deal with Ms Marsh, not only instead of Mr Parker, but also in preference to anyone else.

143. We return to how DGF sought to address the contents of that email below (170).

Meeting 7 June 2019

144. Mr Tooze complained [LT¶58] about the lack of welfare contact from DGF asserting the first of any meetings was on 7 June 2019 when Julia Marsh organised a "catch up" and also about delays in referring him to OH and also to DGF's IPB insurance provider, L&G.

145. Ms Marsh recorded the contents of that meeting via an email dated 14 June [496]:-

> *"Thanks for meeting up briefly last Friday, 7th June, I hope this week has been better for you.*
>
> *Just to summarise We had a discussion around your ongoing health issues and the continuous pain that affects you.*
>
> *We also talked about the struggle you have in driving much over 10 miles without it having an impact and therefore, perhaps undertaking a National role is no longer practical. In saying that, l am not suggesting at this stage that this means you do not have a role, however, I think it's important to acknowledge the facts and seek to work with you overtime on a solution.*
>
> *I confirmed that you have an appointment on 20th June and are hoping to get a referral in order to get some treatment through your private healthcare. In addition I said I would try and speak to Maitland Medical [DGF's OH provider] to see if there are any quicker interventions from a treatment perspective that might help.*
>
> *We went on to talk about your work. l did confirm that as you are off sick there is no requirement for you to do any work from home and therefore, everything should be handed over. There is just one query, I understand that we still need some handover regarding [a client we shall refer to as AM] so Simon will be in touch to set up a call with you next week just to clear up any loose ends there.*
>
> *In the meantime please let me know if there is anything l have missed etc. and as agreed we'll catch up over the phone next Friday 21st June, 10am."*

146. Mr Tooze makes a general complaint that many of the meetings and discussions that he had with DGF were not formally minuted. DGF's procedures required minutes to be taken of many of the meetings and discussions and provided a standard format for these. Whilst, as we identify below many of the formal meetings were minuted and the minutes provided to Mr Tooze, many of these meetings were informal/catch up meetings and that may go some way to explain why a summary was subsequently provided by email/letter etc. Despite that, when Mr Tooze did not agree their content he took the opportunity to raise that with DGF. For example, in cross examination Mr Tooze accepted Ms Marsh's email of 14 June 2019 save in one respect (see (151)) accurately recorded the elements of the meeting of 7 June.

147. What Mr Tooze did not challenge about that summary of the meeting is whether there was any discussion about him being entitled to IPB or that he had not been offered *the Dean Carter role* the previous year. We find that had either been an issue for him at the time he would have raised them when he responded to Ms Marsh's email later on 14 June [497]. We find that his

stance before us in relation to those matters therefore suggests a view that he did not hold at the time but one he subsequently came to.

148. Before us Mr Tooze described his email to Ms Marsh of 14 June as a *"request for help"*. Having identified Maitland Medical had merely documented and reported back to the business in previous referrals concerning his health issues he took the view that Maitland should have been going further and offering some form of occupational therapy. He specifically asked for

> *"… any other support the business can offer, I am on a waiting list for acupuncture, but, that is 18 weeks and not covered on our medical insurance. I have seen the physio for consultation on the 20th and seen the doctor again on the 24th looking for a referral from this to go to the medical insurance with.*
>
> *The doctor wants the physio first prior to referring me elsewhere, talks of neurosurgeon, the doctor said about possible cervical spondylosis on top of other problems…"*

149. That of course was in response to Ms Marsh's offer to contact Maitland to see if there were quicker treatments available other than going through his private healthcare insurance.

150. Whilst Mr Tooze told us that *"request for help"* was a reference to the rehabilitation under the IPB as we state above he made no reference to IPB or his entitlement to it in his reply to Ms Marsh also of 14 June (see (147)). The first reference we can trace to him asserting his entitlement to the IPB that benefit is on 10 July [505, 513 & 530k] although that in turn is a reference to an earlier discussion. We address that below (184).

151. The exception to Mr Tooze's agreement in cross examination that Ms Marsh's summary was a fair one was the basis for issues 2(a), 6 & 14:-

> "*In/about June 2019, did Ms J March say to the Claimant that he would not be able to return to his role?"*

152. That statement was denied as being made by DGF and Ms Marsh.

153. Mr Tooze was asked by the judge that having accepted the remainder of her summary as being a fair record if he accepted she had not said that. Instead of positively asserting that Miss Marsh had made the statement that Mr Tooze would not be able to return to his role, Mr Tooze instead referred to events occurring around that time supporting the conclusion that he drew about what she had said with.

154. As can be seen from his response of 14 June Mr Tooze made no issue with Miss Marsh's summary of the discussion about the possible impracticability of him undertaking a national role. That suggests to us that Ms Marsh had not said that at the time that is reinforced by her specifically stating *"In saying that, I am not suggesting at this stage that this means you do not have a role, however, I think it's important to acknowledge the facts and seek to work with you overtime on a solution."*. Had she said what is alleged we are satisfied that Mr Tooze would have raised that as an issue, and he did not do so. Accordingly, we find that Ms Marsh did not say what Mr Tooze now alleges and so the basis for the complaints at issues 2(a), 6 & 14 is not made out. We further find that is an example where Mr Tooze has retrospectively identified an issue that he did not raise at the time, despite contemporaneously having raised other issues.

155. To reinforce the point, we identify above concerning Mr Tooze's working relationship with Mr Parker in Mr Tooze's email of 14 June he stated, *"I would rather he didn't call, his approach causes me nothing but stress as reported …"*. That was in the context of the requested handover to Mr Parker concerning DGF's client, that we shall refer to as "AM". We find that *report* related to his complaints about DGF and particularly Mr Parker that we address at (130) following, where Mr Tooze had already made clear he did not wish to have any communication with Mr Parker other than via email (see (132)).

156. That links to issue 2(g), 6 &14:-

> *In / about June 2019 [this was later amended to include Sept and October 2019] did Julia Marsh and Lawrence Wright [originally he was identified as "Mr Walsh"] require C to return his company laptop?*

157. In his commentary to the list of issues that Mr Tooze he supplied with his closing submissions he asserted that he believed whilst Ms Marsh told him to supply information on 7 June 2019 she did not ask him to return the laptop and that instead he was asked to return it in September and October 2019 by Mr Wright. We address this issue below (295).

158. Issue 2(b), 6 & 14:-

> *"In/about June 2019, did Mr S Parker say to colleagues and customers that the Claimant would not be returning?"*

159. The first time this issue appears to have been raised was not in June but at the meeting on 8 October between Mr Wright, Ms Marsh, Mr Tooze and Mr Tooze's work companion (who also happened to be his wife) [590]. We return to that meeting in more detail at (271) but so far as is relevant to this issue what was said then was that:-

"…

LT Said in last meeting I felt you don't want me back, feels even more like this

ST Personally speaking I work here, a few people here waiting for him not to come back. Not directed at you

LW I haven't heard any suggestion during this process that you are not wanted back at work. Try not to listen to rumours.

ST Mikes door always open, not all managers the same, I've heard people say that

LT Why is Simon telling people I'm not coming back (confirmed this came from customers and employees, asked for answers as to why this has happened?)

LW I can't comment on that, as I've never heard that mentioned by Simon or anyone else (But agreed LW would look into this and offer an expl[a]nation)

ST My team are discreet, all this upsets me, been here 26 years, so many people jumping ship, hate to hear from colleagues that Lee isn't coming back

…"

Additions made by Mr Tooze marked in red in meeting minute – these are not agreed by DGF

160. Thus, no detail was given by Mr Tooze in that meeting or the additions he made to the notes about the allegation he was making such that it could be properly investigated. Whilst that note of the October meeting made an allegation about something that was happening (present tense) *"Why is Simon telling people I'm not coming back"* in one of the undated statements Mr Tooze cross referenced in his witness statement [495] he alleged that he *"… was informed by Lisa Thompson station manager Luton that one of her reports Ian Crook was informed by Simon Parker in June 2019 that I would not be returning to work.".*

161. Mr Tooze accepted before us that was at best fourth party hearsay and also indicated that a customer had also told him of that as alluded to in the revision he made to the minute. Mr Tooze told us that Mr Crook who worked at one of DGF's customer sites (known as an "implant"). Mr Tooze stated he did not give the customer's name as that would have breached a confidence but that does not address five points :-

161.1. When was Mr Tooze made aware by Ms Thompson about what Mr Parker had been saying? Was that in June or at some other point?

161.2. The reason for the delay in those points being raised by Mr Tooze between June and October and his use of the present tense in October, if he was aware of them in June.

161.3. Whilst the information Mr Tooze gave us was still lacking as to when and what was said, it was more detailed than that he gave in October.

161.4. Whilst Mr Tooze explained why he did not give the name of the customer, he gave no explanation why he did not give the additional detail that he gave the Tribunal at the meeting in October given on his account he was aware of it at that point, and

161.5. At any level that did not allow DGF to properly investigate those points.

162. Whilst Mr Tooze alleged in his annotations to the meeting note that Mr Wright had agreed to look into those matters, we find that was not agreed and absent the missing detail of names, dates and what was said that was completely absent in the meeting, it is difficult to see how that could be investigated. We find that instead Mr Wright sought to give Mr Tooze assurances that he had heard no such thing and to coach him not to listen to rumours. We find Mr wright was thus trying to be supportive. Absent the detail from Mr Tooze of what was said by whom and when, and answers to the points we make above we find that on balance Mr Tooze has not shown that Mr Parker was spreading rumours as alleged or at all, when that was and thus the factual basis for the issue 2(b), 6 & 14 complaints is not made out.

163. Issue 2(f), 6 & 14

> *"In / about June 2019 (discovered by the Claimant in October 2019, did the Respondent cancel a company car with power assisted steering and automatic gearing which had been ordered for him?"*

That also formed the adjustment contended for at 13(c):-

> *Providing the Claimant with a company car with power assisted steering and/or automatic gearing*

164. In cross examination of Ms Marsh, she told us that in February 2019 she asked Mr Parker to remind Mr Tooze to order the car and provided a script to him for the phone call as the car's ordering had been outstanding since the previous autumn. She told us Mr Tooze had been sent a link to order the vehicle the previous autumn but had not done so. Mr Tooze's account was that he had spoken to Mr Parker's manager, Mr Cooke, who had agreed that he could put that

order on hold for a few months so Mr Tooze could order a Toyota Rav4 which was due to come onto DGF's approved order list (but was not on it at that point). When asked Ms Marsh had no knowledge of that.

165. Whilst he accepted it was not a base model Mr Tooze took issue with Ms Marsh's reference in the correspondence to the vehicle having modifications. Although Mr Tooze accepted that part of the reasons for his choice of that vehicle was that when it became part of DGF's list of approved vehicles, one of the standard options available for him included it being a hybrid, had the benefit of a raised driving position (it was an SUV (see 338)), was an automatic, had adaptive steering (steering assistance at low speeds) and had a lumbar support. No evidence was led by Mr Tooze before us that there was "no prospect" that the other vehicles he could chose from DGF's vehicle list were not capable of alleviating any substantial disadvantage Mr Tooze would have been put to rather he chose to wait for the Rav4 to come onto DGF's approved order list.

166. It is clear from the 2018 grievance that Mr Tooze would have preferred a car allowance rather that a business needs car, or as an alternative to retain the ability to claim mileage at 45p/mile rather than the 12 or 14p/mile he would recover with the business needs car and the tax he would have to pay on that.

167. The car was ordered on 13 March 2019 following the approval of its procurement on 11 March [864 - although we were provided with additional internal records from DGF showing its records for the vehicle].

168. Mr Tooze told us the lead time was normally up to 12 weeks, so he expected it to be delivered in mid-June. He told us he chased the dealer, LEX, several times and was given lots of excuses and so gave up chasing. In October 2019 Mr Tooze told us that the person at LEX who had placed the order, told him she had changed jobs, was now back and was shocked to see his name still on the list. He told us having checked she advised the car was put on hold by DGF in June 2019. Mr Tooze told us this coincided with the date Ms Marsh told Mr Tooze he would not be able to return to his role.

169. Given Mr Tooze told us he did not become aware of what he was told by LEX until October that is not something that could have been operating on his mind about DGF's intentions to him in June 2019. We return to the events of October 2019 at (261) below.

Email chain re grievance and consequent events – mid July 2019

170. Whilst Mr Tooze had not identified his email of 11 May as a grievance Ms Marsh identified that its contents could clearly constitute one. We find that that was a reasonable view for her to take. On 13 July (Appendix 2) [530a] she sought to clarify with him if he wished to pursue that as a grievance stating:-

> *"Before I send an invite I just wanted to be sure we are on the same page. My intention was to cover off the issues you raised in an email back in May as attached. As you know I have mentioned the need to address this at a suitable time. Therefore, on the back of this I was proposing to invite you to a grievance meeting. Can you let me know if you are in agreement with this or whether you think it's something different?"*

171. Mr Tooze accepted before us that was a fair question.

172. There then followed a chain of emails between 14 and 31 July (Appendix 3) [533a-k] in which Ms Marsh amongst other matters stated she intended they meet to address his grievance. Mr Tooze responding on several occasions that he had *"not put a grievance in"* and "*To be honest this is all making me ill"*. Her response (16 July [533h] was *"I'm sorry if you feel this is making you ill, that of course is not our intention. I am just trying to work with you to resolve your issues."*. Mr Tooze responded ½ hour later stating amongst other matters:-

> *"This is getting slightly out of hand …*
> …
> *You are playing a game of words Julia …" [533g].*

173. Despite our findings that by May 2019 Mr Tooze actively chose to deal with Ms Marsh not only instead of Mr Parker, but also in preference to anyone else (142) the emails Mr Tooze was sending to Ms Marsh by July suggests that from his perspective at least relations between him and Ms Marsh were starting to fray. We address the deterioration thereafter and having made various complaints about Ms Marsh in the interim, by 5 March 2020 Mr Tooze clearly expressed that view in an email to Mr Sandison [733-34] (see (381) following).

174. Between 10 & 15 July a dispute also developed about Mr Tooze's sick pay not including call out payments [527-30]. DGF's position was that this did not form part of Mr Tooze's basic salary. Mr Tooze regarded the way that was paid as a payment done *"to hide it from head office"* and DGF's failure to pay it as *"Fraudulent"* and that he would be instructing a solicitor. We return to this at ((205) following).

175. By the start of the chain of emails between 14 and 31 July (Appendix 3) [533a-k] an OH referral had not been made. Whilst that did not form one of the issues before us, Mr Tooze complained about that delay as support for his suggestion that a decision was made to terminate his employment at an early stage. He also argued that failure as part of issue 2(d), 6 & 14:-

> *In respect of each of the Claimant's periods of absence in 2019, did the Respondent fail to keep in touch with the Claimant in respect of relevant developments at work including but not limited to staff appreciation day, the Christmas party and allowance)?*

176. On the 17 July Mr Wright wrote to Mr Tooze stating that as he had been off sick for 3 months he was inviting him to a meeting on 28 August to discuss how he was feeling and to get an update on where Mr Tooze was with his various treatment interventions [531]. We find DGF was thus attempting to keep in touch with Mr Tooze.

177. For the reasons we give above Mr Parker, Mr Tooze's manager, had tried to contact him at least twice during April and on 9 May by telephone before he emailed Mr Tooze on 10 May (see (131)). Mr Tooze did not accept/return his calls. We find that Mr Tooze wished to keep contact with Mr Parker to a minimum at that point because of what we find were his negative feelings to Mr Parker and the stress it was causing Mr Tooze. By 10 May Mr Tooze asserted he had already been in contact with Ms Marsh. Whilst we found (see (136)) there was no direct evidence he had informed her of his difficulties obtaining a MED3 from his GP before his absence expired, it was likely he had been in contact with her before then.

178. The email discussion between Mr Tooze and Ms Marsh after their meeting on 7 June suggests that Mr Tooze was sceptical about the help OH could provide so we find Maitland's involvement was discussed by them (see (139)). We were not told the outcome of Ms Marsh's suggestion to speak to Maitland, but subsequent events suggest that Ms Marsh believed that it was agreed the referral to Maitland would be on hold until Mr Tooze's consultant had advised. When Mr Tooze chased her for her an outcome of her discussions with Maitland on 11 July [530i] she replied to that effect [530h-i] and within a few days the referral to OH was made.

179. That being so we find whilst there was a delay in a referral being made to OH that was because Mr Tooze was sceptical about the benefits it might give rise to, he told us that initially investigations were ongoing under the care of his GP, and these took some time to formulate the problem. That supports Ms Marsh's assertion that she believed it had been agreed the referral to OH be delayed until his consultant had reported, and the health issue identified. When it became apparent on 11 July Mr Tooze wanted DGF to refer him to OH that was done

within a few days (16 July 2019) an OH referral was made [533i & 533l-n] (the latter was a document added on Day 10 at the Tribunal's request)].

180. We find whilst there was a delay that was because of those factors and not through any intent on DGF's part to cause Mr Tooze harm. We find in the circumstances that whilst that was unfortunate, there were good reasons for that delay.

24 July 2019 OH Report

181. The OH report was received just over week after that (24 July 2019) [893] and recommended that a radically different alternative role should be considered for the Claimant, that a local role would not suffice and that adjustments also be made including a dedicated workstation [895]:-.

> *"… medi[c]al treatments are not likely to improve his situation so he can return to work.*
>
> *… even when he is driving just a short distance the vibrations and movement of the car does cause him to have pain and symptoms in his hands – if you like it appears to trigger more of these symptoms. …*
>
> *Therefore it seems to me that a more useful way forward would be to more radically look at what he is doing for the Company rather than to consider adjustments in his current role.*
>
> *… I think it is unlikely he is going to give regular and effective service simply by limiting his geographical range, by allowing him longer time and a different performance rate, in terms of entering data, or even by experimenting with voice to text, which is not very helpful with data entry.*
>
> *If it were possible for him to have a different sort of role where he is looking at policies, writing position statements, giving more strategic advice to management, researching into different technical options – in this way he could read, he could write and by writing he could use voice to text techniques.*
>
> *Lee is somebody who ought to have a dedicated workstation with the chair, desk, keyboard and monitor all optimised. It is important for there to be an anatomical position at a workstation in the event that he will have to do some keyboard work and some mouse work even if he is using voice to text technology.*
>
> *Therefore my suggestion is that you look at a radical different type of role for Lee and in that way he is likely to return to work sooner, he will need training on voice to text technologies and then I can see him giving regular and effective service.*
>
> *Given he has had optimum medical care, he has been absent long term – nearly 4 months and he has had the problem for more than 7 years I do not think that minor adjustments are going to help in his current role.*

> … *From what he describes he certainly has an impairment of normal day to day activities, it has been long term and likely to be so, so therefore disability legislation is likely to apply to him as well and that also is a duty for an organisation to consider adjustments to his work.*

182. Three subsequent OH reports were received that we return to in due course:-

182.1. 2 December 2019 [630], ((311) following)

182.2. 8 January 2020 [906] ((338) following) and

182.3. 26 February 2020 [727] ((380) following).

IPB July 2019

183. Issue 2(h), 6 &14 concerned:-

> *"In June / July 2019, did Ms March and/or Mr N Sandison wrongly inform the Claimant that he did not have income protection benefit and/or that it did not extend to rehabilitation?*

184. Ms Marsh wrote to Mr Tooze at 12:26 on 10 July [505, 513 & 530k] correcting a mistake she had made in an earlier telephone call they had had where she had incorrectly advised him that he was not eligible for the IPB benefit (see (150)).

185. Later on that day (10 July) Mr Tooze replied to Ms Marsh thanking her for the confirmation, stating that under the policy the insurer should have been notified of his absence after 4 weeks and he had been asking about physiotherapy and support from DGF for months, and that might have a financial impact upon him as DGF had delayed the process by 2 ½ months.

186. Ms Marsh responded on 11 July [514]

> *"Just for clarity, we are not obliged to submit a claim after 4 weeks absence as there is a 26 week deferred period from start of the absence for any loss of income claim i.e. Income Protection Benefit. We do sometimes refer a case to L&G after 4 weeks absence in the hope that L&G will be able to work with the employee to get them back to work before any loss of income claim becomes necessary, however, based on conversations and appointments you were arranging there was no assumption 4 weeks in that you would be off beyond your period of CSP. At the start of your absence on 9th April 2019, you had 25 weeks full company sick pay which expires on 30th September, 2019 so there would be no loss of income until this date. From 1st October you would then be on statutory sick pay only until 24th October, meaning from 25th October you would be on nil pay. Now that we are aware you are signed off for a further 2 months we will of course process an application.*

Regarding support from DHL, when we met briefly on 7th June, 2019 for a scheduled meeting that you had to leave early from, you told me that you had an appointment on 20th June, 2019 where you were hoping to get a referral that would allow you to pursue some additional support through the Company Private Health Care scheme. In addition, we did discuss involving Maitland Medical for some further advice depending on what came out of your referral."

187. Before responding on 11 July Ms Marsh had checked the position with Karen Watson, the person responsible at DGF for liaising with L&G [504]. We find that the content of her email demonstrates she wanted to check how such claims were addressed to ensure no further errors were made. That also supports the suggestion that IPB (and applications for it) were not something she was familiar with.

188. That email also formed part of a longer exchange of emails Mr Tooze introduced as document 3.1.2.7 [530a-l]. Mr Tooze took issue with a number of elements of her response not least pointing out that she had been late for their meeting on 7 June, and he had to be elsewhere causing it to be *brief*. She responded stating

"I do think to point out that l was late for our meeting when I had driven over 3 hours to see you as close to your home as possible to avoid you driving any distance. is a bit unreasonable. As you know I was around 10 minutes late but you had failed to inform me until i messaged you about the traffic that afternoon that you would need to leave at 3.25pm.

Putting that to one side. I feel there is little point going backwards and forwards on email about the various points you raise. … I think the best course of action is to arrange a meeting with you. I had already intimated to you yesterday that a date had been pencilled in for 30th July to come and see you. However, you informed me that you will be on holiday that week. …".

189. She asked him to provide details of his holiday and /or any appointments over the next month so she could find a suitable date and she would respond separately to a question he raised about call out pay. Mr Tooze reverted stating

"You opened it by saying I had to leave early, ***let's stick to facts not petty timekeeping its irrelevant, you were coming to the area anyway,*** *as I said this is only adding to the stress."*

[Our emphasis]

before making a suggestion of meeting in the first week in August. Ms Marsh responded stating

"It would be helpful if you can confirm the dates you are away as a starting point given the date I did suggest isn't convenient.

There is no intention to add to your stress. I am just trying to work with you on resolving any issues you have." [517-18]

190. The following day Friday 12 July 2019 Mr Tooze complained via email to Mr Young and Mr Sandison under the subject *Income Protection Benefit* [523-4 & 530F]

"… There are several points of which I am not happy in regard to the support I have received to date. Following various conversation[s], I would describe as DGF working towards an expectation that I will not return to work rather than supporting me, something I have been asking for[, for] many months.

One fundamental area is that Julia says that she was told I do not have income protection, obviously I do and this has many other benefits that DGF could have started in giving me the support needed after 6 weeks. Again, something I have been asking for. This has now been delayed by 8 weeks, I would like to understand how in an organisation where employees are so important that an oversight like this has taken place. Only having recently gone through my own paperwork (received previously from Karen Watson) did I realise that I am covered for income protection which highlight the benefits they can assist with which will help, hopefully, with my recovery. …"

191. Mr Young replied at 5:45 pm that day (12th) copying in Mr Sandison [523]:-

"Lee, I am sure [N]ick will come back on these points. From my perspective we need you back when you are fit and well to drive your customers and projects forward. You have been of[f] a while now and your presence is missed. We have a lot of topics where your experience and expertise is beneficial for us. …"

192. We refer above (150) to Mr Tooze's assertion before us that the IPB benefit also provided for rehabilitation and he had been seeking that for months. Save for what he described as his general request for help we can find no specific reference to him wishing to utilise the IPB scheme for rehabilitation before the telephone discussion referred to on 10 July. Neither party detailed when that telephone call was. As we state (150) Mr Tooze had not complained about IPB when correcting the note of their meeting on 7 June. We find given the speed of most replies from both parties that call would have been shortly before that email exchange.

193. It was accepted by DGF that Ms Marsh wrongly informed Mr Tooze he did not have income protection benefit; but not that he had been told that the IPB policy did not extend to rehabilitation.

194. Despite Ms Marsh's apology Mr Tooze did not accept that and had complained about her to not only her line manager (as would be required by a grievance) but also to DGF's chief executive, Mr Young

195. Whilst Mr Tooze alleged that had had IPB rehabilitation been utilised earlier, his absence would have been shorter, he also commended the way his GP had addressed matters. Mr Tooze had been referred to a number of consultants and (physio)therapists and his private (DGF) medical insurance had been utilised to fund that. Whilst Mr Tooze alleged there were the inherent delays as a result of the NHS system he could not point us to where these were. In contrast the OH report of 24 July 2019 [895] that we address at (181) identified his care was optimum at that time.

196. We find that had rehabilitation been utilised under the IPB scheme there is no reason to believe that the same course of investigations would not have needed to be undertaken in order to come to the same conclusions that Mr Tooze's NHS physicians and private health medical providers came to or given the referral to IPB would at best have only have been required to have been made 4 weeks after his absence commenced that that process would have led to a quicker result. Indeed, based on what Mr Tooze told us and this was supported in the later OH reports, essentially he "struck lucky" finding a physiotherapist who against expectations, was able to assist/resolve with many of the effects of his impairments. Accordingly, we find the evidence before us does not support an argument that the application for IPB benefits would have expedited his treatment or care over and above that Mr Tooze actually received and/or that he suffered less favourable treatment than a non-disabled person would have encountered in the circumstances or for that matter that he was treated unfavourably

197. An application for IPB was made by DGF for IPB on Mr Tooze's behalf on 17 July 2019 [525-532]. That was 7 days after Ms Marsh acknowledged her error. The application was acknowledged the following day [539-40].

198. Mr Tooze was subsequently assessed by telephone by L&G's rehabilitation team. On 9 August L&G indicated to DGF that they were awaiting a completed member's statement from Mr Tooze, and they had reissued it to him the previous day [542] we did not have a copy of that before us as that was send direct by Mr Tooze to L&G.

199. We return below (451) to a later allegation concerning DGF's failure to make an application for IPB in July 2020 [832-840].

200. It was put to Mr Tooze that Ms Marsh giving him incorrect information was an innocent mistake in as much as the benefit was rare amongst white collar staff (this was a benefit that had ceased to be offered to new joiners for some time) and she had been misinformed by the relevant department. For context Ms Marsh had been employed by DGF for 14 months at that point and thus was not employed at the time that the benefit was routinely offered. He responded that he felt it may not have been a coincidence given other events in mid June and that following the end of his sick pay he believed he would be managed out of the business. In contrast with his allegation concerning Ms Marsh misleading OH (see (286-290)) he was not sure in relation to this complaint if Ms Marsh's purpose was to mislead.

201. When Mr Tooze was asked whether he accepted there was an innocent explanation for Ms Marsh mis-informing him about IPB on the basis it was by then a rare benefit he explained that *"part of me feels it may not have been coincidence with other things in mid June and DGF were going to pay out my sick pay and I would be gone at the end of it"* and that he was not sure if she was purposefully misleading him but when he found the documents setting out his entitlement, the IPB application was progressed.

202. The additional matters he mentioned in the context of being *managed out of the business* were Mr Parker telling customers and colleagues he was not returning (see (160-162)) and the cancellation/placing on hold of the "business needs car" he had ordered (see (261-269)). He dated both matters to June 2019 although the first time they were raised by him was October 2019. In our judgment Mr Tooze was not only conflating issues that arose with different colleagues but in relation to the car something he had only become aware of in September/October and thus if that formed part of his thinking, that could only have been from October.

203. It was also put to Mr Tooze that if as he suggested DGF had not wanted him back and the IPB policy allowed the business to send him off with a pay out, it was in the business' interests to go down that route? Mr Tooze stated it was a very good question, he couldn't answer it as he was not the one making the decision, but he accepted there was some logic to it.

204. Given Mr Tooze did not raise his entitlement to IPB until July, it is unsurprising given it was a rare benefit that Ms Marsh was unaware of it. We find that was an innocent mistake on her part given her relatively short period of employment with DGF, the rarity of that entitlement and that when she looked into it, she apologised and remedied the error.

August 2019 grievance

205. Issue 2(c)(i), 6 & 14 refers to

> *Did R fail to deal with / determine C's grievance of 25 August 2019 (Case 2304743-19 deduction of salary exchange with Michael Young)?*

206. Contrary to how that is identified in the list of issues by Mr Tooze the email containing the grievance was actually that of 23 August 2019 [557]. It was made to Mr Young. Having raised a series of historic matters it then referenced the call out payments, the discussion with Ms Marsh we reference at (174) and that having been paid these as custom and practice he had become reliant upon them. It essentially raised concerns with his pay that had been addressed in his grievance and the appeal the year before. He concluded *"I am advised legally to raise this as a grievance with the company prior to taking it legal."*.

207. Mr Young responded early on 25 August [556] stating

> *"It's a shame and I am sorry to see your-relationship with the business deteriorate much as it had in looking at this. You request that you do not authorise the sharing or forwarding of this email which limits my ability to objectively provide a reply.*
>
> *Therefore I suggest that you do take this to the grievance and legal stages then we can deal with this in a transparent manner."*

208. We find that, whilst not eloquently put, Mr Young was instructing Mr Tooze to deal with that as a grievance using DGF's grievance procedure and given the reference to relations breaking down, that is to *legal routes,* to allow the complaint to be addressed formally. Whilst it was not stated in that email it is worth reminding ourselves that the law provides (212) that before bringing a Tribunal claim employees should first exhaust any internal grievance procedure as well as providing for ACAS conciliation.

209. Mr Tooze responded on 27 August:-

> *"I don[']t see it that my relationship with the business is deteriorating, I see it that the way the business is treating me has deteriorated showing lack of duty of care and equality.*
>
> *If it requires me to authorise the sharing in order for you to deal with matters as a formal grievance as you chose, then please accept this as my authority to share."*

210. We find that Mr Tooze believed by giving that authorisation on 27 August that he was initiating the grievance procedure. Mr Young was not the proper person for the grievance to be sent to as his email hints at *"I suggest that you do take this to the grievance and legal stages then we can deal with this in a transparent manner."* and that he was suggesting that Mr Tooze should follow the proper grievance process (and thereafter any legal process).

211. Mr Young could have referred that to the appropriate person to deal with. So too could Mr Tooze. We can find no trace of either party actioning that as a grievance and instead on 20 September, 24 days after his last email to Mr Young, Mr Tooze started ACAS conciliation (it ended on 11 October 2019). He thereafter issued an ET claim on 29 October 2019. The subject of that complaint was addressed by Employment Judge Beck on 27 and 28 April 2021 [267 following] where in summary on the substantive point before us

> *53. As I have found the claimant was not entitled to be paid on call payments if no such on call work was carried out, then when he was off work and not carrying out on call duties, no on call payments were payable to him. This would apply to any payments claimed from June 2019 until the termination of employment. The respondent's failure to pay such sums to the claimant was not a deduction from wages under section 13(1) Employment Rights Act (1996).*

212. Had an issue arisen about the failure to pursue a grievance by either party that is something that should have been brought forward at the time those proceedings were commenced on the basis of the general rule that "*where a given matter becomes the subject of litigation … "* the Court or Tribunal "*… requires the parties to that litigation to bring forward their whole case, …"* ("*the rule in Henderson's case"* [91]). No explanation was advanced by Mr Tooze why the claim now made was not made in the earlier proceedings and the rule in Henderson's case should not apply. In any event due to the Tribunal's obligation to consider an in/decrease in any award as a result of a failure to raise or address a grievance pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") any such complaint was a matter that should or ought to have been addressed by the Beck Tribunal.

213. As we say that grievance related at least in part to historic complaints that had been the subject of the 2018 grievance and appeal.

214. The ACAS guide on grievances and discipline at work points out that one of the purposes of a grievance process is to resolve problems before they can develop into major difficulties for all concerned. Once a grievance has been raised and addressed the parties either need to move on

[91] *Henderson v Henderson (1843) 3 Hare 100 Wigram V-C at p114-115*

or to take some form of action such as resigning or seeking legal redress. One of the principal purposes of a grievance process is to attempt to prevent parties ruminating on matters without them being addressed and thereby giving rise to the possibility that they view subsequent events and their treatment through the perspective of the sense of grievance they have. We find in his grievance of 23 August Mr Tooze raised matters that had been raised the year before, that he still felt a sense of injustice about the outcome and for the reasons we will go on to, this continued to influence the way he perceived matters going forward.

The lead up to and meetings on 4 & 16 September

215. Mr Wright (who been employed by DGF since July 2018) told us [LW¶3] he was asked in June 2019 by Ms Marsh to provide support to Mr Tooze.

216. The correspondence indicates that during from 14 – 31 July [533a-k] Ms Marsh attempted to arrange a meeting between her, Mr Wright, Mr Tooze and his companion in July, August and then September to discuss a number of matters. They appear to have included her concerns about what she thought was a grievance from him, his sickness absence, the L&G IPB benefit, the contents of the OH report and alternative roles. That was confounded due to the non availability of attendees.

217. There was thus ongoing contact between Ms Marsh and Mr Tooze over the summer of 2019 as the emails we refer to above evidence.

218. Ms Watson, who to repeat was the person responsible at DGF for liaising with L&G, emailed Ms Marsh on 3 September [561] asking to be updated on the outcome of the discussions with Mr Tooze regarding alternative roles so she could feed the situation back to L&G.

219. Mr Wright met Mr Tooze, on 4 September. It is unclear if that was in person or via other means such as Skype. At that meeting the contents of the July 2019 OH report and the need to look at a different role were discussed. The discussion is recorded in a letter of 12 September [564 (of which we had only the first page before us)] which also recorded that one of the outcomes of the meeting on 4 September was that Mr Wright would look to see if alternative roles for Mr Tooze were available and they would then meet again.

220. By a separate email of 12 September Mr Tooze was invited to attend a skype call on 16 September to discuss a different role that had been identified [563a]. The vacancy identified was at Starley Way and for an "Operations & Customer Service Agent". Details of the role were attached [563d-e]. Mr Wright [¶5] told us the role was an office-based role so did not need to involve any driving which had been a concern for Mr Tooze.

221. That further meeting took place on 16 September. Mr Tooze was accompanied by Mr McCaffrey at both meetings. Ms Marsh and Mr Wright were also present at both.

222. Again, formal minutes of 12 September meeting were not before us, but Ms Marsh wrote to Mr Tooze on 24 September 2019 confirming the matters discussed [572 (although the second page has been incorrectly inserted as that appears to duplicate the second page of 21 December 2019 at [648]). They included so far as we can ascertain:-

222.1. adjustments were discussed to assist him to fulfil that role including the use of voice to text technology, increased breaks and a desk but the role was discounted on the basis of the compatibility of voice to text with the various programmes Mr Tooze used day to day, the volume of manual data input was not something he would be able to maintain and because he worked in an open plan office. An issue also arose as to the pay grade and we return to that below (286),

222.2. the viability of a role focussed on policy writing and project planning although DGF did not have any vacancies across these roles at that time, and

222.3. a reference to the update sought by L&G that we refer to at (218).

223. Ms Marsh's letter recorded that L&G were informed of the result straight after that meeting. [572].

224. Mr Tooze told us that at that meeting it was agreed that the Operations & Customer Service Agent role was not a suitable role because it did not satisfy the requirements of the OH report of 24 July because that amongst other matters had recommended the use of voice to text software which would not work in the open plan office in which he worked. The respondent asserts there were no other suitable vacancies at the time.

225. Mr Tooze subsequently complained that when Ms Marsh stated in a subsequent occupational health referral that part of the rationale for rejection of that role was because it was at a lower grade, it was a lie as that had formed no part of his rationale.

226. Whilst there was no reference to this in the documents we were taken to Mr Sandison told us [¶7] that on 20 September he informed Mr Tooze that his sick pay would run out on 30 September. As we state at (186) Mr Tooze had already been informed of that by Ms Marsh on 10 July.

227. On 26 September [575] Mr Tooze responded disagreeing contents of parts of Ms Marsh's email. The witnesses were not taken to the detail of those challenges at any length. Ms Marsh in turn responded stating she was sorry Mr Tooze disagreed the contents of her summary and that his comments were noted. Given Mr Tooze again raised issues with those minutes at that point, we find that if he had had any specific issues with DGF's summaries of meetings he would have raised them.

228. The adjustment argued at issue 13(d), 6 & 14 was

> *Informing the Claimant of, considering the Claimant for or appointing the Claimant to a suitable alternative role including a role at a fixed location which did not require driving, for example,*
>
> *(i) The customer key account manager role available in the Birmingham office in/about the Autumn of 2018 / January 2019*
>
> *(ii) The export manager role available in the Birmingham office in / or about July / August 2019.*

229. A linked issue was 2(i), 6 & 14

> *Did R prevent C from returning to work by failing to make the reasonable adjustments set out below and/or did R fail to inform C of, consider C for, or appoint C to an alternative role?*

We address the adjustments elements of that issue at (117) above.

230. We attempted to drill down into those various complaints at various times throughout the trial. At one point it appeared Mr Tooze was alleging there were three roles that he should have been considered for rather than the two in issue 13(d). He referred us to his witness statement:-

> *38. The Respondents failed to follow the guidelines of Occupational Health in 2016 even when a job became available locally do the same job role they overlooked the Claimant and gave the job to another person, when later questioned they said it was too low a pay grade so we never considered you, although later they offered the claimant a position in the same office at a much lower pay grade even though this job role meant more keyboard work and in an open office where Voice to text technology recommended by Occupational Health could not be used.*

231. In our judgment that makes clear (as does the list of issues) that only two alternative roles were being argued. The first of those roles is that identified in [LT¶38] and we have addressed that and issue 13(d)(i) at (117) above. As to the second we find that was the role discussed at the meeting on 16 September which Mr Tooze accepted was not a suitable role for him.

232. At [LT¶57] Mr Tooze referred us to [116] which we address at (117) following above, [572-3] (see (190) following above), [523-4] being the summary of the meeting on 16 September (see (222) above) and an advert for a further role being an Air Freight (or Export) Manager role the opening date for which appeared to be 21 August and closing date 30 August 2019 [554-555]. The latter was an extract from DGF's vacancy site, "Jobwatch"; something Mr Tooze told us at (126) he never used. Despite that assertion the extract [554-555] appears to be an email sent by him to someone unknown on 23 August 2019. That email was dated the day before the OH report was dated and was thus before the OH report was received by DGF.

233. The extract [554-555] was not put to the witnesses nor were they asked when the OH report of 24 August was received by DGF (and thus whether that vacancy was still open when the job search was conducted).

234. We find Mr Wright did not search for vacant roles until some time between 4 and 12 September and that the Air Freight (or Export) Manager role had closed for applications by that time.

235. However, two highly significant matters arise from that:-

235.1. Mr Tooze was aware of that Air Freight (or Export) Manager role whilst it was open and did not apply for it nor mention it in the meetings on 4 & 16 September, and

235.2. For the reasons we address at (301) and whilst he was not under oath at the time Mr Tooze repeatedly asserted in the context of putting his case to a witness that he had never been on *Jobwatch* and had never been told how to access it. Given he relied upon an email from his account identifying such a job without providing an explanation for that we find that assertion was patently untrue.

Employee opinion survey

236. We heard each year that DGF conducted an employee opinion survey. Mrs Turner told us this was conducted in September/October and the results were broken down, so managers got a view how employees in the organisation were feeling. In latter years staff were sent an automated link to the allow them to complete the survey.

237. Mr Tooze told us those results would be reported by groups of as little as 10 or so staff and thus this was not as confidential as DGF suggested and put to Mr Wright that managers encouraged staff not to speak out in surveys because it reflected badly on management and was

linked to their bonuses. Mr Wright told us the survey was anonymous and in his view participation and honesty were encouraged.

238. Mr Tooze complains that he was not sent this in 2019 and asked Mr Sandison why this was blocked. Mr Sandison told us that it was DGF's active practice that all staff on long term sick were removed from the list of staff to whom the link would be sent by an employee in "compensation and benefits" (payroll) Mandeep Atwal.

239. We find that whilst Mr Tooze was not sent the survey in 2019 that was because he, like any other member of staff on long term absence (whether disabled or not), would not have been included in the survey.

The IPB Decision

240. The application for IPB was determined by the provider, Legal and General ("L&G"), on Tuesday 1 October 2019. L&G rejected the application [576-81]:-

> *We have now made our decision to decline Lee's claim as he does not meet the suited occupation definition. This means that for the claim to be valid, we would need sufficient evidence to confirm that Lee is unfit to carry out any occupation that is suited to his training, education and experience. We note from the evidence we have obtained that with the relevant adjustments in an alternative role Lee would be fit to work.*

241. We set out the definition of *suited occupation* at (99).

242. Mr Tooze was informed by DGF that his application for IPB had been rejected by L&G the following day (2 October) [582-4]. He responded to Ms Marsh later that day [582]

> *"Received and read through, I understand their viewpoint.*
>
> *What I suggest is on the basis of the outcome of the physio and her prognosis, I go to the doctors and get a fit for work certificate with limitations as he advises and request that DHL support me through the rehabilitation period.*
>
> *I have spoken to ACAS who said that DHL should be making and supporting adjustments to my current role, I feel with this and the treatment by the end of the year I will hopefully be a position to resume my role to meet my contracted hours.*
>
> *When we meet next week we can discuss the finer details, I have some thoughts of my own.*

As I said on the call I have had some amazing results through the physio sessions to date and her opinion is that she will sort [a lot] of the issues, fir sure it's good to be sleeping, it's a shame this didn[']t come sooner, but, we are where we are.

Thanks for the support, I will let you know the outcome from the doctors."

243. We find that at that point Mr Tooze considered Ms Marsh was being supportive of him.

244. The last of the sickness absence forms ("MED3(s)") that we refer to at (128) was dated 29 August. It expired on 28 October 2019 [560].

245. On 3 October Mr Tooze's GP assessed him by telephone and certified him as fit to return to work between 3 October to 2 December 2019 subject to adjustments. The MED3 identified he would benefit from amended duties, altered hours and workplace adaptations [589]. The MED3 included the following narrative:-

"Ongoing physiotherapy which appears to be helping. For work to please support return to work, but will be appropriate to modify working roles (sic.). This includes limiting driving requirements and data entry roles. Planning on return to work from Monday, 7 October 2019"

(our emphasis)

246. That narrative was confusing in two respects:-

246.1. save for making clear that modifications to his working role were required, the section we emphasise makes no sense, and

246.2. the planned date of return to work (7 October 2019) was at odds with the date stated in the fitness certificate (3 October 2019).

247. Those inconsistencies would not have been apparent at the time because the MED3 had been neither collected from Mr Tooze's GP nor handed to DGF. Thus, Ms Marsh merely had to act on what Mr Tooze had told her.

248. Helpfully the second element of that potential confusion, was clarified by Mr Tooze himself in an email he sent to Ms Marsh, copied to Mr Wright at 14:24 on Friday 4 October [589d]:-

"Hi Julia,

Spoke with the doctor who had already discussed the fit for work certificate, he supports the return on the basis of the results to date from the physio and the requested support from DHL he has issued a fit for work with some limitations for Monday 7th.

I will collect this on Monday, also had physio and have to retrieve my laptop, but, it will be back in the business from Monday.

I have some question around L&G to discuss.

I'll work from home as you recommended previously until we meet and plan the way forward.

…"

249. That was part of a larger email chain [589a-h] that also formed Appendix 6 and stretched between 1 and 7 October 2019.

250. Whilst it was not for Mr Tooze to unilaterally decide if he would be working from home or not, we find that was a clear acknowledgement on his part that until the issue of adjustments had been resolved DGF would take the view that he would not be in the office and that that was acceptable to him, at least in the short term.

251. The GP's reference to benefits of the physiotherapy aside, chronologically that "*fit note*" was issued three days after his full contractual sick pay expired on 30 September, two days after he had been notified his IPB claim had been rejected by L&G and approximately four weeks before his earlier sicknote of 29 August was due to expire.

252. We find Mr Tooze's fitness to work came as a surprise to Miss Marsh who replied just over three hours later indicating [589c]:-

"… it is great to hear that you suddenly feel so much better given your symptoms to date. You have been off work for a very long period of time, so I am somewhat surprised at such a sudden improvement-albeit very good news. …"

253. Ms Marsh went on to refer the appointment with Mr Tooze's GP having been a telephone appointment and that he was to provide a fit note with some limitations from Monday 7 October based on the results to date from Mr Tooze's physiotherapist. The MED3 had thus not been seen at that point. Ms Marsh went on to indicate that given the very sudden nature of this recovery that she considered that DGF needed to be very careful about the way in which he returned to work, the duties he performed on his return (specifically the amount of driving he did) so they did not "*aggravate your condition — we wouldn't want to damage your recovery"*. She also referred to the IPB claim based on his being *"unable to work due to incapacity"* having still been outstanding as late as earlier that week. She went on suggest they met on Tuesday, 8 October at 3 pm and that he take holiday until their meeting.

254. That careful approach to his return was in our view warranted. The subsequent OH report dated 2 December (see (311) following) demonstrated that; Mr Tooze's improvement may have arisen because he was off work and thus had not been subjected to triggers. That did not mean his medical problems had been resolved and thus caution was required.

255. In his reply of Sunday 6 October [589b-c – this forms part of Appendix 6 589a-h] Mr Tooze did not agree to take holiday until they met and made a number of comments in response to those of Ms Marsh's which included:-

> *"Hi Julia,*
>
> *… I will only discusses matters face-to-face with people I am not discussing by dialling, also, I expect meeting notes to be timely, agreed and signed off by all parties, no more of the past ways.*
>
> *Dear Nicholas,*
>
> *my reply to your sarcastic and intimidating messages below, I actually feel bullied by you and slightly perplexed by your tactics.*
>
> *I have always felt that the business had rip me off, he seemed to be disappointed of my return rather than embracing it, after all I had been a loyal employee for over 26 years, I certainly hope this is not the case."*
>
> *[our emphasis]*

and in an annotation to Miss Marsh's email of the 4th [589c]:-

> *"... I would question why Simon has been telling customers and employees that I am not returning to work since June?*
>
> *If the company feels they want to protect themselves rule the medical profession's decision to allow me to return to work then I suggest that DHL invoked garden leave until they are comfortable with the situation, I understand you need to look after me."*

256. That response again supports that Mr Tooze accepted DGF had a genuine concern for his welfare that he was agreeable to being placed on garden leave at least in the short term at that point, rather than being asked to take holiday.

257. On 7 October Ms Marsh responded to Mr Tooze's letter of 6th indicating that having been told that given he would be collecting a MED3 with limitations, despite his sick pay having been

exhausted he would be paid sick pay for 7 and 8 October [589a]. That was an oblique reference to their meeting scheduled for 8 October which she stated she and Mr Wright would be attending in person. At the time that decision was made she had not seen that sick note.

258. The two references from Ms Marsh to the suddenness of the change in position were in our judgment unnecessary, one would have sufficed to provide the explanation an employee legitimately would have required as the basis for DGF's stance. DGF's response both in substance and tone reignited Mr Tooze's negative feelings to DGF and thereafter those negative feelings extended to Ms Marsh and Mr Sandison.

259. That reignition of those feelings resulted in a wholly unacceptable response from Mr Tooze including the patronising tone about the way matters should be progressed going forward and also a number of wholly unacceptable and, based on what was before us, unwarranted, unjustified and seemingly out of context comments (identified by our emphasis) directed to Mr Sandison.

260. Mr Wright, Ms Marsh and Mr Tooze subsequently met on 8 October (271 following) but before we turn to the contents of the meeting on 8 October we first address another matter.

Car

261. Returning now to issue 2(f), 6 & 14 (see (163-169))

> *"In / about June 2019 (discovered by the Claimant in October 2019), did the Respondent cancel a company car with power assisted steering and automatic gearing which had been ordered for him?"*

And adjustment 13(c):-

> *Providing the Claimant with a company car with power assisted steering and/or automatic gearing*

262. Ms Marsh told us that Mr Tooze took delivery of the car on 8 October 2019 [JM¶10]. It was put to Mr Tooze the car was not cancelled in June because if it had been it would not have been able to be supplied when he chased it up in October (because given what he told us was the lead time if he had re-instated the order in October it would taken up 12 weeks from then for it to be delivered and it could not have been released virtually straight away as it was). He stated that was not what he had been told and instead suggested that DGF had not cancelled the car but cancelled (that is to say blocked) the release of the car to him so they did not have to pay the lease on the vehicle. It was suggested by DGF it was not delivered because Mr Tooze was

on sick leave in June. Whilst he did not accept that, he did acknowledge that was because he was on sick leave, and it was a business needs car there were tax implications for him.

263. We find that the vehicle's almost immediate delivery in October is something that could not have occurred (due to the lead times) if it had been "cancelled" or "put on hold".

264. Whilst his contact at LEX told him in October the vehicle had been put on hold in June there was no evidence that was so. We ordered from DGF to supply its records and they include no record to suggest the vehicle was placed on hold. There was no hard evidence DGF rescinded or put on hold the order.

265. Mr Tooze told us (168) he had been chasing the dealer, LEX, had got nowhere and had given up. He did not expressly state when he gave up chasing. Given the lead time for delivery was mid June, we find on balance that he would not have started calling LEX until shortly before mid June and would not have given up chasing for several weeks taking that until early-mid July. If the vehicle been put on hold in June by DGF, we find based on his account of chasing LEX it is more likely than not that Mr Tooze would have discovered that then. He did not.

266. We find on balance that the delay lay at the door of a breakdown in communications. There is no evidence before us that either Mr Tooze or DGF had been contacted by LEX to say the vehicle was available. That was in direct contrast to the call from LEX direct to Mr Tooze in October which suggests LEX had his contact details and could and would have contacted him as the first point of contact rather than DGF. The view that there was a breakdown in communications is reinforced by what the person at LEX that Mr Tooze spoke to said to him when she called him in October; namely that she had changed jobs, was now back and was shocked to see his name still on the list (168). That leads us to conclude the vehicle was ready and waiting for collection but someone at LEX had not made the necessary call to say it was ready, no doubt due to Mr Tooze's contact at LEX changing jobs. Those matters lead us to conclude that contrary to what his contact at LEX told him in October the vehicle was not put on hold in June by DGF.

267. That view is further reinforced by the documents before us indicating that DGF had placed the order and took all steps that were required of it to obtain the vehicle. Indeed, DGF had pressed Mr Tooze to order the vehicle. If there was any reluctance to take the vehicle that was on Mr Tooze's part as demonstrated by his delay in it being ordered, his repeated comments about preferring a mileage allowance due to the tax implications and subsequent events that we now turn to:-

268. At 1pm on Saturday 19 October 2019 Mr Tooze informed DGF that he had returned the vehicle having tested it, he told us his rationale being to avoid the tax consequences, having sought advice from the Inland Revenue. A few minutes later he emailed Ms Marsh and Mr Wright amongst others that he had tested out the car, that it was his view that it would no doubt solve his issues with the driving position, automatic, adaptive steering, lumbar support etc. and was another good step forward. Mr Tooze's view concerning the vehicle was subsequently adopted by OH (see (338 & 339)).

269. We find that Mr Tooze returned the vehicle because of the tax consequences for him given he was not undertaking (sufficient) business driving to avoid those tax consequences and ultimately that was his choice, the vehicle having been made available to him.

270. We find arrangements were subsequently made at what we found was a return to work meeting on 13 January 2020 for the vehicle to be made available for Mr Tooze on 1 February 2020 (see (342.4)). The vehicle being returned by Mr Tooze only to be scheduled to again be made available for him leads us to conclude that the vehicle was provided, and any adjustment thus made.

Meeting 8 October 2019

271. The meeting between Mr Wright, Mr Tooze and Ms Marsh on 8 October was minuted by Ms Marsh [590-4]. It lasted just over an hour. The minutes record Mr Wright as stating that given Mr Tooze had pointed out DGF had a duty of care to him, that DGF hadn't handled process well and Mr Tooze laid fault at DGF's door, that DGF wanted to request his consent to access to his medical records and to seek the view of Occupational Health "*in considering whether a return to work is a safe and sensible option*". It went on to record that Mr Tooze agreed to provide that consent [see also 620]. Mr Tooze was placed on medical suspension on full pay. That was subsequently confirmed in a letter of 18 October [619-20].

272. The minutes also recorded

272.1. Mr Tooze was told that Mr Tooze had 19 days holiday accrued to date and that he was being given 38 days' notice that he was required to take this holiday if he was still on medical suspension, and that

272.2. Mr Tooze wanted to request he was paid company sick pay for the week after his sick pay ran out on 30 September on the basis that answers should have been sorted out sooner. Mr Wright agreed to look into that.

273. In his follow up letter of 18 October Mr Wright stated that DGF would not agree to pay company sick pay for the week after Mr Tooze's sick pay ran out [619-20].

274. Issue 2(j), 6 & 14 was:-

> *On 8 October 2019 did Julia Marsh and Lawrence Wright place C on medical suspension? C believes this was a tactic to block his return to work.*

275. It is not in dispute that the factual aspect of 2(j) occurred. DGF dispute that it was a tactic to block his return. The difficulty with that assertion by Mr Tooze is twofold:-

275.1. On 9 October 2019 [602] Mr Tooze emailed Mr Wright stating he understood the position regarding DGF's due diligence and duty of care and that was welcomed by him. The tone of that email was a positive one, and

275.2. In cross examination Mr Tooze accepted that it was appropriate for DGF to want to get an update from its OH advisors before permitting him to return.

276. Whilst Mr Tooze reminded us that Mr Wright in cross examination accepted Mr Tooze's annotation to the meeting notes to indicate that Mr Wright had noticed a change in Mr Tooze over last few weeks, given that

276.1. the conclusions reached at the meetings on 4 & 16 September ((219) following) were that there were no available alternative roles and that voice to text software would not assist,

276.2. the improvement in Mr Tooze's medical condition after just over five months off work was far quicker than his GP had anticipated (it was a day short of four weeks before his previous sick note was due to expire), and

276.3. this coincided with the end of his sick pay, the rejection of his IPB application and the IPB application was predicated on the basis he was no longer fit to work in a role of a similar vein ("a suited occupation"),

we find that improvement in Mr Tooze's medical condition warranted caution on the part of DGF and a further referral to OH. That was confirmed in the subsequent OH report of 2 December (see (218) following) and that the purpose of the medical suspension was to allow DGF to obtain that report without placing Mr Tooze's recovery and health at risk.

277. We find that is reinforced by the content of Mr Wright's email of 11 October [606] responding to Mr Tooze's of 9th. Mr Wright's email of 11th also addressed the issue of the laptop a point we address below (295). Before we do so we first turn to other matters.

278. As to issues:-

> *2(i)[Preventing] the Claimant from returning to work by failing to make the reasonable adjustments set out below and/or failed to inform the claimant of, consider the Claimant for or appoint the claimant to an alternative role.*
>
> *13(a) [failing to provide] the Claimant with fixed work station (as distinct from a hot desking policy) including an ergonomic chair, adjusted keyboard and mouse.*
>
> *13(b) [failing to provide] the Claimant with voice dictation software and training*

279. Mr Tooze confirmed in cross examination the dates those alleged breaches started was from October 2019 when he certified by his GP as fit to return to work subject to adjustments.

280. We find that

280.1. The July OH report having concluded that a radical change of role was required and that a suitable alternative role needed to be identified,

280.2. The meetings on 4 & 12 September having concluded that a suitable alternative role was not available at that time (notwithstanding the use of voice to text), and

280.3. DGF having determined a further OH referral was required, which as we say above Mr Tooze accepted before us was something that was appropriate for them to do (see (275))

in those circumstances we find that it was not reasonable to expect DGF to undertake the adjustments at 13(a) and (b) unless and until that OH report had been considered and/or a suitable alternative role had been identified.

281. We find as a result that DGF did not fail to make adjustments and/or fail to inform Mr Tooze of, consider Mr Tooze for or appoint Mr Tooze to an alternative role and thus issue 2(i) was not made out in the period September – December 2019. We return to the adjustments issue from January 2020 onwards below (340) although that has to be read in the context of the OH advice upon which it was based.

282. Issues 10(d), 13(h), 6(c) & 14 concern:-

> *On 18 October 2019 did* R *refuse to extend company sick pay or backdate payments for C's medical suspension by 1 week, to pay C from the date he was certified fit for work until he was suspended by* R*?*

and 19(e)

> *Did* R *restrict C to maximum of contractual sick pay?*

283. Mr Tooze accepted before us that:-

283.1. his contractual sick pay ran out on Monday 30 September,

283.2. that the narrative of the adjustments required in his fit note [589] certified him as fit for work from Monday 7 October (something he confirmed in his email of 4 October (248)),

283.3. he was not certified as fit for work between 1 and 6 October inclusive and it followed he was certified as sick, and

283.4. he was paid for 7 and 8 October.

284. It was common ground before us that Mr Tooze was not paid sick pay for the period 1 to 6 October inclusive and that he had exhausted his entitlement to sick pay for the period. We find that was not a detriment (that is un-favourable treatment in whatever form) because what Mr Tooze was seeking was preferential treatment, namely he be paid over and above his sick pay entitlement because he believed DGF had delayed internally handling matters concerning his sickness and it should be paid as a gesture of goodwill [612 – 17 October 2019]. None of the disadvantages Mr Tooze argues that the PCPs advanced put him to, address that issue. The purpose of adjustments is to facilitate employees returning to work and paying sick pay, be it ad infinitum or not, is potentially at odds with that premise in that it gives an employee little incentive to do so. Where any delay was shown to be DGF's responsibility it paid sick pay. Further we find Mr Tooze did not demonstrate that the absence between 1-6 October was caused by delays on the part of DGF nor did he show how the payment of sick pay would have potentially alleviated any disadvantage caused to him by his disabilities.

The October 2019 OH referral

285. Two days after that meeting on 10 October 2019 a further Occupational Health report was requested [603-05]. As Maitland Medical, DGF's OH advisor sought Mr Tooze's medical

records, there was a delay with the report. The report was not received until 6 December 2019 [630-33]. We address that below (see (311) following).

286. Issue 6(a) as originally drawn was

> *"In / about July or August 2019, did Ms J March mislead Occupational Health when making a referral to them?"*

287. The date of that complaint is incorrect because Mr Tooze confirmed orally it related to a comment in the OH referral of 10 October 2019 [604]:-

> *"In light of your advice on 16th September, 2019 we had a telephone call with Lee to discuss a desk based Job, close to home, with some adjustments such as a moveable desk, voice to text technology and revieving hours worked along with more frequent breaks. This was ultimately rejected by Lee, the role was a lower grade and in addition it was felt that voice to text technology may not work given the nature of the role, Lee) having to use several applications at the same time."*

288. In cross examination Mr Tooze later explained that was because a lower grade was stated to form part of his rationale for rejecting the role and it did not. Whilst he accepts he did not see that referral at the time, he never used words *"lower grade"*, that was a lie and was intended to mislead OH. Mr Tooze repeatedly made that assertion despite our reminders about the consequences of asserting a witness had lied if that was not shown to have been the case.

289. We find that factually that role was of a lower grade (Mr Tooze accepted that was the case but not that that formed any part of his motivation in rejecting it) and that may have been one of the reasons Ms Marsh believed he had for rejecting it. Whilst it appears she was wrong in believing that formed part of his rationale, she was entitled to state that it was a lower grade role as that was factually correct and it was a material matter. Thus, it does not follow that she lied and nor in our view that she intended to mislead OH.

290. Nor do we find that assertion influenced the subsequent OH report dated 2 December 2019 [630] (see (311) following). Whilst he report repeated the assertion from the referral [631] we find that formed no part of the conclusions or recommendations of that OH report and instead the OH report agreed with a letter dated 10 July from the pain management clinic and advised that whilst Mr Tooze had been absent and has not been undertaking typing inevitably his symptoms settled but that was not evidence that his condition was cured. The OH report went on to advise *"… potentially allowing [an individual] back in an environment that is known to be against their best interests could [not] be considered best practice and potentially there could be criticism for an*

organisation to allow an individual back into an environment that is against their best interests and against their health.". OH suggested they would report back once a report from the OH provider's physiotherapist had been received whether a return to work possible might be possible but if so *"… it is essential, … that not only do we have an optimised workstation but that we do have voice activated software in place for this employee to use and of course for the employee to be delivered appropriate training and support whilst he gets used to it.".*

291. Issues 6(b) & 14 refer to:-

> *"Did Nick Sandison defend Julia Marsh's actions in respect of the IPB and her statements to OH?"*

292. Mr Tooze clarified that related to an email chain at [522A-G]. The specific reference appears to be at [522B & referencing an annotation by Mr Sandison at 522E] *"I do not therefore think that Julia has, in any way, acted negligently or inappropriately".* Mr Sandison explained his position thus:-

> *"48. I defended Ms Marsh because she simply made an innocent mistake based on the advice she received from someone else in DHL in respect of the income protection benefit. Indeed, even Mr Tooze himself was not initially aware that he had such cover. I also did not believe she had misled OH. I do not believe that her actions were intentional, deliberate or done in a way to hurt or negatively impact Mr Tooze. It was simply an error and I would defend any other person in the same set of circumstances as mistakes can happen and she relied on the information given to her. She was trying to do her job and believed the advice she received from the internal compensation team was correct. It was technically their error, not hers and she did promptly apologise to Mr Tooze when the error was realised."*

293. We dealt with Mr Tooze's complaint about Ms Marsh's handling of the IPB issue at (184 following) and the statement to OH at (289 & 290) above. We found that whilst she made a mistake based on what she was incorrectly told by a colleague and an incorrect assumption (in relation to the OH referral) they were innocent and not intentional. We find that Mr Sandison rightly concluded she had made an error but that there was no evidence that was negligent or inappropriate. Mr Sandison sought from Mr Tooze evidence they were deliberate or intentional, and no such evidence was provided. That being so we find that Mr Sandison was reasonably entitled to come to the views he came to.

294. We also find the assertion by Mr Tooze that Ms Marsh lied when stating what we found was her view of events (given the role was a lower grade), demonstrates the mindset Mr Tooze had toward DGF and its employees at the time.

Return of laptop

295. We identified the revised basis of Issue 2(g) at (156 & 157) above.

296. When questioning Ms Marsh in the afternoon of day 6, the panel's notes all record that Mr Tooze asserted that the laptop was taken back to alienate and isolate him and that he had been helping teams who had looked after his customers to ensure none fell short of service.

297. Ms Ferber accepted in the notes supplied as part of her closing argument on behalf of DGF that Ms Marsh asked Mr Tooze to return his company laptop at the 7 June meeting and that was confirmed in her email of 14 June [496] *"We went on to talk about your work. I did confirm that as you are off sick there is no requirement for you to do any work from home and therefore, everything should be handed over" [our emphasis].*

298. DGF also accepts that request was repeated by Mr Wright on 17 September [568], 11 and 17 October 2019 [606 & 610].

299. In his email of 11 October under point 5 Mr Tooze stated *"physio is fixing the RSI issues that made me need to take time off, in doing so this is helping calm down the CPS"* to which Mr Wright responded *"Noted, and I hope this continues to be the case. I want to ensure that your return to work does not in any way negatively impact your recovery."* before repeating the request for the laptop on the basis that DGF believed that there was a spreadsheet relating to a major customer (that we will refer to as AM) on it. That was subsequently repeated at the end of Mr Wright's email of 17 October [610] (see (302)).

300. On 17 October [609-10] Mr Tooze emailed Ms Marsh to stating that he had returned his laptop and then retrieved it when he had been certified as fit for work by his GP. He went on to ask for some clarity around that issue as he had never known anyone still employed by the business have to return their laptop unless there is a risk when it is a salesperson who has tendered their resignation to go to a competitor, and that did not apply to him. He then went on to raise some 12 points of concern for him before stating that if DGF intended him to suffer those consequences "*I will return the laptop, but, please note I have no other means of dealing with requests from anyone."*

301. One of those twelve points was that he could not search for other jobs by accessing *Jobwatch* if he no longer had the laptop. Mr Wright told us that *Jobwatch* was available from any device and not merely from company issued laptops. In the context of his questions to Mr Wright Mr Tooze asserted he never looked at *Jobwatch,* was not aware how to find it and thus was not

aware of other jobs. We made findings on that point above (235.2). Mr Tooze then put that issue to Mr Wright in the context of what we describe above as *the Dean Carter role* which Mr Tooze dated to between October and the end December 2018. Mr Tooze was thus asked to clarify by the Judge given he had his laptop at that point how he had become aware of the Dean Carter role if he had never looked at *Jobwatch* to which he responded by saying Dean Carter had told him about his new job sometime after he had been appointed and that in the past Mr Tooze had "*Always been offered roles - had never looked for them previously - Never knew of that [the Dean Carter] role"* which he confirmed would have advertised on *Jobwatch*.

302. Mr Wright's response email of 17 October [610] attempted to assure Mr Tooze that DGF did not intend him to have the problems he referred to in those 12 points before repeating the request for the laptop on the basis they believed that there was a spreadsheet relating to AM on it before stating "*Can you at (sic.) help us to locate this file? Or suggest an alternative course of action?"*.

303. Mr Tooze told us that the actuality was that set out in his later email of 17 October [611] namely that the spreadsheet was one created and shared by the client and thus was not on the laptop before stating he would return the laptop. Mr Tooze thus did not provide a suggested *alternative course of action* and instead returned the laptop on 22 October 2019 [LW¶19].

304. Mr Tooze's position was that he returned the laptop and then recollected it having been certified as fit for work (see (300)). It follows that the laptop was returned after the request on 17 September and then re-collected before 3 October 2019 (see (245)).

305. By 8 October 2019, DGF had placed Mr Tooze on medical suspension for the reasons we address at (271), one of the recommendations of the July OH report being the use of voice to text to reduce the need for typing. Mr Tooze accepted that was a reasonable request in the circumstances (see (275)). We find in those circumstances the request for the return of the laptop was not less or un-favourable treatment of Mr Tooze but done to protect him pending the OH report which had by then been requested.

December 2019

306. On Sunday 1 December 2019 Mr Tooze emailed Ms Marsh seeking payment of a Christmas party allowance he had been paid in previous years [629]. Ms Marsh responded seeking clarification what that was and also asking Mr Tooze if he was available for a catch up as he was due be on leave. He responded stating he was available for a catch up until Wednesday (4th). On

the 2nd he responded *"I wasn[']t made aware of any amount or party, in past years the ability was there to be able to do something personal if you['re] not invited to a function?"*.

307. There then followed an email chain between 3 and 17 December. The full email chain is at [639-646] although the early part of it (to 4th) is duplicated at [634-37]. That email exchange demonstrates they managed to catch up.

308. At 1:34 pm the following day (3rd) Mr Tooze emailed Ms Marsh concerning carry forward of holiday given his long term sick leave stating he was on leave from 2 December for 18 days taking him to the 30th. He suggested taking a further two days at the end of December and carrying 5 days forward to the following year. Ms Marsh responded the following day stating she was agreeable to that and suggesting that as he intended to return on 6 January he could use three of those days leaving 2 days to be used later that month. She made clear DGF did not make payments in lieu of leave. Mr Tooze responded at noon on 4th stating if DGF were not ready for his return that he revert to medical suspension on 2 and 3 January, that would leave 5 days to be taken which he suggested he should be permitted to use in the first quarter of 2020. He also referred to and thereafter provided a MED3 fit note for period 3 December to 6 January dated 9 December requiring adjustments [638].

309. As previously stated Mr Tooze was on leave at this point and had told Ms Marsh he would be available to contact until 4th. She replied on 5 December [642] repeating the earlier position and indicating a return to work meeting would be conducted on his return on 2 January [642] and she would inform Mr Parker so he could start thinking about inducting Mr Tooze back into the business. We find by 5 December Mr Tooze had ceased to pick up emails (he had said he would only be available until the 4th) because his next response was at 17:14 on 16 December [642] in which he stated he was *"only just back"* and in that response he agreed to take leave on 2 & 3 January.

310. During that break in communications between 5 and 16 December, the OH report sought in October was received by DGF. Whilst the OH report was dated 2 December 2019 (see (311) following) we find it was not received by Ms March until after 5 December because the next time she responded to Mr Tooze (on 16 December) she referred to it without being prompted to do so. We find that she was being open and frank about that and that had she received it before 5 December, she would have mentioned it in her email of 4th.

OH report 2 December 2019 [630-33]

311. Having summarised the position to date, including the disputed comments from Ms Marsh about "lower grade", the OH report recommended :-

> *"If the employee has been absent and has not been undertaking typing them of course inevitably they will be okay, and their symptoms will have settled. That is not evidence that the condition is cured.*
>
> *The nature of RSI is, of course, that if you cease work related upper limb activity (typing) then the situation will settle."*

312. It then went on to state, albeit (a "not" was probably missing) that potentially allowing an individual into an environment that was against their best interests and against their health would not be best practice, that subject to receipt of a report from OH's Physiotherapist, in the meantime a return to work might commence, but that it was essential that an optimised workstation and voice activated software was put in place and appropriate training and support delivered.

Late December 2019

313. We addressed Mr Tooze's email of 16 December [642] above (309). Ms Marsh's reply of 17:51 on 16th started by saying she hoped he had had a good time whilst away, referred to receipt of the OH report and on the basis that he had asked to return on 2 January, that Mr Wright had made arrangements to be in Birmingham to see him, diaries were difficult, so she asked him to attend and he would be given the leave back. Mr Tooze responded to say given the earlier discussions he had already "booked" and so would not be in the UK then. He told us orally that he had gone to see a friend in Southampton and so was in the UK. Again, that is a discrepancy in his account.

314. There followed an exchange of emails on 17 December concerning arrangements for the meeting [639-640]. Mr Tooze clearly appeared to be unhappy about what he saw as the changes to the arrangements stating *"This is starting to feel like a game to me …. why are we playing games, is it to trick me into using holidays up"* and that dates were being set without his agreement. As to the latter point we find 2 January was the date he had previously indicated he was returning to work and if he was scheduled to be at work DGF were entitled to arrange a meeting provided proper notice was given. Ms Marsh responded to inform him DGF agreed he could take Thursday 2 & Friday 3 January as leave which would be deducted from the 5 days to be carried forward and that he would be medically suspended from 6 January 2020 whilst arrangements were being made for him to be seen by OH.

315. On 18 December Mr Tooze emailed Ms Marsh to say that he wanted any further communications via post as they were not easy to follow on email via a phone as he no longer had his laptop. As we say above (300) the laptop had been retrieved by him by then and based on what we were told was not re-returned by him. Mr Tooze then asked for clarification what was happening and why he was being asked to see another Doctor (Appendix 8 [646a]).

316. On 19 December Mr Tooze raised a grievance direct to Mr Sandison [652-53]. This concerned a number of matters surrounding his return to work and the arrangements for that. We address this with the grievance he lodged a few days later on 24 December concerning his holiday leave entitlement (see (318) following).

317. On 21 December Ms Marsh responded (as requested) by post to Mr Tooze's email of 18th in which she set out her position in relation to the changes to the meeting and holidays, why the additional medical report was required and agreed that he would be on medical suspension on 2 and 3 January, return on 6 January, and have until July to use his 5 days leave [647-48].

The Grievances of 19 & 24 December

318. Mr Tooze confirmed those grievances were found in the two emails [652-53 & 649] respectively and those two emails formed the basis of three issues:-

> *2(c) Did the Respondent fail to deal with / determine the claimant's grievances? The claimant believes this was part of a strategy to prevent him returning to work. …*
>
> > *(iii) Case 1304291-20 email Grievance to Nicholas Sandison claiming back holiday 19 Dec 2019*
> >
> > *(v) Case 1304855-20 email multiple item Grievance to Nicholas Sandison 19th December 2019*
> >
> > *(ii) Case 1300289-20 Holiday Grievance email re carry over Lee Tooze 24 Dec 2019*

319. Whilst the grievance of 19th was sent solely to Mr Sandison the grievance of 24th was sent to Mr Wright and Ms Marsh. In cross examination Mr Tooze accepted Mr Sandison dealt with those grievances by an email of 24 December [651-2] where with reference to that of the 19th he suggested *"that given the ongoing process* regarding *his health and* return to work *and to avoid confusing matters any further, I will keep your grievance on hold for the time being until a solution has been sought regarding your safe return to work – this should be resolved early 2020."*.

320. We find as to the grievance of 24th Mr Sandison substantively addressed that stating with regards to the 5 days to be carried over they must be used by the end of January 2020 in lieu of which they would be forfeited. He accepted before us [NS¶21] that at the time he sent that email, he was unaware that it had been agreed by Ms Marsh that Mr Tooze could use his remaining 5 days until the end of July 2020. That no doubt stemmed from Mr Tooze having raised that as a grievance with Mr Sandison and Mr Tooze addressing it with Ms Marsh at the same time (see (316)). Mr Sandison should have checked the position before responding given Ms Marsh's offer of 21st predated the grievance of 24th but we find that stems from the various pieces of correspondence arising as quickly as they did and that was unfortunate. Mr Sandison's acceptance of that error and Ms Marsh's concession later being honoured demonstrate that in our view.

321. Given Mr Tooze's response and because we were not taken to any appeal against that decision we find DGF did address those grievances to his satisfaction. As we say above, the grievance of the 24th with regards to carry over of leave was addressed substantively by Mr Sandison. Mr Raes also sought to address that of the 19th. We return to at (384.3) below.

Keeping In touch

322. Issue 14(a) concerned

> *In December 2019, did the Respondent contact the Claimant excessively in relation to work-related issues?*

323. In cross examination Mr Tooze accepted DGF could contact him about work from 8 October, when he returned from sickness absence. The contrast with issue 14(a), issue 2(d), 6 & 14 was raised with him

> *In respect of each of the Claimant's periods of absence in 2019, did the Respondent fail to keep in touch with the Claimant in respect of relevant developments at work including but not limited to staff appreciation day, the Christmas party and allowance)?*

324. He was asked if that demonstrated too much or too little contact. He pointed out at that at the time he was on holiday. When asked again he said, "positive and negative" and when asked to explain what he meant he answered, "Not enough". The judge asked who decided what was positive or negative? He answered he was excluded from positive contact and only got bad news, going on to explain a formal hearing was bad news and a Christmas party good news, it was for the company to make a call, and we can all make a call on whether something was good or bad news. The difficulty with that stance was highlighted by the next question - was it good

or bad to tell someone who is away that there is a Christmas party when they cannot attend? He responded stating an invite to a party is always good news.

325. We find that the recipient of an invitation to an event that the individual could not attend could be perceived as unwanted conduct, less or un-favourable treatment but that is a highly subjective question.

326. We address above the employee opinion survey (see (236)).

327. We find as the emails show DGF did not contact Mr Tooze excessively and that where it did make contact it was related to responses to matters and requests for clarity raised by Mr Tooze (for instance Christmas party allowance and holiday entitlement). Similarly, Mr Tooze was pressing to be permitted to return to work. Mr Tooze also having sought clarity on issues DGF were obliged to respond. Thus, we find DGF's contact was appropriate.

328. Those difficulties concerning keeping in touch aside we address above at (136) following the period where Mr Parker was dealing with Mr Tooze's initial absence. We give examples how during May, June and July how Ms Marsh kept in regular contact with Mr Tooze until in July Mr Tooze started to make complaints about her too.

2019 Holiday Pay

329. We next turn to four related issues:- Issue 14(b)

> *In December 2019, did the Respondent require the Claimant to take 20 days holiday during medical suspension?*

issue 26(a)

> *Requiring the Claimant to take 20 days holiday during medical suspension in December 2019?*

issue 26(b)

> *In about December 2019 did the Respondent require the claimant to take 5 days outstanding holiday before, firstly, January 2020 and, subsequently, July 2020 and refuse to permit him to carry it over for 18 months after the end of the holiday year?*

and issue 14(c):-

> *In / about December 2019 did the Respondent require the Claimant to take 5 days outstanding holiday before, firstly, January 2020 and, subsequently, July 2020 and refuse to permit him to carry it over for 18 months after the end of the holiday year?*

330. DGF accepts for the harassment complaints that these actions were unwanted conduct but given Mr Tooze was no longer signed off sick, and he was simply being required to take his annual leave within the leave year, as any other employee would be, Mr Wright was doing no more than applying Mr Tooze's contractual terms. DGF also assert there was no connection to Mr Tooze's disability.

331. The aim of holiday leave is to ensure that workers are entitled to actual rest, relaxation and leisure, with a view to ensuring effective protection of their health and safety. That implies they are fit to actively engage in that rest, relaxation and leisure and thus only at the end of a period of sickness absence will they able to do so. Where that absence has been protracted, say over several years, and several month's leave has accrued, the period over which the leave may need to be exercised may need to be extended to enable a proper opportunity for that to take place.

332. Here Mr Tooze had been on sick leave for 6 months and had been warned on 10 July (226) that he had accrued 19 days leave to date and would be expected to take the leave in that holiday year. He elected to take 18 days leave from the start of December but by then had accrued further days leave. That left an extra 7 days, two of which were taken on 30 & 31 December. The way Mr Tooze put this point changed over time; he told us orally "I was told to take holiday" and that he was "forced" to do so by Mr Wright and then when the European caselaw was explained to him to asserted he was not well when he took the 18 days in December and should have been allowed to carry that leave forward as well. Of course, that was not so he was no longer certified as unfit for work at that point.

333. Those changes in position aside we find it was reasonable for DGF to ask Mr Tooze to take the leave he had accrued prior to him being medically suspended at the start of October 2019 during the remaining quarter of the holiday year. When Mr Tooze raised issues in that regard DGF allowed him to carry forward that leave, firstly into January (as was its unwritten guidance (see [651-52] and (319-320)) and then to July. We find that was a concession following representations as part of a negotiation rather than an edict as Mr Tooze suggested and an entirely reasonable stance for DGF to take.

334. As we state above during the hearing Mr Tooze confirmed he was paid 5 days leave after his employment was terminated. He argued instead that he had been required to take 15 days before the end of the year and should not have been and so should have been paid for those sums also. Not only was that not the way the claim had been put (after considerable case management precisely to clarify the issues) but we find for the reasons we give above that it was

reasonable for DGF to require him to take his leave given by that time he was fit to work albeit medically suspended.

335. That however was a further example where Mr Tooze's sense of historic grievance led him to conclude that unless he was given what he considered was the right outcome this was part of a plan to dispense with his employment and/or discrimination.

The OH report of 6 January and changes to arrangements

336. The physiotherapy report referred to in the OH report of 2 December was provided on 6 January. An OH appointment was arranged for 8 January with Maitland so that the physiotherapy report could be reviewed. Thus, instead of the meeting between Mr Wright and Mr Tooze taking place on the revised date of 6 January it appears that was rescheduled for the 13 January so the physiotherapy report and the subsequent OH report could be considered. The exchange of correspondence between 3 and 5 January [654-58] refers. From that exchange it appears attempts had been made to contact Mr Tooze by phone to inform him of those changes (but as we say above it transpired he had been away) and so when he collected the written confirmation of the changes he was initially confused and wanted to know what the reasons for the changes were.

337. The Physiotherapist's report of 6 January 2020 [905a-d] gave a full summary of his symptoms, treatment, condition and concluded :-

> *"At the time of his last visit on the 2nd of December Mr Tooze was feeling vastly better, with no tingling in the fingers and hands and was getting a good night's sleep which was a major issue for him at the outset of his treatments.*
>
> *Presently Mr Tooze is booked in again for some further treatment; however, he states he is feeling vastly improved and could go back to work."*

338. The Physiotherapist's report was considered by the OH physician at a discussion with Mr Tooze on 8 January [906-908]

> *Lee attributes, at least in whole or in part, his symptoms over a 3 year period to long hours of driving and trying to fit in laptop and other computer and held-held devices work in between. … It is impossible, within any simple report today, to give you a precise diagnosis, however, I do agree that there may be a combination of arthritis, overuse and possibly work-related upper limb disorder too.*

What I did mention to Lee today is that one of the hallmarks of work-related upper limb disorder (WRULD) is that symptoms normally settle very quickly after ceasing the movement or actions that cause the problem. Therefore, Lee tells me that his symptoms did start to settle but not until a few months after resting from work. That does suggest, in my view, a combination of problems rather than one explanation.

In any event, eventually Lee saw a Physiotherapist who very quickly, within a few sessions, seems to have (in Lee's view) "miraculously" turned his symptoms around and he now feels better than ever.

I explained to Lee that it is not clear why that would have been the case but I am delighted that it was.

Speaking to Lee today I told him that any possible return to work, however, needs to be carefully monitored and constructed.

Considering Lee has been off for a long period of time, there would need to be a phased and staged return to work.

Lee described a number of positives:

• A new vehicle with a higher driving position and an automatic vehicle too.

• That the number of business hours he would need to drive are diminishing.

• Sitting position, and indeed I would suggest a ***proper workstation assessment of Lee's home environment to ensure that the setup is optimised****. In other respects, in other offices, Lee needs to ensure that he has advice around how to set up any "hot desk" to give him the most comfortable position to work on his laptop or desktop.*

• As previously mentioned, Lee might also benefit from more voice to print, i.e. to reduce the amount of inputting.

• I will leave it to the Company to consider whether any other strategies can be adopted generally but specifically for Lee too to reduce the amount of inputting required?

All in all, once again whatever the mix of reasons for absence, Lee does seem to be in a position where he might achieve a successful return to work. I have to stress, however, that I cannot guarantee this.

In that regard I would normally recommend a graded increase in hours, duties and responsibilities over perhaps a 2-3 week period, perhaps exceptionally 4-6 weeks, to allow Lee to gradually increase his

hours, duties and responsibilities driving, inputting etc and also this will allow any opportunities for retraining and re-appraisal of his situation and recommendations because of any new working practices.

I would also suggest short weekly meetings potentially on the phone, not necessarily face to face, to allow Lee to give feedback as to how that return to work is going ***and importantly as to whether his symptoms have returned."***

[original emphasis]

339. The report recommended:-

"I certainly think we are at a point where Lee could trial a return to work and I hope this will be successful. The changes in car, reduction in hours of driving, implementation of a strategy that would allow Lee to use more voice to print and potentially working more effectively at a more carefully constructed workstation (i.e. workstation assessment) should, I hope, allow Lee to continue in the role.

The alternative to this is that Lee's symptoms would return and once again, for whatever mix of reasons, he would struggle to discharge that role. At this stage I can only tell you that I am cautiously optimistic and only time will tell, perhaps the next few weeks, whether that strategy is successful but of course we all hope it will be."

The meeting held on Monday 13 January 2020

340. A meeting was held on Monday 13 January 2020 between Mr Tooze, Ms Marsh and Mr Wright; Mr Tooze was accompanied by Mr Mike McCaffery. The meeting was also covertly recorded by Mr Tooze. DGF confirmed the transcript [662-673 & 771-782] of the meeting fairly reflected it.

341. Just after 5 pm on 13 January 2020 Mr Wright emailed Mr Tooze *"… as agreed today you are returning to work tomorrow, though not required to attend Starley Way until we have resolved the desk and H&S workspace assessment. Julia will arrange with Simon that he calls you tomorrow to plan next steps"* [661].

342. The following day (14th) Mr Wright wrote to Mr Tooze [674] to confirm

342.1. although a phased return was mentioned by OH, given the nature of easing him back into the role, the days wouldn't be particularly challenging, and he would start back on normal hours.

342.2. that Mr Wright would liaise to ensure there was a resident desk for Mr Tooze at Starley Way.

342.3. Ms Marsh was to arrange a workstation risk assessment, locate his laptop and send that back to Starley Way, and arrange a call between Mr Parker and Mr Tooze for them to discuss his induction back to work.

342.4. Mr Tooze would take possession of his company vehicle from 1 February 2020 and Ms Marsh was ensure the relevant persons were informed.

342.5. Weekly catch ups were to be arranged with Mr Parker and

342.6. Mr Tooze's 5 days outstanding holiday were to be taken by the end of July 2020.

343. In addition to the matters formally recorded in that email the meeting addressed a number of issues:-

343.1. Mr Tooze was told that a formal process was to be commenced (350 following) and

343.2. settlement discussions were conducted, the content of which were redacted by the order of 6 October 2021 (Hearing 24 & 25 August) of Employment Judge McCluggage (see [276-286])

344. Issues 2(l) & 6 relate to

In Jan 2020 did R omit to hold a return to work interview?

345. Whilst it is not in dispute a meeting was held on 13 January Mr Tooze thus argued both at the time [662] and before us that because the adjustments had not been made, his laptop returned, and he was undertaking work it could not be a return to work meeting. He also argued that DGF's procedures had not been followed (amongst other matters that related to the person conducting and format of the meeting, that it was not minuted on the appropriate form and the minutes were not provided as they should have been).

346. DGF's Managing attendance policy at ¶8.2 [396] provided under the heading "Return to Work interview"

Immediately on an employee's return to work the Line Manager will meet with the employee to hold a Return to Work interview. The purpose of this interview is to ascertain the individual's fitness for return and to facilitate a smooth re-integration into the workplace. At this meeting the Line Manager will remind the employee of the Company's expectations in regard to attendance; and will explain the

consequences if absenteeism continues. Details of the interview are to be recorded on the appropriate Return to Work form and the employee will sign and receive a copy.

347. That policy addresses short term absenteeism (and in the case of persistent, frequent and/or an unacceptable pattern of absence where disciplinary procedures might ensue (¶8.4)) and long term absence (¶9):-

> *Long term absence is defined as any absence in excess of 4 continuous weeks, where there is normally a consistent underlying medical condition. Absence may be linked to a previous period of absence, where so indicated by a doctor.*
>
> *Each case of long term absence will be reviewed individually and sympathetically and it is likely that GP medical reports and/or independent Occupational Health Assessments will be requested in most cases. It will always be the Company's aim to facilitate someone on extended absence back into work.*

348. As we state above on 5 December [642] (309) Mr Tooze had been informed that on his return from sick leave that a return to work interview would be conducted. The changes to the date of that meeting aside we find it was clear that the purpose of the meeting on 13 January was to conduct a return to work meeting for the purposes outlined at ¶8.2 [396] of the managing attendance policy. Whilst that meeting was not conducted by his line manager, formally minuted and recorded as such, Mr Tooze was not provided with a copy of the minutes as DGF's procedures required and the content of the meeting went beyond a return to work meeting, we find it had been intended to be a return to work meeting and addressed what was required of a return to work meeting. We find it was a return to work meeting. To reinforce that, in the transcript [666] he provided Mr Tooze described it as a return to work meeting:-

> *"At 23 minutes 40 seconds of the return to work meeting the Agenda was turned to other matters around the relationship of Lee's relationship with Simon and the company."*

349. Several issues arise at this point:-

349.1. As to Issues 2(k) & 6

In Jan & June 2020 Did R omit to refer C to an OH specialist?

349.2. We find that whilst Mr Tooze was not referred to OH specialist in January 2020 Mr Tooze was seen by an OH consultant on 8 January following receipt of the report from his physiotherapist dated 6 January. He also accepted there was a referral at start of February [692]. The latter resulted in the report of 26 February [727-29] (380). Mr

Tooze advanced no basis for a further referral being required above and beyond those referrals and we find that a further referral in those circumstances was unnecessary. We return to the June 2020 element of this complaint at (420) following.

349.3. As to issue 19(a) :-

The Respondent refusing to permit the Claimant to return to work from 14 January 2020

349.4. In cross examination Mr Tooze accepted he was permitted to return to work but was asked to work from home. On 16 January he was formally informed a disciplinary process was to be commenced (350) and on 20 January that he was suspended (353). That suspension continued until he went off sick on 3 February 2020 (359).

349.5. The reason DGF gave for him being asked to work from home from 14 January 2020 was because the desk and workstation assessment needed to be arranged. Mr Tooze did not accept that arrangements for his workstation were being made.

349.6. That fed into issue 13(e):-

Providing the Claimant with adjustments to working capacity on his intended to return to work after 14 January 2020 such as a raising desk with aids for the Claimant.

and issue 13(f):-

Providing the Claimant with adequate voice to text technology.

349.7. As we say (311-312) the occupational health advices received prior to the meeting on 13 January had identified that an optimised work station and voice to text technology should be provided. Whilst this was again suggested by the OH Report of 8 January (0) we address above (342) the steps that DGF agreed to take to facilitate Mr Tooze's return to work in the office following the meeting on 13 January 2020. They included Ms Marsh arranging a workstation risk assessment, locating and returning his laptop to Starley Way, and her arranging a call between Messrs Parker and Tooze to discuss his (re-)induction.

349.8. Voice to text technology was not something that was canvassed at the meeting on 13 January 2020. Nor was that something we can find any trace of Mr Tooze pursuing as an issue in the aftermath of that meeting. However, as we say at (222.1 & 276.1) by September 2019 Mr Tooze had accepted voice to text technology would not work for

him in his role, and was something that before us Mr Tooze rejected as not being of assistance given the nature of the open plan office at Starley Way, the amount of data inputting he had to do in his role and the number of software applications he had to use (see (222)). We find that being so that the evidence before us does not suggest the use of voice to text had any prospect of alleviating the disadvantages Mr Tooze suffered as a result of his impairments. At best that would have required the use of multiple adjustments including a (radically) new role, separate office and different software and these are matters that go beyond what OH, Mr Tooze or Mr Tooze's GP suggested at the time or subsequently.

349.9. The OH report of July 2019 had stressed a new radically approach needed to be adopted and a new role identified for him and that had been discussed in September. We find until that radically new role had been identified it would not have been possible to identify the adjustments required for it. No such role was identified. Accordingly, it was only following the improvement in Mr Tooze's condition and the further OH advice of January that the workstation assessment was appropriate.

349.10. We have considered if there was delay on DGF's part. We find there was not. It was necessary for DGF to consider with Mr Tooze the OH advice and get his agreement to any steps. Combined with the need for the physiotherapist's report and the issues we refer to around arranging the meeting in our judgment DGF actioned that without undue delay.

The start of the formal Process

350. Following the meeting with Mr Wright on 13 January, on 16 January 2020 Mr Jean Claude Raes, DGF's Purfleet station manager wrote to Mr Tooze inviting him to attend a formal hearing on 22 January 2020 at Starley Way [682]. That meeting was to address what Mr Raes described as significant issues about Mr Tooze's relationship with DGF that DGF felt could not be ignored and needed addressing. Mr Raes referred to several communications from Mr Tooze by way of example:-

350.1. 11th May, 2019 – email to Simon Parker regarding issues, 26 bullet points.

350.2. 18th May, 2019 – email received raising issues around role.

350.3. 15th July, 2019 – email highlighting issues around call out payments being stopped.

350.4. July 2019 – email chain showing some dispute around trying to arrange a meeting with you, complaint about a meeting already held, resulting in a further email of complaint to Nick Sandison.

350.5. 6th October, 2019 – email received disputing return to work circumstances and a claim you are being bullied.

350.6. December 2019 – further emails disputing the circumstances around using up outstanding holiday entitlement vs a return to work. This resulted in a grievance raised with Nick Sandison.

351. The letter continued:

> *"The Company considers that if the relationship between you and DGF is irretrievably broken this will fall within the definition of 'some other substantial reason.' Enclosed are copies of evidence on which the Company intends to rely*
>
> …
>
> *It is necessary to inform you that this matter is considered extremely serious, and if substantiated may ultimately lead to you being dismissed from the Company with notice."*

352. Mr Raes also stated that Mrs Turner would be attending to take a minute of the meeting, asked Mr Tooze to confirm his attendance to her and reminded Mr Tooze of his right to be accompanied. Mrs Turner's direct involvement did not start until some time later from what we can trace not least because that meeting did not go ahead.

353. On Monday 20 January 2020 Mr Tooze was suspended on full pay pending first formal hearing that was scheduled for 22 January [684]. Mr Tooze had thus been back at work for 5 working days in the period since 25 March 2019. DGF accepts that Mr Tooze's suspension on 20 January was a detriment.

354. Mr Tooze alleges he was suspended because he did a protected act. We address our conclusions on that and the other victimisation complaints below having considered all the evidence in the round (554-556) but for context we need to record that at the time that decision was made the only tribunal claim that Mr Tooze had made was the first claim that related to historic wages matters (2 and 3).

355. The following day, 21 January 2020, Mr Tooze issued his second tribunal claim.

356. As we state above, Mr Tooze did not attend the meeting on 22 January 2020 nor the further 4 occasions it was rearranged for. That formal meeting eventually went ahead on 8 July 2020 in his absence.

The events of February 2020

357. On 3 February Mr Raes wrote to Mr Tooze to invite him to a second formal hearing to be held on 12 February 2020 at Starley Way [685-86]. Mr Tooze did not attend. Two days later on 14 February a further claim form (ET1) was lodged by Mr Tooze [22].

358. On 3 February 2020 Mr Tooze was also invited by Mr Raes to attend a Grievance Meeting [687-88] on 12 February to discuss the grievance he raised with Mr Sandison on 19 December 2019.

359. Just after 9:00 am on Monday 3 February Mr Tooze emailed Ms Marsh [689] to say that his *"doctor has signed me off work for 2 months with work related stress"*. In contrast the MED3 sick note [691] stated his GP had not assessed his case until 5 February. His medical records [944 & 949a] also referred to an appointment of 5 February. Again, Mr Tooze was not challenged about that apparent conflict between what he told DGF at the time and what his medical records reveal. The resulting MED3 referred to a "stress-related problem" and gave the period of certification as 3 February to 2 April 2020.

360. On 7 February Ms Marsh wrote to Mr Tooze to say that following receipt of the sick note DGF wished to discuss Mr Tooze's absence with him and to facilitate his return to work wished to undertake another referral to Maitland Medical to obtain guidance on how to move things forward. She stated his suspension would be lifted as he was absent from work and that he would be entitled to statutory sick pay as his entitlement to company sick pay had been exhausted.

361. As to his grievance she stated DGF assumed that as he was absent from work he may wish to delay this and unless she heard from him to the contrary the grievance hearing would be stayed until he was in a position to return to work or feel capable of attending a grievance hearing.

362. Finally, she recorded that for the duration of his absence DGF had agreed to keep the vehicle at Starley Way and whilst it had been agreed he would take possession of the car that week that he had emailed DGF on 6 February 2020 to say that he would not take the car for now.

363. Mr Sandison told us [¶13] that also on or about 7 February 2020 DGF received a claim form issued by Mr Tooze and as a result responded to Mr Tooze's allegations via an email at approx.

4pm on the 7th. We were not taken to the content of the claim form but Mr Sandison's response included 10 allegations made in the claim and his annotations in red seeking details of them so they could be investigated [695-97]. In addition to Mr Tooze raised the "hiding of salary from head office" and two compliance related points. The first was an allegation "That Rob Aldridge punched Mr Tooze" to which Mr Sandison stated that been investigated in the grievance outcome of 4 June 2018. As we say Mr Sandison requested further information and/or evidence in relation to the complaints so that a formal compliance investigation could be commenced [710-713].

364. The 6th of the numbered complaints referenced :- "*[I] issued the Grievance to the CEO Michael Young who failed to deal with under the DHL Grievance policy"*. Mr Sandison's response to that email was thus:-

> *Please refer to the last email from Michael Young in which he states "Therefore I suggest that you do take this to the grievance and legal stages then we can deal with this in a transparent manner.". This matter was satisfactorily dealt with in my email (second attachment) to you sent Tue 7/16/2019 3:39 PM. This point is now the basis of your primary ET1 and as such will be dealt with by the tribunal services. DHL's position is made clear per the second attachment.*

We find the reference to Mr Tooze's grievance to Mr Young was to that of 23 August 2019 [557] (see (205) following). The reference to Mr Sandison's *"email (second attachment) to you sent Tue 7/16/2019 3:39 PM"* appears to bear no relationship as its date [16 July] 2019 clearly could not have been a response to an email of 23 August.

365. For the reasons we give above (205) following, any complaint about the failure to address a grievance in relation to Mr Tooze's email of 23 August 2019 fell within the jurisdiction of the Beck tribunal.

366. Mr Tooze responded on 8 February [694] querying why he was being contacted direct as he was off sick and DGF had placed matters in the hands of their lawyers, that DHL had not addressed those issues under its grievance policy when they had the opportunity and querying where the additional items had come from. He provided no further detail of those matters. He also stated :-

> *"Why as always is DHL messaging me on a Friday with such matters, is this to punish me more mining any of my family time, to cause me more distress or simply to prove your might.*
>
> *DHL have put this in the hands of a lawyer so why am I asked to deal with you?"*

367. At 5:55 pm on 9 February 2020 Mr Tooze emailed Mr Sandison under the subject field that included one of his tribunal Case Numbers copying in an office of the Employment Tribunal requesting Mr Sandison to *"… stop harassing me, you['re] badgering me into responding is causing me more stress … I am signed off work with work related stress, this shows Zero duty of care on behalf of DHL and is making matters worse."* [705 & 708].

368. Mr Sandison replied at 8:07 [707/08]

> *There's no harassment on my part. I am simply trying to get to the bottom of some compliance related issues Which you have recently alleged. which you brought up in your email copying in the Tribunal Service.*
>
> *For the reason that I set out in my email below, it is not appropriate to mix 'without prejudice' conversations with 'on' the record' conversations.*
>
> *I made it clear In my email to you that i would investigate the compliance, allegations regardless. You have chosen- net to cooperate in this process. which is. strange given that you chose to raise them.*

369. Mr Tooze replied 11:32 [707] and then Sandison replied again a few minutes later [706]

> *"I note your email and do not intend to comment further in this regard as I do not think it moves the matter forward in a constructive way and you need to focus on your recovery — DHL's position has been stated clearly.*
>
> *You have been written to with regard to your further grievance on 19 December 2019 — reference letter from Julia Marsh dated 7 February 2020. Please confirm how you wish to proceed."*

370. On Monday 10 February at 11:13 Mr Tooze emailed Mr Sandison headed *"formal grievance - Julia Marsh lying to ACAS and OCCI Health"*. Amongst other matters it stated, *"why is Julia continuing to fabricate the truth and discredit me?"* [716-17]. Mr Sandison responded 20 minutes later [716]. He first addressed the content of the email we refer to at (367) he then continued:-

> *"I simply do not understand why you persist in this regard when you are sick? Any comments that you have regarding moving this matter forward in a constructive way would be appreciated."*

371. Mr Tooze responded a couple of hours later referring to the number of letters he had received over the weekend [715-716]

372. Mr Sandison replied a few minutes later still [715]

"I acknowledge your email – I think it best if you take this time to rest and recover as these communications are not helping matters.

I have dealt with the Compliance matter given your indication that you will not co-operate with the investigation."

373. As Mr Tooze later confirmed, in an email to Mrs Turner on 19 May 2020, that his health subsequently did significantly improve as a result of reduced communications (see (410)).

374. Issue 2(c)(iv) relates to the complaint that DGF failed to deal with/determine Mr Tooze's grievance:-

Case 1304855-20 exchange with Nicholas Sandison re Julia Lying Feb 10th 2020

375. Whilst Mr Sandison did not substantively address Mr Tooze's grievance he clearly responded to Mr Tooze on several occasions. For the same reasons we give above (322-328) there was an inherent problem for DGF by now in how it was to deal with Mr Tooze. On the one hand he complained about them not keeping in touch with him and other suggested that when they reduced contact with him his health improved (373 & 410) and was also repeatedly making complaints both by way of grievances (318-321) and tribunal claims that DGF needed to address. Those allegations were serious including assertions that Ms Marsh misled him about IPB (see (183) following) and had misled OH in the referral (286 following). Within the 10 February grievance there was a further allegation that Ms Marsh was being untruthful and fabricating matters.

376. In a grievance investigation that Mr Raes subsequently undertook, Mr Raes invited Mr Tooze to discuss his grievances of 19 December and 5 March (384.3). Whilst that did not specifically refer to Mr Tooze's grievance of 10 February the subsequent investigation sought to elicit from him the details of any complaints he had against the individuals he was complaining about. We return to that below (406).

377. On 20 February 2020 Mr Tooze emailed Ms Marsh seeking clarification on the sick pay policy stating neither his contract nor the sick policy clarified the position [725]. We record that DGF's contractual sick pay was discretionary [349-365 ¶13.5]. Ms Marsh replied on 24th [725]. Ms Marsh explained that sickness was calculated on a rolling 12 month period and the maximum amount of sick pay during any period of illness was the difference between the total entitlement at full pay according to service and the amount of sick pay (if any) already paid

during the 52 weeks immediately preceding the start of the sickness absence concerned. We return to this issue at (396) following.

378. On 12 February an OH appointment was arranged for 24 February [723-24]. On the morning of the assessment Mr Tooze appears to have informed DGF's OH provider Maitland he would not be attending. Ms Marsh emailed him to say that if he did not attend DGF would be charged and asked him to clarify his intentions [722]. Mr Tooze responded, *"Not correct, I spoke to them and they advised re charge, not really up to talking, but, said I would take the call if there is a charge anyway."* [721]. Ms Marsh replied *"As far as I'm concerned you have cancelled todays appointment so unless you tell Maitland otherwise this won't go ahead. Please let me know what your intentions are. Are you attending today, not at all or would you prefer us to reschedule?"* [720] Mr Tooze's response was this

> *Don[']t take that tone with me, I don[']t really care how you are concerned, I made the call and I know what was said you don[']t, but, always jump to conclusions or side with anyone else to discredit me, about sick of it and your actions.*
>
> *They can either call today or reschedule I was told they could not. [720]*

379. That demonstrates the nature of the breakdown of their working relationship. Whilst Ms Marsh was clearly frustrated and her second email more curt than appropriate, the content and tone of Mr Tooze's emails was not acceptable.

OH report 26 February 2020

380. The final OH report before us was dated 26 February 2020 [727-29]. It concluded

> *"Therefore, we have a rather circular argument which is that Lee feels unable to work, feels stressed and anxious about the process that is unfolding and in turn that is impacting upon him psychologically. He is seeing his GP and his GP has chosen to certificate him.*
>
> *As I suggested to Lee, however, I did feel there needs to be some movement (forward) that would help all parties and particularly Lee to achieve some "closure". The self-assessment of this need for "closure" is that this may need to be through a legal route rather than through company process.*
>
> *Speaking to Lee today I felt that he had capacity (as defined under the Capacity Act) but that any possible dialogue, if it was achieved, between himself and the Company, might be better facilitated by:*
>
> - *A neutral venue*
> - *A copy of any agenda ahead of a meeting*

- *For him to be attended by a friend, family member, colleague or other party as your rules allow*
- *To have regular breaks to avoid a build up of any possible emotion*
- *To have enough time set aside for this process to unfold in this way during that meeting*

If I understand Lee correctly, such a meeting would be something he would be unlikely to agree to. As an alternative I touched on with Lee, for example providing written answers to questions you may pose to him and, as a last resort of course if Lee felt unable to answer or attend the final option would be to allow Lee to give his consent to a representative to answer on his behalf.

What I did say to Lee is that irrespective of any possible process that is unfolding, I do think it would assist him psychologically to bring matters to a conclusion sooner rather than later but of course it is for Lee to consider and of course whether there could be any prejudice to his position or outcome is something that Lee can consider.

It does seem as though the situation has escalated beyond a point where Occupational Health can assist further.

If Lee has already considered that those next steps are legal rather than following the usual path of either dispute resolution or other managerial outcome, then of course it is difficult to Occupational Health to assist further."

[our emphasis]

5 March 2020 grievances & the grievance investigation of Mr Raes

381. Issue 2(c)(vi) & (vii) relates to the complaints that DGF failed to deal with/determine Mr Tooze's grievances:-

2(c)(vi) Case 1304855-20 Failure to make reasonable adjustments under the Equality Act email to Nicholas Sandison 5th March 2020 [733-34]

2(c)(vii) Case 1304905-20 Failure to allow the Claimant to return to work email to Nicholas Sandison 5th March 2020 [731-32]

382. In the first of those emails of 5 March 2020 [733-34] Mr Tooze stated to Mr Sandison, ***'The point where the relationship turned was where DHL lied saying I hadn't got IPB'*** and he asked Mr Sandison to ensure that Ms Marsh did not lie again.

383. In the second [731-32] Mr Tooze complained about Mr Parker, Ms [Marsh], Mr Wright, Mr Sandison and Mr Young about amongst other matters them preventing him from returning to work, showing no duty of care to him, subjecting him to harassment, bullying, threatening and trying to intimidate and ostracising him.

384. Before we address how they were dealt with we need to record that

384.1. on 9 & 11 March two further claims to the Employment Tribunal were lodged by Mr Tooze [50 & 64], and

384.2. on the basis of the Occupational Health report dated 26 February, DGF concluded Mr Tooze was fit to attend a formal hearing [746A], and so on 11 March Mr Raes wrote to Mr Tooze inviting him to a third formal hearing to be held at a Hotel near Mr Tooze's home on 19 March [737]. That letter was essentially in the same form as the January and February letters. It transpired Mr Tooze later contacted DGF to inform it that he could not attend due to him self—isolating [740-41 & 746A].

384.3. on 22 March 2020 Mr Raes wrote inviting Mr Tooze to a formal grievance meeting to be held on 3 April by Skype regarding his three grievances of 19 December (x2) and 5 March [741a]. Mr Raes indicated if there were any further matters Mr Tooze wanted him to consider that he should provide details by close of business on Thursday 2 April 2020. He reminded Mr Tooze of his right to a companion and suggested a number of adjustments including regular breaks and that if Mr Tooze preferred to provide written answers to questions as an alternative option to answering questions during the meeting to let Mrs Turner know.

Other matters in March & April

385. Following on from his letter of 11 March 2020 (384.2) on 25 March Mr Raes wrote to Mr Tooze inviting him to a fourth formal hearing to be held by skype on 3 April [740-41]. That invitation was in the same form as the January letter

> *As you are already aware, we are now in receipt of an Occupational Health report dated 26 February 2020. The advice provided on the report states that Occupational Health think that it would assist you to bring matters to a conclusion sooner rather than later. The report does not suggest that you are not fit enough to attend a meeting with us, subject to adjustments as discussed below.*

386. Again, the meeting scheduled for 3 April was subsequently rescheduled for reasons we address below (392) following.

387. The next issue that arises is an act of victimisation

> *19(b) Writing to the Claimant on 11 March 2020 and/or 25 March 2020 threatening to terminate his employment and to organise a hearing to discuss matters outside of the grievance procedure.*

388. On 2 April Mr Tooze emailed Mr Sandison [756] to say he had been issued a further MED3 sick note on 2 April 2020 and as soon as he had received it he would send it through. That was subsequently provided and referenced "stress caused by work-related issues – ongoing" and certified the period of sickness as 2 April to 1 July 2020 [742].

389. Mr Tooze listed 15 complaints about the way he had been treated and concluded by saying:-

> *"Please do not reply with anything other than replies to the above questions and statements, do not start harassing me and trying to intimidate me in your normal fashion, it will not be tolerated."*

390. We do not intend to relay all those matters save that Mr Sandison responded to point 9 in turn prompting a reply from Mr Tooze. Thus:-

> *9. Why are all your letters and emails received on a Friday?*
>
> *NS. They are not. There is not bad intent in this regard. I prepared this email on Friday but have chosen not to respond until Monday so as to avoid offence.*
>
> *LT. noted and appreciated [757]*

391. We should record there was further mention of those matters at point 12 where Mr Tooze questioned why DGF were *"continuing to play psychological games with me, sending one letter on a Friday full of threats …".*

392. Whilst Mrs Turner told us [JM¶32] she took over as a HR contact for Mr Tooze in June 2020 we can trace the start of her involvement to a letter from Mr Raes of 14 April [746A-B] written following the adjournment of the formal meeting scheduled for 3 April 2020.

393. We find as a direct result of the nature, content and repetition of the allegations Mr Tooze made about Ms Marsh, Mrs Turner's involvement in dealings with him increased.

394. Despite the contents of the Occupational Health report of February and the offer of adjustments Mr Raes identified in his letter of 14th that Mr Tooze had informed DGF that he was not only unfit to attend but that he was only able to answer written questions put to him one at a time. Mr Raes stated it was not feasible to conduct a hearing in that way and so the

hearing was postponed to allow Mr Tooze to recover and so he was fully able participate in the hearing.

395. At that point Mr Tooze was certified as unfit for work until l July 2020 but in DGF's view had exhausted his sick pay entitlement. Mr Raes stated it was DGF's intention to continue communicating with him from a welfare perspective in particular, to understand when he was likely to be able to return to work and what, if any adjustments he might need in relation to his return. He explained how given Mr Tooze had complained about Ms Marsh and Mr Wright and have taken issue with receiving any communication from them that communications should be with Mrs Turner, gave her email address and phone number and asked Mr Tooze to confirm how he would prefer her to contact him.

396. Mr Raes also referred to the series of questions Mr Tooze had sent to Mr Sandison on 2 April 2020 suggesting that Mr Sandison's response of 6 April 2020 had addressed all of his requests but if not to contact him. Finally, Mr Raes stated he would be writing separately about Mr Tooze's ongoing grievances.

397. On 15 April 2020 Mr Tooze sent emails to

397.1. Mr Raes querying why he was being asked for details of his complaints because he had already clarified them to Mr Sandison and

397.2. Mrs Turner asking for clarification of DGF's company sick pay policy [764].

398. The latter links to issue 29:-

Between 18/6/20 - 15/7/20 Did R fail to pay C sick pay?

399. Mrs Turner replied on Friday 17 April [748]:-

I have reviewed your company sick pay entitlement and it does indeed work on a one year rolling basis. Please find calculation below from the payroll manager, in your case:

Current absence: 03/02/2020 - present day

Previous absence: 08/04/2019 - 06/10/2019 - total 130 days (26 weeks)

At the start of the current absence we look back one rolling year (to 03/02/2019) and deduct any absence taken during this period from Lee's current sick pay entitlement. As Lee had already taken 26 weeks sick during this period he has no entitlement remaining for the current period of absence.

400. Whilst the explanations DGF gave on 24 February (377) and 17 April are consistent, both are not easy to understand on their faces. The reason for that difficulty is the reference to "rolling year". That is no doubt used to distinguish the reference period from, say, a calendar year, but the confusion arises because the reference period is not purely "rolling" instead it is fixed by reference to the start of that absence. That could have been clarified in DGF's procedures and policies by the use of examples. But that clarification is absent (that may be because it was discretionary) but that aside in our view some form of explanation should have been provided in practice so that the position was clear, and this situation avoided.

401. Mr Tooze referred us to DGF's managing attendance policy [387-403] which made four references to a 12-month rolling period at ¶8.1 (x1) & 8.4 (x3).

402. Whilst we can understand Mr Tooze's comparison they address different matters. That is demonstrated by them having different assessment/trigger points - the return to work and start of the absence. Absent evidence ,rather than an assertion of bad faith to show that was not DGF's policy, we accept the explanation provided by DGF that that was its policy, something that was supported by the subsequent clarification from its payroll manager, someone who we remind ourselves, was not connected with events.

403. We find that Mr Tooze had been paid his full sickness entitlement of 26 weeks in the 12 month period preceding the start of his sickness absence on 3 February 2020 and so had exhausted his contractual sick pay.

The continuation of the grievance process undertaken by Mr Raes

404. Following on from his letter of 22 March (384.3) and Mr Tooze's reply of 15 April (397) on 22 April Mr Raes sent a further letter to Mr Tooze headed "Investigation Into Grievances dated 19 December and 5 March" [749a-d].

405. Mr Raes explained he understood Mr Tooze's grievance in relation to taking annual leave had been resolved as it had been agreed Mr Tooze would take the annual leave by the end of July 2020 and so did not intend to take that issue any further. Mr Raes went on to say that given Mr Tooze had made complaints against a number of individuals he asked Mr Tooze to explain how he felt aggrieved and what it was that they had said or done and when, that caused that. He sought a reply by 1 May.

406. Whilst neither Mr Raes' letters of 22 March nor 22 April refer to the Mr Tooze's complaint of 10 February (370), we find within his email of 22 April Mr Raes was seeking from Mr Tooze details of any complaints he had against the individuals concerned.

407. On 28 April 2020 Mr Tooze emailed Mr Raes, providing a lengthy response to his request for further details of his complaints [761-764]. That did not include the information Mr Raes had sought, namely the detail of what was said or done by whom and when that he complained about.

408. On 14 May 2020 Mr Raes wrote to Mr Tooze headed *"Investigation into outstanding Grievances"*. It set out his outcome into Mr Tooze's grievances. Having referenced how the 2018 grievance and his grievance in relation to holiday entitlement had been addressed it went on to address the following:

> *"… the allegations you have raised in respect of your holiday entitlement, and withholding salary have now gone as far as they can in respect of Our internal processes. As you have brought Employment Tribunal claims in this respect, these issues will now be handled via the Tribunal process rather than our internal processes.*
>
> *Further, as far as I can see, any complaints you have made against Julia Marsh (not Walsh) in your email, are related to your complaint in respect of your holiday entitlement which, as stated above, has already been dealt with via our internal process as advised in her letter to you dated 21 December 2020. Further to your mail of the 28 April, I therefore consider this matter closed.*
>
> *As regards to the allegations against Simon Parker, you have re-iterated the 26 bullet points that you listed in your email to Simon Parker with Julia Marsh in copy on 11 May 2019. Julia Marsh responded on 16 July 2019 and notified you that a grievance hearing was to be set up to address all of the bullet points raised. You replied on 16 July 2019 at 10:14, and 16 July at 13:38 advising that you have not raised a grievance. On 16 July at 21:38 you repeated that you have never asked for any emails to be accepted as a grievance and advised that the 26 bullet points were merely statements of fact. 50 I take it from this that you did not raise a grievance about Simon Parker. Therefore, you had the opportunity to raise these points at this time as a grievance and declined to do so and we do not intend to open this now, which you will appreciate are many months later.*
>
> *Finally, you name in your grievance of 5 March: Nicholas Sandison; Michael Young; and Lawrence Wright. However, your letter of 26 April does not provide any allegations against any of these individuals which can be investigated.*
>
> *I appreciate your comment in respect of trying to focus on your health and a return to work and I want to ensure you feel supported with this aim. You also state that you are following the advice from Occupational Health, dated 26 February 2020, where it suggests it best to deal with the items that are causing the stress. Based on my findings, I see nothing further to be investigated and therefore, as far as I*

am concerned all outstanding grievances in respect of your letters dated 19 December 2018, 5 March 2020 and 28 April 2020 are now dealt with." [764a-b]

409. Notwithstanding what we find was Mr Tooze's failure to engage with Mr Raes by providing the detail of what was said or done by whom and when in relation to some of those complaints we find Mr Raes had tried to investigate those matters as best he could and decided any aspects of the grievance he had not been able to address would be closed. We find that was a reasonable view that he was entitled to come to.

Welfare Meeting of 26 May and subsequent events

410. On 19 May Mr Tooze was invited to a welfare meeting by Mrs Turner so she could get an update on how he was since he had been off sick with work related stress from 2 April 2020. She offered to make herself available if it suited him at 2:00 pm on 26 May [800] and given the lockdown suggested that that take place by skype. He replied later that day [799] thanking her for her email saying he was *"…fine and I'm doing well in the main due to the vast reduction in communication and letters from DHL. I have also had communications with Nicholas and Jean Claude, both with positive conclusions."*. He went on to say the work related stress started on 3 February.

411. There was then an exchange about Mr Tooze not having access to a work laptop and thus not being able to access Skype. That was resolved and on Tuesday 26 May 2020 the welfare meeting went ahead as planned. Mr Tooze covertly recorded it [769a-m]. It was minuted by DGF [766]. The minutes record:-

"CT: I am pleased to hear that you have improved Lee what is a typical day like for you at the moment, how is this affecting you ?

LT: Well it's not affecting me at the moment, When they start threatening your employment… …DHL kept on at me for months. They have backed off now and dropped everything. I have had positive messages from Nick and Jean Claude recently. They have now backed off and dropped everything.

CT: What do you mean?

LT: Well you know you have been party to the letters.

CT: Well yes we have confirmed that the Grievances are now closed down, do you agree.

LT: Yes I do, people wanted to talk to me about rubbish. They should have focused on all these issues years ago. I have worked for DHL a long time they never adhere to procedures. I am now focusing on getting back to work.

CT: That is correct Lee in that we have confirmed that the grievances have been now been closed down, however as explained in the letters we were dealing with the matters separately. In terms of the formal hearing we have confirmed to you that our preference is to hold this when you are well and return to work and you can fully participate.

LT: So I am getting more rubbish. This is supposed to be a welfare meeting and you should have spoken to me 6 weeks ago. That's what it says in the Attendance Management Policy.

CT: Well Lee that depends on the situation, in this case you are off with stress that you attribute to work, in which case we would be guarded and mindful about the circumstances. These meetings usually take place with the line manager but we have been trying to handle outstanding grievances from you where you have named a number of managers. Which is why I have been asked to handle the welfare meeting. I apologise that it has taken this long."

412. At 3:57 am on 28 May 2020 Mr Tooze emailed Mrs Turner, Mr Raes and Mr Sandison under the Subject "Re: Welfare Meeting" [793-95]:-

"We started out the call today by you not thinking we had met when indeed we had, from not knowing me I felt the call very much a personal attack.

Have to say, today felt nothing like a Welfare call, felt more of the same bombardment of the past months and that your only purpose to call was to find out my next steps, backtrack and play more physiological games with me how was that ever supposed to be about my Welfare? …"

413. That seems to have been prompted by Mrs Turner stating it was good to meet Mr Tooze whereas they had met before. That email concluded :-

"Thanks, but today did nothing for my Welfare at all, I will continue to report through to Nicholas as I feel he is better positioned to address such matters."

414. In our judgment Mr Tooze not only took those comments out of context but placed far greater emphasis on them than they warranted. His perception of them demonstrates the difficulties DGF was facing. That is reinforced by contents of their conversation referencing the number of colleagues Mr Tooze had complained about and their personal and repeated nature.

415. In contrast later on 28 May at 9:24 am Mr Tooze emailed Mr Sandison [784] to say he was feeling better and that his GP had certified him as fit to return to work with adjustments.

> *"The past month with less interaction has enabled me to focus upon my welfare and left me feeling much better, that coupled with the messages from yourself and the content, also, the letter from Jean Claude and its content."*

416. His fit note [783] was for the period 28 May to 27 June 2020 and identified the adjustments as a workstation adaptation to help with his repetitive strain injury symptoms.

417. At 9:15 am on 29 May 2020 Mr Raes emailed Mr Tooze [785] thanking him for his email of the previous day and amongst other matters stated:-

> *"I am pleased to hear that your health has sufficiently improved to enable your GP to consider you fit to return to work as of yesterday, which is earlier than the your current sick note which states you are unfit until 1st July 2020.*
>
> *As per my letter to you on 14th April 2020 you were advised that we would reschedule the formal hearing at a point in time when you were fit to return to work and able to fully participate in the meeting. A revised invite letter will be sent to you shortly in this regard.*
>
> *In the meantime the decision has been made to suspend you from work until further notice. Your suspension does not constitute disciplinary action and does not imply any assumption that you have committed misconduct. We will keep your suspension under review and will aim to make the period of suspension no longer than is necessary. Your suspension may be lifted at any time and with immediate effect."*

418. Mr Tooze was informed he would receive his full salary while suspended.

419. Via an email of 18 June [800c] Mr Tooze informed Mr Sandison that he had been signed off as unfit for work from 18 June 2020 to 17 July 2020. Mr Tooze's GP notes [947] record the diagnosis as "Work stress". He was thus suspended for a period of about 3 weeks prior to 18 June.

420. Four further issues relate to the period to June 2020. Issue 2(m), 6 & 19(d):-

> *"Did R suspend C (despite C having a fit to work note)?"*

issues 2(l) & 6:-

"Did R omit to hold a return to work interview in January/June 2020?"

issues 2(k) & 6 (following our findings at ((349.1 & 349.2)) as to the January 2020 aspect of this complaint):-

In Jan & June 2020 did R omit to refer C to an OH specialist?

and issues 2(e), 6 & 14 were that:-

In Feb-May 2020 & June-July 2020 did R omit to keep in touch with C during his sickness absences in 2020?

421. As to the issues concerning the June suspension and absence of a return to work interview the decision was taken in January to suspend Mr Tooze during the disciplinary process. We address our determinations on the reason for that process and the suspension that went along side it below (489-501).

422. As to the OH referral it was accepted that Mr Tooze was not referred to OH in June 2020. However by that time DGF had received an OH report dated 26 February 2020 which had concluded that the resolution to Mr Tooze's stress lay in resolving the workplace processes that were at play, and that OH could not assist further (380). We find that being so an OH report would not assist, and it was in no sense because of his disability that that was not done.

423. As to the failure to keep in touch in his sickness absence between 3 February and 28 May 2020 and between 18 June and his deemed date of termination, 15 July at (452) following below.

June Grievances

424. Issue 2(c)(viii) & (ix) relates to the complaint that DGF failed to deal with/determine the following of Mr Tooze's grievances:-

2(c)(viii) Case 1304905-20 Formal Grievance sick pay exchange with Nicholas Sandison 24 June 2020

2(c)(ix) Email Grievance re Policies 26 June 2020 [the grievance was actually dated 25 June see [807]]

425. With regards to (c)(viii) that formed part of an email chain between 22 and 24 June [801-05]. The grievance that is referred to as part of this issue is that dated 24 June [801-02] and was a reply from Mr Tooze to an email from Mr Sandison of 23 June [802]. That was preceded by Mr

Tooze sending emails headed *"grievance"*. Mr Sandison emailed Mr Tooze on 23 June as follows [802] :-

> *"Collette responded to you yesterday. I am satisfied that Collette answered your question about CSP fully. Furthermore, I have asked Payroll to run a check from June 18 2020 back to June 19 2019 and I can confirm that you are not entitled to anymore CSP. For the avoidance of doubt, CSP is discretionary on the part of the Company, although we do apply similar rules as for SSP. You are therefore not entitled to any further CSP at the present time. If you disagree, then your recourse is to the Employment Tribunal. I will also remind you about clause 13 of the Attendance Policy which I sent you yesterday – regarding payment whilst the disciplinary process is underway.*
>
> *I am not prepared to consider this as a grievance.*
>
> ***The communication in your last email is unacceptable. I have had cause to write to your previously (16 July 2019) asking you to desist from making derogatory statements, and unfortunately you continue.*** *I have passed your email on to Collette Turner as I judge your comments to be unacceptable. These will, in turn, be considered during your Formal Disciplinary Hearing which will be re-scheduled very soon.*
>
> *I indicated that you could contact me regarding the WP conversations, not other matters."*
>
> ***[Our emphasis]***

426. Mr Tooze's grievance of 8:38 on 24 June included amongst a series of complaints [801-02]

> *"…*
>
> *8. You use bullying and harassment tactics*
>
> *9. You make employees ill so they cant work and ensure it's done in a way they are not entitled to CSP*
>
> *10. You and your staff have failed at every point on every policy*
>
> *11. You tell me to deal with HR managers that are incompetent and have failed both DHL and myself also that have tried to manage me out of the business.*
>
> *…"*

427. Mr Sandison replied to Mr Tooze's email 4 minutes later [801] stating he made his position clear.

428. That demonstrated in our minds the extent to which the relationship had broken down.

429. At 13:23 on 25 June 2020 Mr Tooze raised a grievance about Mr Sandison to Mr Young [807] He was told that the appropriate person to address the grievance was Mr Frank Bickmeier, to whom Mr Sandison reported, and cc'd it to him.

430. It is noteworthy that prior to that exchange Mr Raes had attempted to address any grievances that Mr Tooze had before the reconvened conduct hearing but with little success. It is thus not hard to see why DGF assert that Mr Tooze was deliberately abusing the grievance policy in order to be difficult and obstructive. We find he was not but instead Mr Tooze's sense of discontent was such that he no could longer engage constructively or properly with DGF as demonstrated by his rude, disrespectful and inappropriate communications with it and its staff. Indeed, that correspondence was such that they actively alienated, harassed and intimidated the colleagues he was dealing with.

431. The reason grievance procedures exist is to allow matters to be addressed so they do not start to gnaw away at relationships between colleagues and/or employers. Those are the very circumstances that arose here. However, once a grievance has been aired, decided, if relevant, appealed and any appeal determined they require the parties to move on and put the sense of grievance behind them, whether the outcome was favourable or not. As his repeated complaints stretching back to matters in 2018 and before demonstrate Mr Tooze did not move on but instead retained that sense of grievance and that gnawed away at his relationship with DGF and in turn his colleagues.

432. Whilst we find Mr Tooze was not deliberately abusing the grievance policy, that was only because he had lost, by that time, all sense of perspective and that aside we find Mr Sandison's comment that we emphasise above at (425) demonstrated that DGF concluded that what it described as the derogatory statements in those exchanges were matters that needed to be addressed as part of the formal disciplinary hearing that was due to be rescheduled. We find the content of Mr Tooze's communications entitled it to do so.

The final Disciplinary Hearing invitation

433. On 2 July 2020 Mr Tooze was sent a letter inviting him to a further rearranged disciplinary hearing. He was told if he did not attend that DGF intended to proceed in his absence [809a].

434. By the time of the invitation letter of 2 July 2020 [809a-e] the matters DGF wished to discuss with Mr Tooze had been distilled into 4 allegations:

1: That you repeatedly send what appear to be vexatious communications in which you hold colleagues and management to ransom over a number of issues, examples of which include the following; ineffective management, unfair treatment, bullying, harassment, victimisation, acting in a way that is causing you to be unwell and a repeated failure on our part to discharge our Duty of Care towards you.

[examples were then listed for each of the four allegation in turn]

2: That you have been obstructive and have failed to assist us with investigating complaints and/or grievances you have made.

3: That you resurrect historic complaints and grievances spanning back in time (eg; since 1998) which you have either not raised at the relevant time, or you have raised at the same time as you made an allegation that you were entitled to improved pay and benefits.

4: That your behaviour is considered erratic and unpredictable and causing substantial disruption and does not demonstrate the required trust and confidence which should exist in an ongoing employment relationship between an employer and an employee, as per the above.

This is exampled by continual clashing and disputes with others and is causing issues including undermining productivity and damaging the harmonious running of the business.

435. Whilst reference was still made to "irretrievable breakdown" the purpose of the meeting was described thus:-

"The formal disciplinary hearing is for me to consider the following allegations, …"

Whilst the invitation letters included the warning:-

"It is necessary to inform you that this matter is considered extremely serious, and if the allegations are upheld, may ultimately lead to you being dismissed from the Company with notice.

Please be advised that should you fail to attend the formal hearing, we will consider proceeding in your absence as we have attempted to hold the hearing on 3 occasions on 22nd January 2020, 19th March 2020 and 3rd April 2020 and now rescheduled for 8th July 2020."

Unlike the letter of 16 January [682-83] no explicit mention was made of some other substantial reason for dismissal in the letter of 2 July 2020 [809a-e] whereas that later letter specified the allegations before stating:-

"If the allegations are upheld, this may lead to a disciplinary sanction and/or the conclusion that the relationship between you and DHL is irretrievably broken, which could lead to the termination of your employment."

436. We consider that by 2 July 2020 the hearing was to also address a conduct issue. Before us this was argued as both some other substantial reason and conduct in the alternative [318 ¶8.1].

437. That letter was accompanied by a pack of supporting information in the form of 19 appendices. Some documents in the bundle were expressly marked as an "app"(endix); namely appendix 2 [530a], appendix 3 [533a-533k], appendix 4 [497a-b], appendix 6 [589a-589h], appendix 8 [646a], appendix 16 [480a-c], appendix 17 [481a-d], appendix 18 [481e-m] and appendix 19 [481n-o].

438. Issue 2(n) concerned

Reinstating disciplinary proceedings after telling the Claimant that they had been dropped in correspondence dated 14 May 2020 from Mr Raes which stated "Based on my findings I see nothing further to be investigated."?

439. We address Mr Raes' letter of 14 May at (408-409). The previous invitation to a disciplinary meeting was that of 25 March inviting Mr Tooze to a (fourth formal hearing) to be held by skype on 3 April (see (385)).

440. We find the correspondence concerning the grievance and disciplinary processes was for the most part kept entirely separate and there was a clear distinction in the headings of the correspondence sent by DGF to Mr Tooze delineating between the grievance process and the disciplinary process.

441. Mr Tooze at times placed great emphasis on the use of words and was a highly intelligent man and thus we find that on a reasonable view and reading of the correspondence a clear distinction was being made between the grievance process which was treated as concluded at (408-409) and the disciplinary process, where not only no such statement was made, but further letters sent making clear the reverse was the case.

442. What is more DGF had sought to identify and address not only the grievances Mr Tooze had raised but any further issues before the disciplinary hearing.

The disciplinary hearing & second IPB claim

443. On 8:28 am on Wednesday 8 July, the day scheduled for his disciplinary hearing Mr Tooze emailed Mr Sandison seeking a further referral to L&G under the IPB policy [840].

444. There followed an exchange of email correspondence between 8-20 July [832-840] where Mr Sandison identified Mr Tooze's previous IPB application from 2019 had been turned down, that OH had identified the barriers to his return as his interplay with management and sought to clarify how a further application differed from the previous application.

445. Mr Tooze responded identifying stress and his musculoskeletal conditions as the basis for the application [836] and on Wednesday 9 July Mr Sandison indicated he would ask Ms Marsh to make referral to L&G [835].

446. As we say that exchange started on 8 July 2020, the day the formal disciplinary hearing was held. That disciplinary hearing proceeded in Mr Tooze's absence (as we say above (435). Mr Tooze had been warned that may happen in the invitation [809a-e]). The meeting was chaired by Mr Raes. It was minuted [810a-q] by Allison Stewart and Mrs Turner was also in attendance as a procedural advisor.

447. At a number of points during the notes Mr Raes identified questions he had wanted to ask Mr Tooze about. He could have sent those questions to Mr Tooze in advance. We cannot identify that Mr Raes did. His outcome suggests he did not :-

> *"As you know the company has been trying to speak to you on this matter since writing to you, on 16th January 2020, when you were advised that based on what you have told us we believed there to be significant issues with your relationship with the company and that these were matters that we could not ignore. Despite many attempts to meet with you and resolve this you have failed to engage with us and work towards resolution.*
>
> *Essentially my brief was to determine whether the allegations were justified or not and then to review the health of the employment relationship at that point. Consider whether we had acted reasonably towards you or not. This was made more difficult by your failure to engage and put across your case.*
>
> *The minutes detail the content of the hearing and the questions I would like to have asked you had you been in attendance and so in the absence of this i am left with making a decision based on the information I have before me. …" [816]*

448. Mr Raes' outcome was emailed to Mr Tooze on Monday 13 July 2020 [815-821]:-

> *"It appears to me that the catalyst for this was when you became unhappy about your April 2018 pay award. You compiled an email on 29th April 2018 entitled 'Victimisation Grievance' to the CEO outlining a number of serious grievances. A Grievance Hearing and Appeal [was] held with AC* [Mr

Cooke] *and SN* [Mr Neville] *to consider these. You were citing victimisation, bullying, intimidation, being head-butted by your previous manager who I will refer to as RA* [Mr Aldridge] *who was leaving the business at that point. You complained of being persecuted by RA for 25 years, although it appears you had only worked for the company for 20 years at that stage. I would liked to have clarified this discrepancy with you. You were putting to us that you felt history was about to repeat itself and that your new manager SP* [Mr Parker] *was showing the same behavioural traits as RA. You complained of a number of issues examples of which include you being under consultation for 12 months, threat of being sacked, SP's management style and that the pay increase he awarded you was discriminatory. At the same time you claim improved pay and benefits on a range of issues, you wanted a car allowance rather than job need backdated and you sought pay parity with peers requesting backpay to 2006.*

The outcome was that some aspects of your grievance were upheld, some were not and you were advised of the reasons supporting this. Essentially you provided no specific evidence to support your claims against RA or SP.

At the appeal you received an apology about the re-organisation taking so long and an explanation as to why this was. I understand that this affected all of the sales team and not just yourself.

What I really wanted to explore with you is, if I had any issues with my pay and conditions of service then I would ordinarily raise these with my manager. If it was, as in this case, that you believed your award in April 2019 was discriminatory then it would be a case of simply submitting a pay award appeal, as this would go to SP's manager to consider. However in your case you decided at this point in time to put your request for improved pay and benefits into a grievance to the CEO at the same time as raising very serious and longstanding complaints of persecution, intimidation and bullying and a serious complaint of being headbutted by your manager in 1998. Despite this tenure of what you regarded as persecution by RA you carried on working for him and state that you were highly successful in your role. You also allege that as a result of management not addressing any of these issues we had failed in our duty of care towards you. I would have asked you how we had failed in our duty of care towards you when we had no knowledge of this.

In the appeal hearing notes Appendix 18 you state in the meeting; 'It would have been easier to go to Kuehne & Nagel and get £10,000 more'. In the email to the CEO Appendix 12 you state; 'You don't see me stealing company data and looking for another job, I easily could'. I find it difficult to comprehend why you would make these statements to your employer." [817]

…

"On 5th March 2020 at 04:12 you email NS ….. to say; ***'The point where the relationship turned was where DHL lied saying I hadn't got IPB'. You ask NS to ensure that JM does not lie again.'*** *"*
[819]

449. Mr Raes concluded [820]:-

> *"Having carefully considered all of the aforementioned I believe all of the allegations against you to be proven. I also believe that without reasonable and proper cause you have conducted yourself in a manner calculated to seriously damage the mutual relationship of confidence and trust between us rendering it untenable and irretrievable.*
>
> *My decision is that you be dismissed …"*

450. Mr Tooze was dismissed by Mr Raes with effect from 13 July 2020. Mr Raes confirmed Mr Tooze would be paid twelve weeks' notice and any accrued but untaken annual leave [815]. As we state above it was common ground Mr Tooze's effective date of termination was actually deemed to be 15 July 2020. By the time these complaints came before us he had been paid until his effective date of termination, for his notice pay. A dispute remained regarding his holiday pay.

451. On 16 July 2020 Mr Tooze was issued a further sick note for the period 16 July to 15 September 2020 referring to "stress at work" [823]. Whilst that was within the bundle before us it was not clear if and when that was forwarded to DGF. By the time it was issued he had already been dismissed.

452. On 18 July Mr Tooze sought an update on the latest IPB application. On 20 July Ms Marsh replied staying "*I understand that your employment with DGF was terminated last week, therefore, this application will no longer progress.*".

453. Returning to issues 2(e), 6 & 14:-

> *In Feb-May 2020 & June-July 2020 did* R *omit to keep in touch with C during his sickness absences in 2020?*

454. As can be seen from the June 2020 grievance exchange and our analysis of it at (425-432) above Mr Tooze's sense of discontent was such that he no could longer engage constructively or properly with DGF as demonstrated by his rude, disrespectful and inappropriate communications with it and its staff. Indeed, his correspondence was such that it actively alienated harassed and intimidated the colleagues he was dealing with. By then (June 2020) that sense of discontent made it almost impossible for any reasonable interactions with Mr Tooze to

take place. However, Mr Tooze's sense of discontent stretched back before December 2019 (as the exchanges and Mr Tooze's response in December principally about the carry forward of holiday but also latterly about DGF's attempts to meet with him, Mr Tooze's accusations that Ms Marsh had misled him about IPB (183), that she had misled OH in the referral (286 following) demonstrated (and in February 2020 he had accused her of lying to ACAS (370))). Those matters aside, as we said above that sense of discontent stretched back to Mr Tooze's 2018 grievance and its appeal.

455. We set out above (322-328) the difficulties that DGF faced with keeping in touch, that the contents of the OH advice in February only heightened. Those difficulties were demonstrated all too clearly by Mr Tooze's comments when Mrs Turner met Mr Tooze in May. We find in those circumstances and faced with those difficulties, DGF did the best it could to keep in touch with him.

Appeal

456. Mr Tooze appealed. There were three grounds:-

456.1. He was dismissed because of disability

456.2. Whistleblowing. That complaint was struck out by Employment Judge McCluggage on 6 October 2021 [276-286]) and does not form part of the issues before us.

456.3. Income protection benefit

457. It was heard on 8 September 2020 by Mr Wing. Mr Tooze attended but chose not to be accompanied. It was minuted [864A-F]. His outcome letter was dated 18 September 2020 [865-68]. Mr Wing decided not to uphold any of the grounds.

457.1. As to the first he decided that reviewing the disciplinary hearing evidence pack and the disciplinary outcome letter that there was clear evidence to support all four of the allegations and the reasons for Mr Tooze's dismissal

457.2. The second ground does not fall for us to consider.

457.3. As to the third Mr Wing acknowledged that due to the timing of the request and the pending disciplinary hearing DGF decided to await the outcome of the hearing before making proceeding with the referral. Given dismissal followed Mr Wing went on to consider if there were adverse consequences for Mr Tooze. He decided there were none because Mr Tooze was not dismissed on medical grounds.

458. Mr Wing went on to say this:-

> *"In addition to the above points … I would like to highlight that throughout the appeal meeting. even though you advised that you would like to return to your role within the Company, you still expressed to me a strong belief it is DHL that is completely at fault. You raised your concerns to me about number of managers within the business and advised that it would be for DHL to make changes for the relationship between you and the Company to improve going forward. To your own admission, you did not see practically how we could move forward with a positive working relationship based on your current feelings. I have reviewed a number of your comments from the disciplinary appeal meeting which i believe support Jean-Claude Raes disciplinary findings that there has been serious damage to the mutual relationship of confidence and trust between yourself and the Company rendering it untenable and irretrievable. …" [868]*
>
> Before going on to repeat as part of the last conclusion that Mr Tooze's belief that any change needed to be made by DGF and not Mr Tooze.

459. We find that over the course of the time frame we have had to consider Mr Tooze made complaints about almost all of the managers/HR colleagues he had any consistent dealings with (Mr Aldridge, Mr Parker, Ms Marsh, Mr Wright, Mrs Turner & Mr Sandison), some of those allegations challenged the integrity of the individuals concerned (the repeated assertions that Ms Marsh had misled OH and lied), in many instances the grievances he made were in response to decisions he did not agree with (the sick pay policy and some of Mr Sandison decisions) and not made in accordance with DGF's procedures (but to its UK CEO and in Mr Sandison's case to his manger in Germany).

460. We find those complaints were done in a way that intimidated and harassed his colleagues as them being repeatedly made in an inflammatory and immoderate manner such that it turned to personal attacks. We refer in particular to Mr Sandison's warning in that regard to Mr Tooze (425 & see also 430)). Many complaints related to historic matters that were not raised at the time they arose or when Mr Tooze became aware of them (one such example that only arose with clarity at the hearing was the Dean Carter role). Having raised grievances Mr Tooze then failed to engage with them (see Mr Raes' investigation into the grievances) and provide details or to respond to reasonable requests from his managers (the telephone calls and email from Mr Parker about Mr Tooze's absence in early May 2019). Even when some of those allegations were raised and determined Mr Tooze's refused to accept the outcome and his grievances continued to rankle with him.

461. There is also a stark contrast between Mr Tooze's complaints that DGF was not keeping in touch and his complaints about DGF keeping in touch (his complaint that Mrs Turner did not recall having met him before at the welfare meeting they had in May 2020). His position was at points both at odds and unreasonable (even before us whilst accepting voice to text would not work he continued to argue an adjustment should have been made) and minor problems became large ones (the telephone calls and email from Mr Parker about Mr Tooze's absence in early May 2019 and Mrs Turner's comment at the welfare meeting).

462. We find the disciplinary allegations against Mr Tooze were made out and DGF were entitled to conclude its relationship with him had fundamentally broken down. That conclusion is an easy one for us to draw because Mr Tooze contemporaneously accepted that to be so at the appeal meeting.

463. That breakdown in relations on Mr Tooze's own account commenced long before the first of the grievances or protected acts he made. At one point he dated that breakdown to April 2019. That however is misleading because his sense of grievance refers to matters that were included in his 2018 grievance as was demonstrated by him continuing to refer to the issues that had been addressed by it and some that were not (the Dean Carter role). That too is demonstrated in his responses.

464. The third ground of appeal links to one of the adjustments complaints and so we address our further findings and conclusions there.

Other matters

465. Issue 10(c), 14(d) & 19(c) was

> *"Between Feb-Oct 2020 did R persistently write to C with case-related correspondence on a Friday?"*

466. The claimant identified these by number in one of the spreadsheets he provided

> *"3.1.3.18 - Email re Fridays 23 October 2020 [218]*
>
> *3.1.3.19 - Email to Jean Claude re Friday letters 2 April 2020 [743]*
>
> *3.1.3.20 - Email to Jean Claude re Friday letters 28 April 2020 [761-764]*
>
> *3.1.3.21 - Email to Nicholas Sandison re Friday letters 8 Feb 2020*
>
> *3.1.3.22 - Exchange with NS point 9 re Fridays 30 May 2020 [755-758]*
>
> *3.1.3.23 - Nicholas Sandison Email exchange started Friday 7th Feb 1555 [18-21 & 707-719]*

3.1.3.24 - Envelope 2 sent Saturday 19 Sept 2020 [869]

3.1.3.25 - Envelope send 12 March 20 for Friday arrival [739]

3.1.3.26 - Envelope sent 23 July 2020 to arrive Friday by 1pm birthday weekend [847]

3.1.3.27 - Envelope sent Friday 24 April 2020 for Saturday delivery by 1pm [759]

3.1.3.28 - Envelope sent Saturday 19 Sept 2020 [869A]

3.1.3.29 - Envelope showing sent 7 July 2020 for saturday by 1pm delivery [810]"

467. Thus, over the 9 month period we were pointed to, Mr Tooze relied upon 12 matters. Of them only 6 were letters sent to him and only 1 was stated to be sent out on a Friday. Two others arrived on a Friday. On the best of those measures (3 sent or arrived over 9 months) 0.33 letters a month could not in our view be said to be persistent. However, of greater import we were not taken to the totality of the correspondence Mr Tooze was being sent over that time period and thus the proportion will in all likelihood be substantially smaller.

468. Further, Mr Tooze had by then asked for correspondence to be sent to him by post. Whilst some of that post was sent to arrive next day or by a specified time/day, ultimately it was out of DGF's hands when that was received by him. Further still some of the correspondence was forwarded because that related to meetings DGF was trying to arrange, was thus time sensitive and it was understandable that was sent in that way. Whilst it is accepted that the correspondence sent in that way was unwanted some was also in response to issues raised by Mr Tooze.

469. For those reasons we find that in so far as correspondence was sent to him contrary to his requests that was not done *persistently*, was for good reasons and was in no sense whatsoever related to his disability.

Our further findings and conclusions

Timing

470. We set out the various complaints as analysed by Employment Judge McCluggage at (1) above. The claims that have not been determined are those related to discrimination complaints [50] following although an issue arises also in relation to wages that goes beyond the issues determined at the hearing on 27 and 28 April 2021 by Employment Judge Beck (see (2 and 3) and [263] following).

471. The first of the discrimination complaints was presented on 9 March 2020. Mr Tooze having conciliated via ACAS [49] which started and ended on 9 March 2020.

472. DGF argue any issues concerning the use of a second early conciliation certificate aside (see the following paragraphs) the time limit for any conduct extending over a period to be in time was therefore 10 December 2019 (three months less a day before the discrimination complaints were commenced).

473. As we state above the first claim lodged (point "7a" of Employment Judge McCluggage's summary) was presented on 29 October 2019 to London South Employment Tribunal for breach of contract only although Employment Judge McCluggage described it as a wages complaint. It followed early conciliation between 20 September and 11 October 2019 (21 days).

474. Prior to the discrimination complaint Mr Tooze had previously conciliated via ACAS between 19 December 2019 and 6 January 2020 [1] in relation to his claim relating to the carry-over of holiday pay (issued on 21 January 2020 [2-13]) and between 21 January and 6 February 2020 (18 days [17] in relation to his claim for "forced holiday" (issued on 14 February 2020 [22-33]).

475. It was sent to the respondent on 5 November 2019.

476. The most beneficial option for Mr Tooze here is to argue that he could only conciliate once [92] because that takes the end of the conduct back 21 days by reference to the period in early conciliation in the first claim "7a" or by 18 days by reference to the first claim in the bundle (because the period spent in early conciliation in for the discrimination claims was no complete days) and thus the last day any conduct extending over a period needed to have extended beyond was 18 (or 21) November 2019. It matters little here because the only incidents that occur during the period 18 (or 21) November to 10 December 2019 was the allegation of excessive contact relating to work issues in December and that extended beyond the last of those dates but in any event we have proceeded on the basis that 18 November 2019 is the correct date being the first period of early conciliation.

477. We find Mr Tooze was aware of the factual matters that he was complaining about at the times they occurred. That is demonstrated by the grievances he raised in 2018 and again in August 2019. In the latter he makes a point that Mr Young referred to legal recourse. Despite that he provides no good explanation why he did not bring a claim in relation to the discrimination

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[92] Once a claimant has complied with early conciliation requirements for the purposes of section 18A of the Employment Tribunals Act (against the correct prospective respondent) the start and end of early conciliation are fixed *"27. … For the reasons explained by Kerr J in HM Revenue & Customs v Serau Garau [2017] UKEAT 0348/16 that position was not - and could not be - changed by any later application for EC made by the Claimant in respect of the same matter."* (per HHJ Eady QC in *Treska v The Master and Fellows of University College Oxford [2017] UKEAT/0298/16)*

complaints that arose before 21 November before he lodged his claim on 9 March 2020 (or indeed that of 21 January 2020).

478. Some of the discrimination complaints that predate 21 November 2019 stretch back to Autumn 2018 (the failure to inform, consider, or appoint him to an alternative (the Customer Key Account Manager role) which in itself is problematic in that regard as it relates to an adjustments complaint). His failure to be able to recall both the dates and detail of some events, and the changes to the allegations even before us (for example the car not being cancelled but put "on hold") demonstrates the difficulty and therefore prejudice, caused to both parties as a result. The Customer Key Account Manager is a case in point. The changes to the way he put the substance of his claims (e.g., regarding holiday (see (334)) reinforces the prejudice to DGF.

479. We considered if the delay could be reason of his disability. Mr Tooze did not provide any direct evidence that he was fit to bring the claim in January but not in March. Despite that we noted that his sickness absence commenced on Monday 3 February 2020 (359) but also that that did not prevent him raising grievances to DGF, many of which included the complaints he now brings.

480. In addition to the delays between the various steps Mr Tooze does not explain how given there were different perpetrators why those acts should be linked so the conduct preceding 21 November 2019 should be treated as extending over a period.

481. Looking at all those matters in the round we conclude that all allegations under the EqA that predate 21 November 2019 issues 2(i), 2(a), 2(b), 2(f), 2(h), 6(b), 10(a), 2(c)(i), 2(g), 2(d), 6(a), 13(a), 13(b), 2(j) and 6(c) and any equivalent complaints are out of time, that the prejudice to the respondent caused by the delay outweighs the prejudice to Mr Tooze not being able to pursue those complaints no good explanation being present and conclude that it is not just and equitable to extend time to the complaints that precede 21 November 2019. Notwithstanding that determination we have considered the substance of them below.

Harassment complaints

482. Before us 25 acts of unwanted conduct were identified in issues 14(a)-(d), the direct discrimination complaints set out at 2(a)-(j) (including (c)(i)-(ix)) and the discrimination because of something arising from disability complaints 6(a)-(c).

483. Section 212(1) & (5) EqA headed *'General interpretation'* effectively provide that if an act is found to be harassment it cannot also be a detriment (and thus direct discrimination). Where an act is

not found to be harassment that does not prevent conduct amounting to a detriment for the purposes of direct discrimination complaint. Thus, harassment needs to be considered first.

484. As we say above (334) issue 14(c) "*Did R require C to take 5 days' outstanding holiday before, firstly, January 2020 and, subsequently, July 2020, and refuse to permit him to carry it over for 18 months after the end of the holiday year?"* was no longer pursued.

485. As to the issues that are not accepted by DGF as having taken place in some way we found that

485.1. (2(a)) For the reasons we gave at (151-155) that Ms Marsh did not say in/about June 2019 to Mr Tooze that he would not be able to return to his role,

485.2. (2(b)) We found Mr Parker did not say to colleagues and customers that Mr Tooze would not be returning (see (158-162)),

485.3. ((2(c)(i)-(ix)) Mr Tooze's grievances were addressed (or have previously been adjudicated upon) for the reasons we give at (205-214), (318-321), (370-376), (381-384.3 & 404-409) and (424-432),

485.4. (2(d) & (e)) We found that DGF did not fail to keep in touch with Mr Tooze (176, 323-328, 420-423 & 453-455),

485.5. (2(f)) We found at (261-267) that the vehicle was not cancelled, or as Mr Tooze subsequently put it "put on hold" in June as Mr Tooze alleged,

485.6. (6(a)) We found (286-290) that Ms Marsh did not mislead OH in October 2019 in her OH referral by stating the alternative role was rejected by Mr Tooze because it was a lower grade. We found both those elements (that it was rejected and that it was a lower grade) were factually correct, as was another reason that was given for the rejection, the voice to text issue. We found that neither did the evidence before us suggest OH was misled.

485.7. (14(a)) We found (327) DGF did not contact Mr Tooze excessively in relation to work-related issues in December 2010, the contact it made was in response to matters raised by Mr Tooze and limited to what was reasonably necessary to reply to him

485.8. (14(d)) We found (465-469) DGF did not persistently write to Mr Tooze with case-related correspondence on a Friday as alleged but in any event we found that was done for good reasons and was in no sense whatsoever related to his disability.

486. DGF accepted the following issues occurred in some form:-

486.1. (2(g))

486.1.1. We found (295-305) that whilst Ms Marsh and Mr Wright required Mr Tooze to return his company laptop, Mr Tooze only did so after DGF's request on 17 September and then Mr Tooze re-collected it when he had been certified as fit for work by his GP (300). The GP consultation was on 3 October 2019 (245). He was again asked to return it on 11 and 17 October 2019 [606 & 610] but we heard no evidence he did so.

486.1.2. Prior to the request on 14 June [496] Mr Tooze had been certified as unfit for work until 4 October. He should not have been using his laptop for work's business particularly given the OH Report of 24 July 2019 (181) had emphasised the need for a radically different role, a workstation assessment and voice to text to reduce the symptoms he suffered generally and from keyboard use in particular. Whilst he was certified as fit to work on 3 October (245) his GP in the MED3 stated *"Ongoing physiotherapy which appears to be helping. For work to please support return to work, but will be appropriate to modify working roles (sic.). This includes limiting driving requirements and data entry roles. Planning on return to work from Monday, 7 October 2019"*.

486.1.3. Thus, the use of a laptop for work use remained a legitimate concern. Mr Wright's response *"Noted, and I hope this continues to be the case. I want to ensure that your return to work does not in any way negatively impact your recovery."* demonstrates that. By way of reinforcement that that was genuinely DGF's view by 8 October 2019, DGF had placed Mr Tooze on medical suspension and Mr Tooze accepted that was a reasonable request in the circumstances (275).

486.1.4. Mr Tooze told us he had never known anyone still employed by the business have to return their laptop unless there is a risk when it is a sales person who has tendered their resignation to go to a competitor, and that did not apply to him (300). That does not mean he would have known if anyone on long term sickness being asked to return their laptop or indeed in the specific medical conditions and their effects as here. Whilst Mr Tooze's view as he made clear from his questions to Ms Marsh in the afternoon of day 6, was that the laptop

was taken back to alienate and isolate him and that he had been helping teams who had looked after his customers to ensure none fell short of service the panel's notes all record that (296) that reinforces the concern he was working when he should not have been and placing himself at risk of injury.

486.1.5. Whilst the situation was later confused by requests being made in part so customer data could be accessed, we find that was a peripheral issue, and we make a positive finding (*Hewage* see (65)) that that was done because he was off sick to protect him. As Mr Tooze later accepted in relation to his medical suspension any reasonable employer would have done the same given the recommendations of the July OH report. For whilst the requests for the return of the laptop were unwanted by Mr Tooze in those circumstances they could not be viewed as creating the prescribed consequences necessary for harassment.

486.2. (2(h)) We found above that the error DGF accepts Ms Marsh made in relation to IPB in June / July 2019, was a genuine one for the reasons we gave at (200-204) and once identified was remedied and the application made within a week. Further, if Mr Tooze had forgotten about the IPB benefit as it appears to us he did until he raised it July, it is unsurprising given it was a rare benefit that Ms Marsh was also unaware of it. We found it was in no sense done because of Mr Tooze's disability. In coming to that view, we considered the rationale provided by Mr Tooze why he said its purpose was to create the consequences proscribed by s.26 EqA and rejected that.

486.3. (2(i))

486.3.1. We address the allegation that DGF failed to inform, consider, or appoint Mr Tooze to, the Customer Key Account Manager role in the Birmingham office in or about October 2018 at (117) following and the role that arose in summer 2019 (229-235). If Mr Tooze had considered they were roles he was interested in he would have applied (where he was aware of it/them) or complained he had not been appointed to them at the time and did not do so. The failure to offer or consider him for those roles was in no sense due to his disability simply they were not roles that he or DGF considered were suitable roles for him.

486.3.2. We address below the adjustments complaints at (502-541).

486.3.3. For the reasons we give at (278-281) we found Mr Tooze was not prevented from returning to work in October 2019 by virtue of DGF failing to make reasonable adjustments or failing to appoint or consider him for an alternative role because the July OH report having concluded that a radical change of role was required, a suitable alternative role needed to be identified and the adjustments that were necessary investigated. Mr Tooze accepted orally that was the process required of a reasonable employer.

486.3.4. As to the period from January 2020 the radical change of role that had previously been identified as required by OH had still not been identified and OH had by then recommended a return to work. DGF met with Mr Tooze and again and for the same reasons as in October the assessment of the workstation and any adjustments that were necessary still needed to be investigated so he was suspended. We found a few days later he was suspended so the conduct issues/the breakdown in his working relationship could be addressed and that remained so (sickness absences aside) until his employed terminated (350) following. For the reasons we give at (489-501) we find that those conduct concerns were genuine and DGF was entitled to suspend Mr Tooze.

486.3.5. For those reasons we conclude that whilst that conduct may have been viewed as unwanted by Mr Tooze, the reasons for it were in no sense whatsoever connected to his disability but for the reasons we give.

486.4. (2(j)). We determined that Ms Marsh and Mr Wright placing Mr Tooze on medical suspension in October 2019 was not a tactic to block his return to work (274-277) but was done so further OH advice could be sought. Mr Tooze accepted his being placed on medical suspension in October 2019 was a reasonable position for DGF to adopt and thus nor could it have created the proscribed consequences.

486.5. (6(b)) It was not disputed that Mr Sandison *defended* Julia Marsh's actions in respect of the IPB and her statements to OH. We found at (291-293) that he came to a view he was reasonably entitled to come to and thus in no sense was it related to Mr Tooze's disabilities. Nor in doing so could it be viewed as creating the proscribed consequences.

486.6. (6(c)).

486.6.1. It was admitted by DGF that it did not extend company sick pay or backdate Mr Tooze's medical suspension for the 6 days up to 7 October 2019 during which he was certified as unfit for work by his GP. We found that his sick pay had expired and thus what Mr Tooze was essentially seeking was to be treated more favourably than colleagues on the same contractual terms whose sick pay had run out.

486.6.2. Given he was certified as unfit it was unnecessary to medically suspend him and pay him as such, nor to backdate that suspension.

486.6.3. We find DGF were merely implementing the rules of its contractual sick pay scheme. We were not taken to examples where DGF went outside its contractual sickness policy for other staff. We find this refusal was unrelated to Mr Tooze's disabilities. We cross checked that (although we emphasise that is not the statutory test) by considering if he had been signed off work for a non disability related reason if he would have been treated in the same way. We find he would; he had exhausted his right to contractual sick pay.

486.7. (14(b)) It was accepted DGF required Mr Tooze to take 20 days' holiday during his medical suspension. We find that was unwanted conduct. Like our findings in relation to issue 6(c) again we find there was no relationship to Mr Tooze's disabilities. Mr Tooze was no longer signed off sick, and he was simply being required to take his annual leave within the leave year, as any other employee would have been. Indeed, when Mr Tooze queried his ability to take the leave DGF showed flexibility about this.

Direct Discrimination complaints

487. Before us 23 acts of less favourable treatment 2(a)-(o) (including (c)(i)-(ix)), were raised.

488. We found above that 2(a)-(f) did not occur. As to 2(g)-(j) we have made positive findings as to the reason why DGF acted as they did and that was in no sense whatsoever connected to Mr Tooze's disability. However, that aside as to matters that did occur:-

488.1. (2(g)) For the reasons we give at (486.1) anyone, whether disabled or not, who was off work on sick leave or suspended on medical grounds and where OH had given the advice that had been given regarding Mr Tooze would have been asked to return their

company laptop and treated in the same way as Mr Tooze was. He was not subjected to less favourable treatment.

488.2. (2(h)) As we stated at (486.2) Ms Marsh made an error in relation to IPB and that it was a genuine one. We find she would have treated anyone whether disabled or not in the same way. Again, Mr Tooze was not subjected to less favourable treatment.

488.3. (2(i)) We were able to make positive determinations in relation to each of the elements of this complaint (486.3) and in case found the treatment was in no sense connected to Mr Tooze's disability.

488.4. (2(j)) We made a positive determination above (486.4) that this was done because of OH advice and in order to protect Mr Tooze and thus not because of his disability. Thus, the reason for the treatment is "narrower" than the disability (*Taiwo*). The point can be verified by the use of the statutory hypothetical (non-disabled) comparator to whom OH would have issued the same advice. We find that hypothetical comparator would have been treated in the same way. Given the reason for the treatment is "narrower" it can also be cross checked by the use of another comparator merely to illustrate the veracity of what we say. We find a disabled comparator to whom OH had not issued the same advice would not have been treated in the way Mr Tooze was.

488.5. (2(k))

488.5.1. Whilst DGF did not refer Mr Tooze to an OH specialist in January 2020 that was because a referral had already been made and was in process, that a further OH assessment took place on 6 January leading to a report on 8 January. A further referral was thus unnecessary but when one was (in February) a further referral was made.

488.5.2. DGF accepted it did not refer Mr Tooze to an OH specialist in June 2020. We found that whilst Mr Tooze was fit to work from 28 May to 18 June 2020 (416) DGF held an OH report from 26 February 2020 that had had concluded that the resolution to Mr Tooze's issues lay in resolving the workplace processes that were underway, and that OH could not assist further (380) following. Those issues had not been resolved.

488.5.3. We find in both instances a non-disabled person in same circumstances would have been treated in just same way and there was no less favourable treatment.

488.6. (2(l)). We found at (348) that DGF did hold a return to work meeting in January 2020 with Mr Tooze. Whilst DGF accept that it did not hold a return to work meeting in June 2020 after Mr Tooze had provided a fit note stating he was fit to return to work with adjustments on 28 May we found that was because he was re-suspended by Mr Raes on 29 May pending the formal hearing to consider whether there had been an irretrievable breakdown in the employment relationship. He was treated in the same way any employee in those circumstances would have been treated. Again, we find Mr Tooze's suspension was in no sense connected to his disability but because of the way he had been behaving to colleagues and that needed to be addressed.

488.7. (2(m)) DGF accepts that it suspended Mr Tooze in June 2020 despite him having a fit to work note. For the reasons we summarise at (488.6), we found that was that was not less favourable treatment, and those reasons were in no sense connected to his disability.

488.8. (2(n)) We found at (408-409, 438-442) that DGF did not reinstate the disciplinary proceedings having informed Mr Tooze they had been "dropped". That was a misreading by Mr Tooze of the correspondence of 14 May 2020 from Mr Raes. which expressly related to his grievance and not the disciplinary proceedings. Mr Tooze was thus not treated in the way he alleged.

488.9. (2(o)) It was not disputed that Mr Tooze was dismissed. Before we turn to address this issue we first need to consider the reasons why DGF acted in the way they did in commencing the disciplinary process against Mr Tooze, suspending dismissing him and then rejecting his appeal.

The respondent's reasons for acting as it did

489. We address the reason for Mr Tooze's treatment looking at matters in the round and not just from the perspective of determining the direct discrimination issue.

490. We turn first to the wider background. As we state above, at the time the disciplinary process started Mr Tooze had commenced one Tribunal claim but also raised a number of grievances.

As we identify below (554) only one was specifically raised before us as a protected act. Notwithstanding that we considered if any played a part in DGF's decision making.

491. Whilst he was formally made aware the disciplinary process was being commenced on 16 January and he was suspended on 20 January the first time Mr Tooze was made aware that was a possibility appears to have been the meeting on 13 January 2020.

492. When Mr Raes started that disciplinary process he referred to a number of matters by way of examples. Whilst two of the examples related to October and December 2019 the others dated back to events in May and July 2019.

493. We found above that Mr Tooze's communications and behaviour toward Mr Parker (see (138)) and Ms Marsh (see (172 & 189)) in the examples from May and July 2019 we give above was rude, disrespectful and inappropriate. He accused Ms Marsh of misleading him about IPB (183) following, that she had misled OH in the referral (286) following and by February 2020 he had accused her of lying to ACAS (370).

494. However, that discontented mindset that those examples demonstrate stretched back long before that, not only to his grievance in 2018 but to earlier events as well. That view appears to be reinforced from what we can discern by Mr Tooze's first Tribunal claim being related to some of the matters raised in his 2018 grievance.

495. That mindset was such that as time passed we find he no could longer engage constructively or properly with DGF and his behaviour and tone of correspondence deteriorated (430-431 and 459) amongst others, as the list of colleagues whom Mr Tooze had complained about again (459) demonstrates. His disputed first meeting with Mrs Turner on 26 May is a further example.

496. Mr Tooze should or ought to have known without being told that the contents of his correspondence was not acceptable. However, he was also warned. Mr Sandison stated on 23 June 2020 *"The communication in your last email is unacceptable."* (425) & [802]. In that email he referenced a warning from 16 July 2019 *"to desist from making derogatory statements"*. Whilst we can find no trace of the 16 July email containing that warning in the bundle Mr Sandison orally referred to having had cause to remind Mr Tooze about the way he referred to Ms Marsh visiting her boyfriend – which Mr Sandison told us he had said to Mr Tooze was inappropriate at the time. That appears to be a reference to a point Mr Tooze repeated orally before us that Ms Marsh had only arranged a meeting close to his home for her own means so she could meet her boyfriend. There was a dispute when that was but to place that in general terms chronologically we find was most likely to be that on 7 June (187). At no point did Mr Tooze

deny that warning had been given. We find it had. That reinforces the concerns DGF had about Mr Tooze's behaviour before the protected acts that concern us.

497. Whilst he had raised a grievance in 2018 (which as we say elements of which appeared to form the basis of his first tribunal claim) and others in August and December 2019 his own account (to Mr Raes) was *'The point where the relationship turned was where DHL lied saying I hadn't got IPB'.* That of course was July 2019 (183) following. His sense of grievance dated back to well before that time as his repeated references to the matters raised in his 2018 grievances demonstrated. As that 2018 grievance also showed, some of Mr Tooze's complaints went back to the start of his employment (102). He also told us that he felt it had been decided he would not be returning to work as far back as June 2019 (202).

498. On 25 August 2019 [556] Mr Young said in response to Mr Tooze's informal grievance *"It's a shame and I am sorry to see your-relationship with the business deteriorate much as it had in looking at this. ..."* (207). By 17 December (314) Mr Tooze stated in relation to changes to the date of the planned meeting *"This is starting to feel like a game to me …. why are we playing games, is it to trick me into using holidays up"*. Whilst as we say matters deteriorated thereafter, we find for the reasons we give that by 17 December the nature and content of Mr Tooze's correspondence and behaviour was such that it had caused a genuine concern on DGF's part that their working relationship had broken down and thus a disciplinary process should be commenced.

499. Relations deteriorated still further such that Mr Tooze felt he could repeatedly accuse colleagues of lying, we found unwarrantedly. We find that Mr Tooze's relationship had by the time of his dismissal broken down. That is reflected in the detailed and lengthy reasons set out in the outcome letters of Mr Raes and Mr Wing. We find they reflect the genuine view of DGF.

500. We found that any non-disabled employee who had behaved in the way Mr Tooze had done would have been made the subject of disciplinary process suspended and, as he was, dismissed as a result.

501. Thus, reverting to issue (2(o)) Mr Tooze was not subjected to less favourable treatment by his dismissal because he was treated in the same way a non-disabled comparator would have been. Nor was the disciplinary process, suspension or his dismissal because of his disability, they were undertaken because of his behaviour and the breakdown in the relationship that caused.

The duty to undertake reasonable adjustments

502. Given that discrimination because of something arising from disability complaints are partially predicated on whether adjustments should have been undertaken and as always the

proportionality exercise within the justification defence for s.15 will ordinarily fail if the duty to make adjustments arose and was not complied with we address this first.

503. This complaint was put by reference to 5 PCPs, 4 disadvantages and 9 adjustments (albeit one had two elements) that were contended for.

504. DGF denies four of the five PCPs were applied:-

> *10(a) They required / expected that an employee / the Claimant undertake the full range of duties associated with his role including, in particular, data entry and driving?*
>
> *10(b) They required the Claimant to use a company workstation and equipment?*
>
> *10(c) Writing to the Claimant on a Friday despite his requests not to do so?*
>
> *10(e) Restricting application of /applying the Respondent's Income Protection Policy/Permanent Health Insurance policy.*

505. As to 10(a) DGF asserts the adjustments contended for had already been agreed so the PCP as set out was not applied. In the alternative if the PCP was applied, DGF asserts Mr Tooze was not put to a disadvantage because of the previously agreed adjustments. As to knowledge DGF asserts Mr Tooze was happy with the adjustments made to his role and did not indicate any wish to change role.

506. As to 10(b) if the PCP is proved the substantial disadvantage and knowledge is admitted by DGF.

507. As to 10(c) if the PCP is proved DGF asserts any disadvantage was not connected to Mr Tooze's disabilities. As to knowledge that is not conceded on the basis Mr Tooze gave any information to DGF that might suggest his receipt of letters on a Friday caused him a substantial disadvantage connected with his disabilities.

508. As to 10(e) DGF deny there was such a PCP, nor that there was a disadvantage. Again, if we find there was knowledge is accepted.

509. As to the remaining PCP:-

> *10(d) Applying company sick pay policy to the Claimant?*

DGF admits that was applied but DGF argues that no disadvantage is pleaded to by Mr Tooze. It was assumed the disadvantage was a lack of pay. That stems from :-

13(h) Paying the Claimant extended sick pay.

If so again knowledge is admitted.

510. We agree that no substantial disadvantage was set out in relation to 10(d) and it is difficult to see what substantial disadvantage Mr Tooze was put to that was caused by the application of the PCP when what he was seeking was that he be given a benefit that went beyond that given to other employees, particularly where the benefit employees received was far greater than that payable under the statutory sick pay scheme. Essentially Mr Tooze was seeking he be treated better than his colleagues were entitled to be. Whilst that is at the heart of most adjustment complaints here there is no identified disadvantage a non-disabled employee would have been put to. Nor were we taken to examples where DGF went outside its contractual sickness policy for other staff. We find that complaint 10(d) fails for those reasons.

511. As to the disputed PCPs

10(a) They required / expected that an employee / the Claimant undertake the full range of duties associated with his role including, in particular, data entry and driving?

10(b) They required the Claimant to use a company workstation and equipment?

512. Mr Tooze was a disabled person from 10 May 2019. From that date he was either absent on leave, sick leave, medical suspension, working from home (for a few days in January 2020 (340) following & (350) and/or suspended pending the disciplinary process. A no point did Mr Tooze lead any evidence detailing how from 10 May 2019 onwards PCPs 10(a) and (b) were applied to him by DGF. The evidence we heard points squarely to the view that they were not. We find he has not shown that was so and any complaints that stem from them fail.

513. It follows that from the start of his absence in May 2019 that those PCPs did not put Mr Tooze to the following substantial disadvantages

11(a) He was unable to type and/or drive to the same extent as those who are not disabled?

11(b) Using standard workstation equipment caused pain?

in particular or indeed any other of the substantial disadvantages by virtue of the application of the PCPs 10(a) and (b).

514. We therefore find that it was not reasonable to require DGF to undertake the adjustments contended for at

> *13(a) Providing the Claimant with fixed work station (as distinct from a hot desking policy) including an ergonomic chair, adjusted keyboard and mouse.*
>
> *13(b) Providing the Claimant with voice dictation software and training*

any of the other adjustments listed or for that matter any other adjustment not listed from the start of his sickness absence in May 2019. The application of the PCP and substantial disadvantage aside, we address the reasons 13(a) & (b) were not undertaken and why it was not reasonable to expect they be undertaken at (280) & (349.6) following.

515. The issue for DGF is highlighted by the following. Given a number of options had crystalised by the time of the 13 January 2020 meeting (including it appears his departure on terms to be agreed and a disciplinary process) and only one would have resulted in Mr Tooze returning to work it was unreasonable to expect DGF to undertake those adjustments until the outcome of those alternatives was known. The same applies to other periods for instance when OH had advised a radically new role needed to be found. The adjustments could only have been assessed and then made when that was identified.

516. Thus, that reasoning also applies to

> *13(e) Providing the Claimant with adjustments to working capacity on his intended to return to work after 14 January 2020 such as a raising desk with aids for the Claimant.*
>
> *13(f) Providing the Claimant with adequate voice to text technology.*

517. Further as to 13(f) this had been previously rejected by Mr Tooze as not being able to work both in terms of the open plan office in which he worked but also the data input role he undertook. Hence a radically new role for him was required. That was investigated but one was not available. It was for that reason at the January return to work meeting a workplace assessment was agreed to be arranged but because of his suspension did not take place. We address below why it was not reasonable to do that earlier (see (556.2)). In our judgment DGF undertook such steps as it was reasonable for it to take in the circumstances.

518. As to adjustment

13(c) the provision of a company car with power assisted steering and/or automatic gearing

the evidence before us from Mr Tooze (268) which was subsequently adopted by OH (338 & 339) was that the vehicle that he eventually ordered would resolve any issue from driving on work related business and the adjustment contended for would have been addressed by its provision. On Mr Tooze's own account despite promptings to place the order from DGF (164-167) it was he who had delayed placing that order since Autumn 2018 until March 2019 to await the availability of what he considered a suitable vehicle. No evidence was led before us that there was "no prospect" that the other vehicles he could chose from DGF's vehicle list were not capable of alleviating any substantial disadvantage Mr Tooze argues he would have been put to and so we find it was a choice on his part to wait for that vehicle and no failing on DGF's part to make a reasonable adjustment to allow him to do so prior to March 2019.

519. We found (262-269) that the delay following the order of the vehicle stemmed from a breakdown in communications most likely on LEX's part (266). The vehicle was then made available, and the adjustment made, only for the vehicle to be returned by Mr Tooze. At what we found was the return to work meeting on 13 January 2020 it was agreed the vehicle would again be made available for Mr Tooze on 1 February 2020 (342.4) on 6 February 2020 he had emailed DGF to say that he would not take the car for now (362). We conclude that there was no failure to make reasonable adjustments on DGF's part; it took all reasonable steps to provide the vehicle and when the vehicle was provided Mr Tooze chose to return the vehicle because of the tax consequences for him given he was not undertaking (sufficient) business mileage. That was his choice (see (269)). Again when it was agreed at the return to work meeting in January Mr Tooze was to be given the vehicle in February, on 6 February 2020 he had emailed DGF to say that he would not take the car for now (362). Other than stating the vehicle was given to another employee doing the same role [LT/31] Mr Tooze did not give any detail of the circumstances surrounding the vehicle thereafter including whether he elected not to take the vehicle given he was not undertaking business miles or when that other employee was given the vehicle.

520. As to PCP 10(c)

Writing to the Claimant on a Friday despite his requests not to do so?

521. This complaint is put slightly differently to the way it is addressed above (465). The first request not to do so that we can trace from the list provided by Mr Tooze is the email to Mr Sandison of 8 February 2020 [694] that we address at (366). As we say at (467) 3 letters were sent or received

on a Friday from the list Mr Tooze identified. They all arose after 8 February 2020. Notwithstanding the negative nature of the PCP identified we find that writing to Mr Tooze contrary to his request is clearly capable of being more than a one off and a practice.

522. The only disadvantage of those argued that could potentially flow from PCP 10(c) is

> *11(c) Writing on a Friday made the Claimant ill and unable to spend quality time with his daughter?*

523. DGF denies not only that the forwarding/receipt of letters on a Friday caused Mr Tooze a substantial disadvantage connected to his disabilities but that it had no knowledge of that disadvantage on the basis Mr Tooze gave no information to DGF that supports that either at the time or before us. In his witness statement he said this:-

> *"14. The Respondents continually contacted the Claimant on a Friday via email and then via letter, no matter how many times the respondents were asked not to send me post on a Friday this continued, in fact it got worse, each letter was send special or recorded delivery to arrive on a Friday, it was even written on envelopes to ensure it arrived, these letters were never good news and had a physiological effect on the Claimant and his family life.*
>
> *15. It was not just one person at DHL doing this and it continued through even with the respondent's representatives as recent as February 2022.*
>
> *16. The Claimant relies upon section 3.1.3 Fridays and the documents under that heading on the Claimants Schedule of documents."*

524. Nor does Mr Tooze address in his impact statement how any of the matters he raises were tied to DGF writing to him on a Friday [126-130]. The principal basis for that complaint appears in our view to be the email exchange on 2 April [757] that we refer to at (389-391) that Mr Tooze felt DGF were playing psychological games with him attempting to ruin his weekend by sending letters so they arrived on Fridays.

525. Clearly Mr Sandison was aware of that issue. There is no direct evidence in the OH reports or GP notes that suggested that either advised that adjustment be made. In contrast the February OH report (380) made clear *"… that irrespective of any possible process that is unfolding, I do think it would assist him psychologically to bring matters to a conclusion sooner rather than later but of course it is for Lee to consider and of course whether there could be any prejudice to his position or outcome is something that Lee can consider. …"*. The starkness of the position was that the assessor felt it was necessary to indicate that he believed Mr Tooze was competent under the Mental Heath Act.

526. The relevant adjustment contended for was

> *13(g) Postponing sending correspondence relating to the dispute between Claimant and Respondent to the Monday or any other day other than Friday.*

527. We find in the light of that advice there was thus an imperative for DGF to act, and quickly if possible, subject to the medical advice. We found that DGF did not *persistently* write to Mr Tooze with case-related correspondence on a Friday, but beyond that given this allegation is put slightly differently of the correspondence we were referred to only one was stated to be sent out on a Friday and two others arrived on a Friday. When set against the totality of the correspondence Mr Tooze was being sent over that time period that was insignificant particularly given by then Mr Tooze had asked for correspondence to be sent to him by post and ultimately it was out of DGF's hands when that was received by him (notwithstanding some of the post was sent to arrive next day or by a specified time/day) (465-469).

528. In the circumstances and taking those factors into account it was not possible to completely avoid post being sent/received on a Friday, the post that was complained about was in the context of the correspondence taking place at the time and was small. Accordingly in our judgment DGF did not fail to make reasonable adjustments in that regard.

529. As to PCP 10(e)

> *Restricting application of / applying the Respondent's Income Protection Policy/Permanent Health Insurance policy.*

530. The only disadvantage of those argued that could potentially flow from that PCP is

> *11(d) The Claimant was held not to be entitled to the said insurance policy and his employment was terminated?*

531. The adjustment contended for was

> *13(i) Paying the Claimant sums under the said insurance policy.*

532. Firstly, we should say that the IPB was a policy issued by L&G and thus it was for them to determine the application and either pay out or decline, not DGF. Whilst Ms Marsh initially gave Mr Tooze incorrect information, that was subsequently remedied. Whilst Mr Tooze appeared to argue that as rehabilitation was one of the benefits he could have received under the policy and thus there was a delay in his recovery as a result of that failure that is not a

disadvantage that is argued before us in the list of issues. That would need to have been specifically argued (and it was not) so DGF could address it. That aside we determined there was no delay and thus disadvantage above (195-196).

533. L&G refused the IPB application in October 2019 on the basis Mr Tooze did not meet the definition of *suited occupation* because he was not unfit to carry out any occupation that was suited to his training, education and experience (240).

534. Similarly in relation to the second application for IPB in July 2020 whilst the adjustment at 13(i) could encompass it, that adjustment does not stem from the disadvantage because no decision was made. That aside in relation to this second instance the PCP seeks to address the failure of DGF to process the application. DGF argues that PCP was not applied.

535. We also need to consider the apparent conflict between what Mr Wing stated in his outcome letter as the reason for this and Mrs Turner's explanation as to the administrative time it would have taken to process.

536. We found above (443-445) that the second IPB application was made early on the day of the dismissal hearing. Contrary to the instruction from Mr Sandison to Ms Marsh at 17:15 on Thursday 9 July (445) [835] by 20 July we know from Ms Marsh's reply the application would no longer progress and had not been forwarded to L&G (452). That was because Mr Tooze was no longer an employee.

537. Delaying processing such an application until after an employee is dismissed necessarily precludes an employee from receiving IPB. The ***Briscoe*** line of authorities [93] suggests a term can be implied into contracts where the employee is in receipt of such benefits, but other authorities make clear that whilst an employer cannot terminate an employee's merely in order to avoid continuing to pay him/her the disablement benefit, dismissal is not precluded in cases where the dismissal is for conduct related reasons [94].

538. Ms Marsh also told us the application takes some time to complete and the application had not been submitted prior to the termination of his employment.

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[93] The EAT in *Awan v ICTS UK Ltd [2019] IRLR 212, [2018] UKEAT 0087/18* determined the whole purpose of permanent health insurance or other disability schemes would be defeated if the employer could end entitlements by dismissing employees when they became unfit for work. It was therefore appropriate to imply a term to the effect that, once the employee had become entitled to payment of disability income under the long-term disability plan, the employer would not dismiss him on the ground of his continuing incapacity to work.

[94] *Briscoe v Lubrizol Ltd (No.2) [2002] EWCA Civ 508, [2002] IRLR 607* where it was agreed there was an implied term not to terminate that employment save for a cause other than ill health so as to deprive the claimant of the continuing entitlement to the very disability benefit, applying *Hill v General Accident Fire & Life Assurance Corp Plc (No.1) 1999 S.L.T. 1157, [1998] 8 WLUK 132*

539. It is unclear whether Mr Sandison was aware the disciplinary hearing had already taken place when he emailed Mr Tooze on 9 July and if so, how long Mr Raes was going to take to make and send out his decision. It actually went out sometime on Monday 13 July, that is less than two working days after Mr Sandison's instruction.

540. Given the lateness of the second IPB application, the nature of disciplinary process being undertaken and the administrative time it would take to process (the first application took seven days to process internally (540)), we find that it was unlikely that the application could have been completed prior to the point at which Mr Raes sent out his decision. That aside we find it was permissible for DGF to defer making that referral until after the disciplinary decision had been taken by Mr Raes because the circumstances in *Awan* did not apply. As Mr Wing stated, Mr Tooze was dismissed because the employment relationship had broken down due to Mr Tooze's behaviour and not for reasons connected with Mr Tooze's disability or the absence that emanated from it.

541. Those issues aside the adjustment contended for was for DGF to pay out to Mr Tooze under the IPB policy. The medical and other evidence in October 2019 led L&G to conclude that he did not qualify. The evidence in July 2020 was that the medical symptoms Mr Tooze was then encountering were related to his employment with DGF and needed to be resolved. Again, that did not point to him being unfit to carry out *any* occupation that was suited to his training, education and experience. Given that was so we do not consider it reasonable to expect DGF to make an adjustment which would have potentially placed him a far better position than he otherwise would have been.

542. Accordingly, for those reasons those reasonable adjustments complaints fail.

Something Arising from complaints

543. Two "somethings" were alleged to arise from disability.

5(a) Absence from work?

5(b) A need for adjustments to his role?

544. As to issue 5(a) DGF

544.1. accepted that Mr Tooze's absences from work in 2019 and 2020 arose in consequence of his disabilities

544.2. denied that Mr Tooze's 2-week absence for stress in Jun 2018 arose in consequence of his disabilities, since his stress condition did not become a disability until

545. As to the latter it has already been determined that Mr Tooze was not a person with a disability within the meaning of the EqA in 2019 so it follows his absence in 2018 cannot arise from his disability.

546. As to issue 5(b) DGF accepted that if Mr Tooze showed there was a duty by DGF to make a particular adjustment to his role, then that duty arises in consequence of his disabilities. We found above the duty to make reasonable adjustments was not engaged so issue 5(b) falls away.

547. Thus, the sole "something" that falls for us to determine is Mr Tooze's absences from work in 2019 and 2020. We thus considered if this was the cause of any of the 29 acts of unfavourable treatment that were relied upon.

548. Those 29 acts of unfavourable treatment were made up of issues 2(a)-(o) (including (c)(i)-(ix)) & 6(a)-(d). Issue 6(d) is not by its nature an act of unfavourable treatment (as the way the harassment complaint is argued (as our comments at (482) demonstrate).

549. We have determined to date that 2(a)-(f), (n) and 6(a) did not occur.

550. Accordingly, we need to address whether Mr Tooze's absences were the cause of the unfavourable treatment we found that did occur at 6(b) & (c),and 2(g)-(m) & 2(o). DGF denies that the treatment complained of was unfavourable but that if it is found to be so, it asserts was it was not because of something arising in consequence of the Claimant's disability but because the Claimant was a difficult person to communicate with and deal with. As such, those dealing with him including Ms Marsh, felt they were treading on eggshells. (¶4.3 Grounds of Resistance ("GoR")).

551. Addressing them in turn:-

551.1. 6(b) Mr Sandison *defending* Ms Marsh's actions was in our view in no sense connected to Mr Tooze's disability related absences. The error she made would not have occurred had Mr Tooze not been absent but was not caused by the absence. Similarly, Mr Sandison *defending* Ms Marsh's actions would not have occurred had Mr Tooze not been absent but was not caused by it. We found Mr Sandison acted in the way he did because of the reasons we give at ((291-293 and 486.5) and that was in no sense

connected to Mr Tooze's absences but because he had determined she made an innocent mistake and he was genuinely entitled to come to that view.

551.2. 6(c) we found the refusal to extend sick pay was in no sense connected to Mr Tooze's absence but instead was caused because Mr Tooze had exhausted his entitlement to contractual sick pay and merely reflected the application of the respondent's policy. Again, what Mr Tooze seeks to argue is that *but for* his absence he would or should have been paid. Whilst that type of connection can succeed to create the necessary link between the disability and something arising the more restrictive *because of* test applies to the link between the unfavourable treatment and the something arising and thus cannot succeed here.

551.3. 2(g) As we state at (486.1) the OH Report of 24 July 2019 (181) had emphasised the need for a radically different role, a workstation assessment and voice to text to reduce the symptoms he suffered generally and from keyboard use in particular. Mr Tooze's laptop was supplied for him to undertake his role and he was signed off work ill or on medical suspension. He should not have been working. Accordingly, we find there was no unfavourable treatment of Mr Tooze when the return of his laptop was sought.

551.4. 2(h) As we stated at (486.2) Ms Marsh made an error in relation to IPB and that it was a genuine mistake and was remedied within days of it being raised by Mr Tooze. Given the IPB claim was rejected by L&G it is difficult to see in any event how that gave rise to unfavourable treatment. However, the error was not caused by the something, Mr Tooze's absences, but the fact the IPB was not a common benefit and her not having come across it previously due to her being a relative newcomer and her lack of knowledge of that benefit.

551.5. 2(j) Mr Tooze having accepted this issue was reasonable behaviour on the part of DGF investigating what adjustments were required that cannot be unfavourable treatment in our view. Again, the reason for the treatment was not due to his absence but because of the need for adjustments to his role to be investigated.

551.6. 2(k) As we state above (488.5) a further referral in January was not necessary given the previous report having been dated 8 January. When a further referral was required (in February) a further referral was made). As to the need for a further referral in June 2020 DGF held an OH report from 26 February 2020 that had had concluded that the resolution to Mr Tooze's issues lay in resolving the workplace processes that were

underway, and that OH could not assist further (380) following. Those issues had not been resolved. Accordingly, the reason reports were not requested at both points was that they were not required, and we find for both elements there was no unfavourable treatment.

551.7. 2(l) As we say at (488.6) DGF held a return to work meeting in January 2020. Whilst DGF accept that it did not hold a return to work meeting in June 2020 that was because Mr Tooze was re-suspended by Mr Raes on 29 May pending the formal hearing to consider whether there had been an irretrievable breakdown in the employment relationship. Thus, the former did not occur and as to the latter the failure to hold the return to work meeting because of his absences but instead because he had been suspended whilst the disciplinary process was ongoing.

551.8. 2(m) our reasoning in relation to 2(l) applies equally unrelation to 2(m), and

551.9. 2(o) whilst dismissal amounts to unfavourable treatment Mr Tooze was not dismissed because of his absence from work but for the reason we gave at (489-501).

Justification

552. The only legitimate aim pleaded to (¶4.4 GoR) was that the Respondent needed to manage its employees' return to work in such a way that it complied with its own duty of care not to allow employees to return to work who were unfit to do so.

553. For the reasons we give above Mr Tooze's complaints fail for other reasons and so we do not need to make this already long judgment still longer by addressing the same.

Victimisation

554. Three specific protected acts are identified:-

(a) a letter dated 19 December 2019.

554.1. It was admitted that this grievance is a protected act (because of the reference at the bottom of 652 to a failure to make adjustments)

(b) an email dated 10 February 2020

554.2. DGF deny that there is anything in that email that is capable of constituting a protected act. That email [717] includes allegations of Ms Marsh lying to ACAS and OH but makes no reference to Mr Tooze's disability or approach making reference to

any of the elements of s.27(2) EqA and specifically *"(d) making an allegation (whether or not express) that A or another person has contravened this Act".*

(c) a letter dated 14 February 2020.

554.3. This letter has been ruled inadmissible (see paragraph 12(h) of the order of Employment Judge McCluggage [280] and thus does not fall for consideration by us.

555. However, whilst the list of issues does not exhaustively identify the protected acts by prefacing those listed with "including" no further protected ats were identified before us.

556. Of the 6 acts of detriment only two were not accepted as having occurred.

19(a) The Respondent refusing to permit the Claimant to return to work from 14 January 2020.

556.1. We address this at (340-349.10). We found Mr Tooze was permitted to return to work but was to work from home.

556.2. Even if we are wrong on that issue for the reasons we give at (349.4-349.10) we found that was in no sense whatsoever because Mr Tooze had done a protected act but was done because following the further OH advice of January 2020 a desk and workstation assessment needed to be arranged. Whilst that had been suggested by OH as far back as the OH advice of July 2019, that earlier advice had stressed a radically new approach needed to be adopted and a new role identified for Mr Tooze. Until that role had been identified it would not have been possible to identify the adjustments required for it. No such role was identified and instead by January 2020 the OH recommendation had changed. Accordingly, it was only following that change of circumstances that the workstation assessment was appropriate.

19(c) Writing to the Claimant persistently on a Friday (as per 14(d) above)?

556.3. We found for the reasons we give at (465-469) that DGF did not persistently write to Mr Tooze with case-related correspondence on a Friday. In any the correspondence was sent not because of the protected act but for the reasons we give at (468).

19(b) Writing to the Claimant on 11 March 2020 and/or 25 March 2020 threatening to terminate his employment and to organise a hearing to discuss matters outside of the grievance procedure.

556.4. DGF accepts Mr Raes wrote to Mr Tooze inviting him to a formal hearing to consider whether there had been an irretrievable breakdown in the employment relationship,

which could result in termination of his employment. The threat of disciplinary action can clearly amount to detrimental treatment. The question for us here is whether that was done because Mr Tooze had raised a protected act.

556.5. We do not need to determine for these purposes if Mr Tooze's behaviour was because of the way he, incorrectly in our view, perceived DGF and its staff were treating him, or vice versa. It is the reasons for the actions of DGF that we must focus on. We found for the reasons we gave at (489-501) that DGF came to the view that it was Mr Tooze's behaviour had demonstrated the breakdown their relationship and whilst that had been so for some time his behaviour in the early part of December 2019 principally concerning the taking of carry forward of holiday (but also other matters such as the Christmas party allowance) culminating in his email of 17 December was the catalyst for it deciding to act as it did when it did.

556.6. There is a sharp contrast between Mr Tooze's comments *"This is starting to feel like a game to me …. why are we playing games, is it to trick me into using holidays up"* and that dates were being set without his agreement and the response of DGF (314). That exchange in early December was the culmination of events that caused DGF to raise the termination of Mr Tooze's employment on mutually agreed terms on 13 January and when that could not be achieved to embark on the disciplinary route culminating in his dismissal and not the raising of his grievances or complaints to the Tribunal.

556.7. Whilst DGF was aware of Mr Tooze's earlier grievances of 2018 and August 2019 and his first claim by then, they essentially related to historic call out and other pay matters and how Ms Marsh (and others) had dealt with him. Whilst we note the grievances he raised in December repeated his complaints about the carry forward holiday pay and also made a complaint that he felt he had not been supported and was being managed out of the business we find that the breakdown of the relationship between Mr Tooze and DGF started well before any of the protected acts and only culminated with the exchange about holidays in December. That he had raised a grievance in 2018 (and the first tribunal claim that flowed from the issues it raised) and no detrimental action had been taken by DGF toward Mr Tooze in relation to it (and indeed parts were upheld) reinforces our view that Mr Tooze's grievances themselves had no discernible effect on DGF's decision. What did, as the detailed and lengthy reasons set out in the outcome letters of Mr Raes and Mr Wing identify, was the unacceptable way in which Mr Tooze conducted himself towards colleagues as was demonstrated in the breakdown of his working relationships with so many of them. The outcome letters of

Mr Raes and Mr Wing reflected the genuine view of DGF, and he was in no sense dismissed because of his protected act.

19(d) Suspending the Claimant in June 2020 (with the Claimant having a fit to work note)?

556.8. Whilst DGF argues that Mr Tooze's suspension was not a detriment because that was on full pay, we do not agree because a suspension of the length that occurred here can lead to a loss of skills and relationships with colleagues. That aside for the reasons we give at (489-501) Mr Tooze was not suspended because he raised a protected act, he was suspended because of what we found were DGF's genuine concerns about the way he was corresponding with its staff and the breakdown in the employment relationship that they led to.

19(e) Restricting the Claimant to the maximum of contractual sick pay?

556.9. We address this at 6(c) and 10(d) (see (486.6 and 509- 510) respectively). Mr Tooze was not at work and had exhausted his contractual sick pay entitlement. DGF's refusal to extend contractual sick pay entitlement was it applying its sick pay policy. Mr Tooze was asking to be treated more favourably than he was entitled to. In the absence of a contrary custom or practice and no specific examples to support such a practice were advanced we find in no sense was that detrimental treatment. It cannot be a detriment not to provide something an employee is not entitled to.

19(f) Dismissing the Claimant.

556.10. It was admitted that Mr Tooze was dismissed and that amounts to a detriment but denied that was less favourable treatment because of his disability.

556.11. DGF argues Mr Tooze was not dismissed because he had done a protected act; but his dismissal was because of the way he had behaved and the breakdown in his relationship with DGF and its staff.

556.12. To find a claimant has been directly discriminated against or victimised the reason for the treatment must be because of the protected characteristic, here disability, or the protected act. Where we are able to make a positive determination in relation to the reason for the treatment as *Hewage* identifies we need go no further and consider the burden of proof provisions. When addressing issue 2(o) albeit when considering direct discrimination (see (488.9)) we were able to make such a positive determination

concerning the reason for his dismissal and found it was because the way Mr Tooze had conducted himself had led DGF to conclude there was a fundamental breakdown of Mr Tooze's working relationship with DGF and in turn its other employees.

Unfair dismissal

557. We address above DGF's reason for commencing the disciplinary process, the suspension and its decisions on the dismissal and appeal above (489-501). The principal reason for dismissal was that there was a breakdown in their relationship albeit that stemmed from and was demonstrated by Mr Tooze's behaviour and interactions.

558. As to fairness DGF made its reasoning clear for commencing the disciplinary process providing evidence in support. As Mr Tooze's behaviour escalated DGF expanded on these, again providing the evidence it relied upon. It did not proceed with the hearing on four occasions and obtained occupational health advice. That as we say recommended that until the process had been concluded (whatever its outcome was) Mr Tooze's symptoms would not resolve. DGF sought to consider alternatives to a traditional form of hearing by offering to hold this remotely and/or for Mr Tooze to make written representations. It sought to address Mr Tooze's grievances before undertaking the dismissal hearing. Mr Tooze did not take up those alternatives and DGF decided to proceed. In the circumstances we find a reasonable employer could have concluded that it would have done likewise. The appeal proceeded and addressed the matters Mr Tooze wished to raise. We find for those reasons that the process adopted was procedurally fair and that DGF had acted within the band that a reasonable employer would have done. Given Mr Tooze's conduct and behaviour we find a reasonable employer would have been entitled to conclude their relationship had broken down and that dismissal was the only sanction.

Wages/Working Time Regulations complaints

559. These were as follows:-

> *26. Did the Respondent refuse to permit the Claimant to exercise his entitlement to annual leave under regulation 13 and/or 13A of WTR by:*
>
> > *a. Requiring the Claimant to take 20 days holiday during medical suspension in December 2019?*

b. In about December 2019 did the Respondent require the claimant to take 5 days outstanding holiday before, firstly, January 2020 and, subsequently, July 2020 and refuse to permit him to carry it over for 18 months after the end of the holiday year?

27. Did the Respondent fail to pay the Claimant an amount due in respect of the said 5 day period of annual leave and thereby breach regulation 16 WTR and/or make an unlawful deduction from the claimant's wages?

28. Did the Respondence fail to pay the Claimant sums he was entitled to under the Respondent's income protection/permanent health insurance policy?

29. Did the Respondent's failure to pay the Claimant sick pay in June and July 2020 amount to an unlawful deduction from wages?

560. We have addressed issues 26(a) and (b) under issues 14(b) and (c) at (332-334 & 486.7) and (23.1 & 334) respectively above. Those complaints fail.

561. Whilst Mr Tooze's revised argument in relation to issue 26(a) could have had a knock on effect onto issue 27 given our determination that was not one of his complaints before the Tribunal given his concession that he was paid five days pay upon or after termination that complaint also fails.

562. As to issue 28 as we say at (23.3) Mr Tooze no longer pursued the complaint that DGF failed to pay to him sums under the income protection insurance policy as an unlawful deduction from wages claim but it was pursued as a claim of failure to make a reasonable adjustment. We have addressed that at issue 10(e) (529-541) above.

563. As to issue 29 Mr Tooze was not at work, and had exhausted his contractual sick pay entitlement and had no contractual entitlement to any further sick pay (400-403). There was no deduction from his wages and DGF's refusal to extend contractual sick pay entitlement was it merely applying its sick pay policy.

Summary

564. None of Mr Tooze's complaints succeed and they are all dismissed.

signed electronically by me
Employment Judge Perry
Dated: 16 June 2022